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Presidential Documents

Title 3—

The President

Executive Order 13596 of December 19, 2011

Amendments to Executive Orders 12131 and 13539

By the authority vested in me as President by the Constitution and the laws of the United States of America it is hereby ordered as follows:

Section1. Section 1–102 of Executive Order 12131 of May 4, 1979, as amended (President's Export Council), is further amended to read as follows: ''The membership of the Council shall be as follows:

(a) The heads of the following executive departments, agencies, or offices, or their representatives:

(1) Department of State.

(2) Department of the Treasury.

(3) Department of Agriculture.

(4) Department of Commerce.

(5) Department of Labor.

(6) Department of Energy.

(7) Department of Transportation.

(8) Department of Homeland Security.

(9) Office of United States Trade Representative.

(10) Export-Import Bank of the United States.

(11) Small Business Administration.

(12) United States Trade and Development Agency.

(13) Overseas Private Investment Corporation.

(14) Council of Economic Advisers.

(15) Office of Management and Budget.

(16) National Economic Council.

(17) National Security Staff.

(b) In their discretion, the heads of the following organizations or their designees:

(1) National Governors Association.

(2) United States Conference of Mayors.

(c) Five members of the United States Senate, designated by the President of the Senate, and five members of the United States House of Representatives, designated by the Speaker of the House, to serve for a two-year term.

(d) Not to exceed 28 citizens appointed by the President. These individuals shall be selected from those who are not full-time Federal officers or employees. They shall include representatives of business and industry, agriculture, and labor.''.

Sec. 2. (a) Section 3(d) of Executive Order 13539 of April 21, 2010, as amended (President's Council of Advisors on Science and Technology), is further amended to read as follows: ''The Department of Energy shall provide such funding and administrative and technical support as the PCAST may require.''.

(b) Section 5(a) of Executive Order 13539, as amended, is further amended to read as follows: ''Insofar as the Federal Advisory Committee Act, as amended (5 U.S.C. App.) (FACA), may apply to the PCAST, any functions of the President under the FACA, except that of reporting to the Congress, shall be performed by the Secretary of Energy in accordance with the guidelines and procedures established by the Administrator of General Services.''.

THE WHITE HOUSE,
December 19, 2011.

[FR Doc. 2011–33335
Filed 12–23–11; 8:45 am]
Billing code 3295–F2–P

Presidential Documents

Memorandum of December 21, 2011

Flexible Implementation of the Mercury and Air Toxics Standards Rule

Memorandum for the Administrator of the Environmental Protection Agency

Today's issuance, by the Environmental Protection Agency (EPA), of the final Mercury and Air Toxics Standards rule for power plants (the ''MATS Rule'') represents a major step forward in my Administration's efforts to protect public health and the environment.

This rule, issued after careful consideration of public comments, prescribes standards under section 112 of the Clean Air Act to control emissions of mercury and other toxic air pollutants from power plants, which collectively are among the largest sources of such pollution in the United States. The EPA estimates that by substantially reducing emissions of pollutants that contribute to neurological damage, cancer, respiratory illnesses, and other health risks, the MATS Rule will produce major health benefits for millions of Americans—including children, older Americans, and other vulnerable populations. Consistent with Executive Order 13563 (Improving Regulation and Regulatory Review), the estimated benefits of the MATS Rule far exceed the estimated costs.

The MATS Rule can be implemented through the use of demonstrated, existing pollution control technologies. The United States is a global market leader in the design and manufacture of these technologies, and it is anticipated that U.S. firms and workers will provide much of the equipment and labor needed to meet the substantial investments in pollution control that the standards are expected to spur.

These new standards will promote the transition to a cleaner and more efficient U.S. electric power system. This system as a whole is critical infrastructure that plays a key role in the functioning of all facets of the U.S. economy, and maintaining its stability and reliability is of critical importance. It is therefore crucial that implementation of the MATS Rule proceed in a cost-effective manner that ensures electric reliability.

Analyses conducted by the EPA and the Department of Energy (DOE) indicate that the MATS Rule is not anticipated to compromise electric generating resource adequacy in any region of the country. The Clean Air Act offers a number of implementation flexibilities, and the EPA has a long and successful history of using those flexibilities to ensure a smooth transition to cleaner technologies.

The Clean Air Act provides 3 years from the effective date of the MATS Rule for sources to comply with its requirements. In addition, section 112(i)(3)(B) of the Act allows the issuance of a permit granting a source up to one additional year where necessary for the installation of controls. As you stated in the preamble to the MATS Rule, this additional fourth year should be broadly available to sources, consistent with the requirements of the law.

The EPA has concluded that 4 years should generally be sufficient to install the necessary emission control equipment, and DOE has issued analysis consistent with that conclusion. While more time is generally not expected to be needed, the Clean Air Act offers other important flexibilities as well.

For example, section 113(a) of the Act provides the EPA with flexibility to bring sources into compliance over the course of an additional year, should unusual circumstances arise that warrant such flexibility.

To address any concerns with respect to electric reliability while assuring MATS' public health benefits, I direct you to take the following actions:

1. Building on the information and guidance that you have provided to the public, relevant stakeholders, and permitting authorities in the preamble of the MATS Rule, work with State and local permitting authorities to make the additional year for compliance with the MATS Rule provided under section 112(i)(3)(B) of the Clean Air Act broadly available to sources, consistent with law, and to invoke this flexibility expeditiously where justified.

2. Promote early, coordinated, and orderly planning and execution of the measures needed to implement the MATS Rule while maintaining the reliability of the electric power system. Consistent with Executive Order 13563, this process should be designed to ''promote predictability and reduce uncertainty,'' and should include engagement and coordination with DOE, the Federal Energy Regulatory Commission, State utility regulators, Regional Transmission Organizations, the North American Electric Reliability Corporation and regional electric reliability organizations, other grid planning authorities, electric utilities, and other stakeholders, as appropriate.

3. Make available to the public, including relevant stakeholders, information concerning any anticipated use of authorities: (a) under section 112(i)(3)(B) of the Clean Air Act in the event that additional time to comply with the MATS Rule is necessary for the installation of technology; and(b) under section 113(a) of the Clean Air Act in the event that additional time to comply with the MATS Rule is necessary to address a specific and documented electric reliability issue. This information should describe the process for working with entities with relevant expertise to identify circumstances where electric reliability concerns might justify allowing additional time to comply.

This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

You are hereby authorized and directed to publish this memorandum in the *Federal Register*.

THE WHITE HOUSE,
Washington, December 21, 2011

[FR Doc. 2011–33337
Filed 12–23–11; 8:45 am]
Billing code 6560–50–P

Rules and Regulations

Federal Register

Vol. 76, No. 248

Tuesday, December 27, 2011

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

DEPARTMENT OF AGRICULTURE

Rural Utilities Service

7 CFR Part 1778

Rural Housing Service

Rural Business-Cooperative Service

Rural Utilities Service

Farm Service Agency

7 CFR Parts 1942, 1944, 1948, 1951, and 1980

Rural Housing Service

7 CFR Parts 3560, 3565 and 3570

Rural Business-Cooperative Service

Rural Utilities Service

7 CFR Part 4274

Intergovernmental Review

AGENCIES: Rural Housing Service, Rural Business-Cooperative Service, Rural Utilities Service and Farm Service Agency, USDA.

ACTION: Final rule.

SUMMARY: The U. S. Department of Agriculture (''Department'') is amending several regulations, which make reference to RD Instruction 1940–J, Intergovernmental Review.'' This action is necessary since the affected regulations refer to RD Instruction 1940–J, which is being rewritten and replaced by RD Instruction 1970–I. The intended effect is to simplify and update the regulations and to ensure the Department's field offices have current guidance on intergovernmental review of proposed projects being reviewed pursuant to the National Environmental Policy Act.

DATES: *Effective Date:* December 27, 2011.

FOR FURTHER INFORMATION CONTACT: Annie Goode, Environmental Protection Specialist, Technical Support Branch, Program Support Staff, Rural Housing Service, Rural Development, U.S. Department of Agriculture, Mail Stop 0761, 1400 Independence Avenue SW., Washington, DC 20250, telephone: (202) 720–9653.

SUPPLEMENTARY INFORMATION:

Classification

This action is not subject to the provisions of Executive Order 12866 since it involves only internal Agency management. This action is not published for prior notice and comment under the Administrative Procedure Act since it involves only internal Agency management and publication for comment is unnecessary and contrary to the public interest.

Civil Justice Reform

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. In accordance with this rule: (1) Unless otherwise specifically provided, all State and local laws and regulations that are in conflict with this rule will be preempted; (2) no retroactive effect will be given to this rule except as specifically prescribed in the rule; and (3) administrative proceedings of the National Appeals Division (7 CFR part 11) must be exhausted before litigation against the Department is instituted.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, agencies generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures to State, local, or tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. When such a statement is needed for a rule, section 205 of the UMRA generally requires agencies to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, more cost-effective, or least burdensome alternative that achieves the objectives of the rule.

This rule contains no Federal mandates (under the regulatory provisions of title II of the UMRA) for State, local, and tribal governments or the private sector. Thus, the rule is not subject to the requirements of section 202 and 205 of the UMRA.

Environmental Impact Statement

This document has been reviewed in accordance with 7 CFR part 1940, subpart G, ''Environmental Program.'' The Agencies have determined that this final action does not constitute a major Federal action significantly affecting the quality of human environment, and in accordance with the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.,* an Environmental Impact Statement is not required.

Executive Order 13132, Federalism

The policies contained in this rule do not have any substantial direct effect on States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Nor does this rule impose substantial direct compliance costs on State and local governments. Therefore, consultation with the States is not required.

Programs Affected

The Programs impacted by this action, and associated Catalog of Federal Domestic Assistance numbers, are as follows:

10.415—Rural Rental Housing—Direct Loans.
10.420—Self-Help Technical Assistance Grants.
10.433—Housing Preservation Grants.
10.438—Rural Rental Housing Program—Guaranteed Loans.
10.441—Technical and Supervisory Assistance Grants.
10.763—Emergency and Imminent Community Water Assistance Grants.
10.766—Community Facilities Loans and Grants.
10.767—Intermediary Relending Program.
10.768—Business and Industrial Loans.

Paperwork Reduction Act

This rule does not revise or impose any new information collection

requirements from those approved by OMB.

E-Government Act Compliance

The Agencies are committed to complying with the E–Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

Discussion of Final Rule

The Department is updating Agency regulations regarding intergovernmental reviews conducted pursuant to the National Environmental Policy Act (''NEPA,'' 40 CFR 1500–1508). To accomplish this goal, existing RD Instruction 1940–J, ''Intergovernmental Review,'' is being rewritten and replaced by RD Instruction 1970–I. Because several regulations make reference to RD Instruction 1940–J, revisions are needed to change all references from 1940–J to 1970–I. The intended effect is to simplify and update the regulations and to ensure the Department's field offices have current guidance on intergovernmental review of proposed projects being reviewed pursuant to NEPA.

List of Subjects

7 CFR Part 1778

Community development, Community facilities, Grant programs—Housing and Community development, Intergovernmental relations—Grant programs, Loan programs—Housing and community development, Rural areas, Waste treatment and disposal, Water supply, Watersheds.

7 CFR Part 1942

Community development, Community facilities, Loan programs—Housing and community development, Loan security, Rural areas, Waste treatment and disposal—Domestic, Water supply—Domestic.

7 CFR Part 1944

Grant programs—Housing and community development, Home improvement, Loan programs—Housing and community development, Low and moderate income housing—Rental, Mobile homes, Mortgages, Nonprofit organizations, Reporting requirements, Rural housing, Subsidies.

7 CFR Part 1948

Business and industry, Coal, Community development, Community facilities, Energy, Grant programs, Housing and community development, Housing, Planning, Rural area, Transportation.

7 CFR Part 1951

Loans Programs—Agriculture, Rural areas.

7 CFR Part 1980

Loan programs—Business and industry—Rural development, Rural areas.

7 CFR Part 3560

Accounting, Administrative practice and procedure, Aged, Conflict of interests, Government property management, Grant programs—Housing and community development, Insurance, Loan programs—Agriculture, Loan programs—Housing and community development, Low and moderate income housing, Migrant labor, Mortgages, Nonprofit organizations, Rent subsidies, Rural areas.

7 CFR Part 3565

Conflict of interests, Environmental impact statements, Fair housing, Hearing and appeal procedures.

7 CFR Part 3570

Accounting Administrative practice and procedure, Conflicts of interests, Environmental impact statements, Fair Housing, Grant programs—Housing and community development, Loan programs—Housing and community development, Rural areas, Subsidies.

7 CFR Part 4274

Community development, Economic development, Loan programs—Business, Rural areas.

For the reasons set forth in the preamble, Chapters XVII, XVIII, XXXV, and XLII, of title 7 of the Code of Federal Regulations are amended as follows:

Chapter XVII—Rural Utilities Service, Department of Agriculture

PART 1778—EMERGENCY AND IMMINENT COMMUNITY WATER ASSISTANCE GRANTS

■ 1. The authority citation for part 1778 continues to read as follows:

Authority: 5 U.S.C. 301; 7 U.S.C 1989; 16 U.S.C. 1005.

§ 1778.14 [Amended]

■ 2. Section 1778.14(f) is amended by removing ''1940–J'' and adding in its place ''1970–I, 'Intergovernmental Review,' available in any Agency office or on the Agency's Web site''.

Chapter XVIII—Rural Housing Service, Rural Business-Cooperatives Service, Rural Utilities Service and Farm Service Agency, Department of Agriculture

PART 1942—ASSOCIATIONS

■ 3. The authority citation for part 1942 continues to read as follows:

Authority: 5 U.S.C. 301; 7 U.S.C 1989.

Subpart A—Community Facility Loans

§ 1942.5 [Amended]

■ 4. Section 1942.5(b)(1)(ii)(B) is amended by removing ''(FmHA Instruction 1940–J, available in any FmHA or its successor agency under Public Law 103–354 office.)'' and adding in its place ''(These requirements are set forth in U. S. Department of Agriculture regulations 7 CFR 3015, subpart V and RD Instruction 1970–I, 'Intergovernmental Review,' available in any Agency office or on the Agency's Web site.)''.

Subpart C—Fire and Rescue and Other Small Community Facilities Projects

§ 1942.106 [Amended]

■ 5. Section 1942.106(a) is amended by removing ''in accordance with subpart J of part 1940 of this chapter'' and adding in its place ''requirements set forth in U. S. Department of Agriculture regulations 7 CFR 3015, subpart V and RD Instruction 1970–I, 'Intergovernmental Review,' available in any Agency office or on the Agency's Web site''.

PART 1944—HOUSING

■ 6. The authority citation for part 1944 continues to read as follows:

Authority: 5 U.S.C. 301; 42 U.S.C 1480.

Subpart I—Self-Help Technical Assistance Grants

§ 1944.409 [Amended]

■ 7. Section 1944.409 is amended by removing ''Under subpart J of 1940 of this chapter (available in any Agency office),'' and adding in its place ''These requirements are set forth in U. S. Department of Agriculture regulations 7 CFR 3015, subpart V and RD Instruction 1970–I, 'Intergovernmental Review,' available in any Agency office or on the Agency's Web site''.

Subpart K—Technical and Supervisory Assistance Grants

§ 1944.526 [Amended]

■ 8. Section 1944.526(c)(2), is amended by removing ''(See FmHA Instruction 1940–J, available in any FmHA or its successor agency under Public Law

103–354 Office)'' and adding in its place ''(See RD Instruction 1970–I, 'Intergovernmental Review,' available in any Agency office or on the Agency's Web site.)''.

§ 1944.529 [Amended]

■ 9. Section 1944.529(b)(9) is amended by removing ''(See FmHA Instruction 1940–J, available in any FmHA or its successor agency under Public Law 103–354 Office)'' and adding in its place ''See RD Instruction 1970–I, 'Intergovernmental Review,' available in any Agency office or on the Agency's Web site''.

§ 1944.531 [Amended]

■ 10. Section 1944.531(c)(3) is amended by removing ''See FmHA Instruction 1940–J, available in any FmHA or its successor agency under Public Law 103–354 Office.'' and adding in its place ''See RD Instruction 1970–I, 'Intergovernmental Review,' available in any Agency office or on the Agency's Web site''.

Subpart N—Housing Preservation Grants

§ 1944.674 [Amended]

■ 11. Section 1944.674(c) is amended by removing ''Under FmHA Instruction 1940–J (available in any FmHA or its successor agency under Public Law 103–354 office) prospective* * *'' and adding in its place ''These requirements are set forth in U.S. Department of Agriculture regulations 7 CFR part 3015, subpart V, and RD Instruction 1970–I, 'Intergovernmental Review,' available in any Agency office or on the Agency's Web site. Prospective* * *''

PART 1948—RURAL DEVELOPMENT

■ 12. The authority citation for part 1948 continues to read as follows:

Authority: 5 U.S.C. 301; 7 U.S.C. 1932, note.

Subpart B—Section 601 Energy Impacted Area Development Assistance Program

■ 13. The authority citation for subpart B of part 1948 continues to read as follows:

Authority: Section 601, Put. L. 95–620, delegation of authority by the Sec. of Agri., 7 CFR 2.23; delegation of authority by the Asst Sec. for Rural Development 7 CFR 2.78.

§ 1948.79 [Amended]

■ 14. Section 1948.79(k)(3) is amended by removing ''See FmHA Instruction 1940–J, available in any FmHA or its successor agency under Public Law 103–354 office.'' and adding in its place ''See RD Instruction 1970–I, 'Intergovernmental Review,' available in any Agency office or on the Agency's Web site''.

§ 1948.80 [Amended]

■ 15. Section 1948.80(g) is amended by removing ''(See FmHA Instruction 1940–J, available in any FmHA or its successor agency under Public Law 103–354 office.'' and adding in its place ''(See RD Instruction 1970–I, 'Intergovernmental Review,' available in any Agency office or on the Agency's Web site.)''.

§ 1948.84 [Amended]

■ 16. 1948.84(c) is amended by removing ''See FmHA Instruction 1940–J, available in any FmHA or its successor agency under Public Law 103–354 office.'' and adding in its place ''(See RD Instruction 1970–I, 'Intergovernmental Review,' available in any Agency office or on the Agency's Web site.)''.

§ 1948.84 [Amended]

■ 17. Section 1948.84(i)(2) is amended by removing ''See FmHA Instruction 1940–J, available in any FmHA or its successor agency under Public Law 103–354 office.'' and adding in its place ''(See RD Instruction 1970–I, 'Intergovernmental Review,' available in any Agency office or on the Agency's Web site.)''.

PART 1951—SERVICING AND COLLECTIONS

■ 18. The authority citation for part 1951 continues to read as follows:

Authority: 5 U.S.C. 301; 7 U.S.C. 1932 note.; 7 U.S.C. 1989; 31 U.S.C. 3716; 42 U.S.C. 1480;

Subpart R—Rural Development Loan Servicing

§ 1951.872 [Amended]

■ 19. Section 1951.872(a) is amended by removing ''FmHA or its successor agency under Public Law 103–354 Instruction 1940–J, 'Intergovernmental Review of Farmers Home Administration or its successor agency under Public Law 103–354 Programs and Activities,' available in any FmHA or its successor agency under Public Law 103–354 office.'' and adding in its place ''the requirements set forth in U.S. Department of Agriculture regulations 7 CFR part 3015, subpart V, and RD Instruction 1970–I, 'Intergovernmental Review,' available in any Agency office or on the Agency's Web site''.

PART 1980—GENERAL

■ 20. The authority citation for part 1980 continues to read as follows:

Authority: 5 U.S.C. 301; 7 U.S.C. 1989. Subpart E also issued under 7 U.S.C. 1932(a).

Subpart E—Business and Industrial Loan Programs

§ 1980.451 [Amended]

■ 21. Section 1980.451(f)(8) is amended by removing ''See FmHA or its successor agency under Public Law 103–354 Instruction 1940–J, available in any FmHA or its successor agency under Public Law 103–354 Office.'' and adding in its place ''See RD Instruction 1970–I, 'Intergovernmental Review,' available in any Agency office or on the Agency's Web site''.

PART 3560—DIRECT MULTI-FAMILY HOUSING LOANS AND GRANTS

■ 22. The authority citation for part 3560 continues to read as follows:

Authority: 42 U.S.C. 1480

Subpart A—General Provisions and Definitions

§ 3560.4 [Amended]

■ 23. Section 3560.4(a) is amended by removing ''RD Instruction 1940–J, available in any Rural Development Office.'' and adding in its place ''RD Instruction 1970–I, 'Intergovernmental Review,' available in any Agency office or on the Agency's Web site''.

PART 3565—GUARANTEED RURAL RENTAL HOUSING PROGRAM

■ 24. The authority citation for part 3565 continues to read as follows:

Authority: 5 U.S.C. 301; 7 U.S.C. 1989; 42 U.S.C. 1480

Subpart A—General Provisions

§ 3565.9 [Amended]

■ 25. Section 3565.9(a) is amended by removing ''RD Instruction 1940–J, available in any Rural Development office.'' and adding in its place ''RD Instruction 1970–I, 'Intergovernmental Review,' available in any Agency office or on the Agency's Web site''.

PART 3570—COMMUNITY PROGRAMS

■ 26. The authority citation for part 3570 continues to read as follows:

Authority: 5 U.S.C. 301; 7 U.S.C. 1989.

Subpart B—Community Facilities Grant Program

§ 3570.69 [Amended]

■ 27. Section 3570.69 is amended by removing ''RD Instruction 1940–J (available in any Rural Development office)'' and adding in its place ''7 CFR 3015, subpart V and RD Instruction 1970–I, 'Intergovernmental Review,' available in any Agency office or on the Agency's Web site''.

PART 4274—DIRECT AND INSURED LOANMAKING

■ 28. The authority citation for part 3570 continues to read as follows:

Authority: 5 U.S.C. 301; 7 U.S.C. 1932 note.; 7 U.S.C. 1989

Subpart D—Intermediary Relending Program (IRP)

§ 4274.337 [Amended]

■ 29. Section 4274.337(a) is amended by removing ''(See RD Instruction 1940–J (available in any Rural Development State Office)).'' and adding in its place ''These requirements are set forth in U.S. Department of Agriculture regulations 7 CFR part 3015, subpart V, and RD Instruction 1970–I, 'Intergovernmental Review,' available in any Agency office or on the Agency's Web site''.

Dated: December 6, 2011.

Dallas Tonsager,

Under Secretary, Rural Development.

Dated: December 8, 2011.

Michael Scuse,

Acting Under Secretary, Farm and Foreign Agriculture Services.

[FR Doc. 2011–33025 Filed 12–23–11; 8:45 am]

BILLING CODE 3410–XV–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2011–1238; Airspace Docket No. 11–AAL–20]

Revocation and Establishment of Compulsory Reporting Point; Alaska

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action modifies a low altitude and a high altitude Alaskan compulsory reporting point in the vicinity of Kodiak, Alaska. The FAA is removing the MARLO compulsory reporting point and establishing CJAYY in the same location, to avoid confusion with a reporting fix of the same name. The boundaries, altitudes, and operating requirements remain the same.

DATES: Effective date 0901 UTC, April 5, 2012. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order 7400.9 and publication of conforming amendments.

FOR FURTHER INFORMATION CONTACT: Colby Abbott, Airspace, Regulations and ATC Procedures Group, Office of Mission Support Services, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone: (202) 267–8783.

SUPPLEMENTARY INFORMATION:

History

The FAA has determined that the low and high altitude Alaska reporting point MARLO has the same name as another reporting point fix that is in use by another country and is contained in the aeronautical database. To overcome possible confusion and flight safety issues, the FAA is changing the name of the low and high altitude MARLO compulsory reporting point in the vicinity of Kodiak, Alaska, to become the CJAYY compulsory reporting point by removing MARLO and establishing CJAYY in the same location. The latitude and longitude information used to define the reporting point, as well as the intersection description information, are unchanged. Accordingly, since this is an administrative change and does not affect the boundaries, altitudes, or operating requirements of the airspace, notice and public procedures under Title 5 U.S.C. 553(b) are unnecessary.

The Rule

The FAA amends Title 14 Code of Federal Regulations (14 CFR) part 71 by removing the low and high altitude MARLO Alaskan compulsory reporting point in the vicinity of Kodiak, Alaska, and establishing the low and high altitude CJAYY Alaskan compulsory reporting point in the same location.

Alaskan Low Altitude Reporting Points are listed in paragraph 7004 of FAA Order 7400.9V dated August 9, 2011, and effective September 15, 2011, which is incorporated by reference in 14 CFR 71.1. Alaskan High Altitude Reporting Points are listed in paragraph 7005 of FAA Order 7400.9V dated August 9, 2011, and effective September 15, 2011, which is incorporated by reference in 14 CFR 71.1. The reporting points listed in this document will be revised subsequently in the Order.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this regulation: (1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under Department of Transportation (DOT) Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority.

This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it amends Low and High Altitude Compulsory Reporting Points in Alaska.

Environmental Review

The FAA has determined that this action qualifies for categorical exclusion under the National Environmental Policy Act in accordance with 311a, FAA Order 1050.1E, ''Environmental Impacts: Policies and Procedures.'' This airspace action is not expected to cause any potentially significant environmental impacts, and no extraordinary circumstances exist that warrant preparation of an environmental assessment.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

■ 1. The authority citation for part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order 7400.9V, Airspace Designations and Reporting Points, signed August 9, 2011, and effective September 15, 2011, is amended as follows:

Paragraph 7004 Alaskan low altitude reporting points.

* * * * *

MARLO: [Removed]

* * * * *

CJAYY: [New]

Lat. 57°27′51″ N., long. 150°31′51″ W. (INT Kodiak, AK, 107° radial and Anchorage CTA/FIR boundary).

* * * * *

Paragraph 7005 Alaskan high altitude reporting points.

* * * * *

MARLO: [Removed]

* * * * *

CJAYY: [New]

Lat. 57°27′51″ N., long. 150°31′51″ W. (INT Kodiak, AK, 107° radial and Anchorage CTA/FIR boundary).

Issued in Washington, DC, on December 15, 2011.

Gary A. Norek,

Acting Manager, Airspace, Regulations and ATC Procedures Group.

[FR Doc. 2011–33019 Filed 12–23–11; 8:45 am]

BILLING CODE 4910–13–P

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240

[Release No. 34–66020; File No. S7–19–10]

RIN 3235–AK69

Extension of Temporary Registration of Municipal Advisors

AGENCY: Securities and Exchange Commission.

ACTION: Interim final temporary rule; extension.

SUMMARY: The Securities and Exchange Commission (''Commission'') is amending interim final temporary Rule 15Ba2–6T, which provides for the temporary registration of municipal advisors under the Securities Exchange Act of 1934 (''Exchange Act''), as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act (''Dodd-Frank Act''), to extend the date on which Rule 15Ba2–6T will sunset from December 31, 2011 to September 30, 2012. Under the amendment, all temporary registrations submitted pursuant to Rule 15Ba2–6T will expire no later than September 30, 2012.

DATES: *Effective Date:* December 31, 2011. The expiration of the effective period of interim final temporary Rule 15Ba2–6T (17 CFR 240.15Ba2–6T) is delayed from December 31, 2011, to September 30, 2012.

FOR FURTHER INFORMATION CONTACT: Victoria Crane, Assistant Director, Office of Market Supervision, at (202) 551–5744; Yue Ding, Attorney-Adviser, Office of Market Supervision, at (202) 551–5842; Mary Simpkins, Senior Special Counsel, Office of Municipal Securities, at (202) 551–5683; Dave Sanchez, Attorney Fellow, Office of Municipal Securities, at (202) 551–5540; John L. McWilliams, III, Attorney Fellow, Office of Municipal Securities, at (202) 551–5688; or any of the above at Division of Trading and Markets, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–6628.

SUPPLEMENTARY INFORMATION: The Commission is extending the expiration date for interim final temporary Rule 15Ba2–6T under the Exchange Act.

I. Discussion

Section 15B(a)(1) of the Exchange Act,[1] as amended by Section 975(a)(1)(B) of the Dodd-Frank Act,[2] makes it unlawful for a municipal advisor to provide advice to or on behalf of a municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities, or to undertake a solicitation of a municipal entity or obligated person, unless the municipal advisor is registered with the Commission. Section 15B(a)(2) of the Exchange Act,[3] as amended by Section 975(a)(2) of the Dodd-Frank Act, provides that a municipal advisor may be registered by filing with the Commission an application for registration in such form and containing such information and documents concerning the municipal advisor and any person associated with the municipal advisor as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors.

The registration requirement for municipal advisors became effective on October 1, 2010. On September 1, 2010, the Commission adopted interim final temporary Rule 15Ba2–6T under the Exchange Act,[4] which permits municipal advisors to temporarily satisfy the statutory registration requirement by completing Form MA–T[5] through the Commission's public Web site.[6] Rule 15Ba2–6T serves as a transitional step to the implementation of a permanent registration program, makes relevant information available to the public and municipal entities, and permits municipal advisors to continue their business after October 1, 2010.

Under existing Rule 15Ba2–6T, all temporary registrations submitted pursuant to that rule will expire on the earlier of: (1) The date that the municipal advisor's registration is approved or disapproved by the Commission pursuant to a final rule adopted by the Commission establishing another manner of registration of municipal advisors and prescribing a form for such purpose;[7] (2) the date on which the municipal advisor's temporary registration is rescinded by the Commission; or (3) on December 31, 2011.[8] Further, existing Rule 15Ba2–6T will expire on December 31, 2011.[9]

As stated in the Interim Release, the Commission believes that providing a temporary registration process for municipal advisors, pursuant to an interim final temporary rule, is a

[1] 15 U.S.C. 78*o*–4(a)(1).

[2] Public Law 111–203, 124 Stat. 1376 (2010).

[3] 15 U.S.C. 78*o*–4(a)(2).

[4] 17 CFR 240.15Ba2–6T.

[5] 17 CFR 249.1300T.

[6] *See* Securities Exchange Act Release No. 62824, 75 FR 54465 (September 8, 2010) (''Interim Release''). The Commission received seven comment letters on the Interim Release. *See* letters from Brad R. Jacobsen, dated September 7, 2010; John J. Wagner, Kutak Rock LLP, dated September 28, 2010; Joy A. Howard, Principal, WM Financial Strategies, dated October 5, 2010; Steve Apfelbacher, President, National Association of Independent Public Finance Advisors, dated October 8, 2010; Carolyn Walsh, Vice President and Senior Counsel, Center for Securities, Trust and Investments, American Bankers Association, Deputy General Counsel, ABA Securities Association, dated October 13, 2010; Amy Natterson Kroll and W. Hardy Callcott, Bingham McCutchen LLP, on behalf of the National Association of Energy Service Companies, dated October 13, 2010; and Leslie M. Norwood, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association, dated November 15, 2010.

[7] On December 20, 2010, the Commission proposed for public comment rules for the permanent registration of municipal advisors. *See* Securities Exchange Act Release No. 63576; 76 FR 824 (January 6, 2011) (''Proposing Release'').

[8] *See* 17 CFR 240.15Ba2–6T(e).

[9] *See* 17 CFR 240.15Ba2–6T(f).

necessary and appropriate way to proceed, is consistent with the intent of Congress in enacting Section 975 of the Dodd-Frank Act, and is a tailored way to provide investors and municipal entities with basic and important information while the Commission considers a permanent registration program. As noted above, however, existing Rule 15Ba2–6T will expire on December 31, 2011. Accordingly, the Commission has determined that it is necessary and appropriate to extend the expiration date of Rule 15Ba2–6T to September 30, 2012, to provide a method for municipal advisors to continue to temporarily satisfy the registration requirement under Section 15B of the Exchange Act until the Commission promulgates a final rule establishing another manner of registration of municipal advisors, prescribing a form for such purpose, and developing an electronic registration system. This extension will prevent a gap between the time at which the temporary rule expires and at which municipal advisors must be registered with the Commission under a permanent registration regime. The Commission notes that it is adopting amendments to Rule 15Ba2–6T only to extend the expiration date of that rule. The Commission is not making any other amendments to Rule 15Ba2–6T or Form MA–T.

Specifically, the Commission is amending Rule 15Ba2–6T(e) to provide that all temporary registrations submitted pursuant to Rule 15Ba2–6T will expire on the earlier of: (1) The date that the municipal advisor's registration is approved or disapproved by the Commission pursuant to a final rule adopted by the Commission establishing another manner of registration of municipal advisors and prescribing a form for such purpose; (2) the date on which the municipal advisor's temporary registration is rescinded by the Commission; or (3) on September 30, 2012. The Commission is also amending Rule 15Ba2–6T(f) to provide that the interim final temporary rule will expire on September 30, 2012. Thus, absent further action by the Commission, Rule 15Ba2–6T will expire on September 30, 2012 at 11:59 p.m. Eastern Time.

The Commission has considered the seven comment letters received on the Interim Release [10] and, given the limited nature of this extension and the Commission's ongoing process of considering permanent rules for the registration of municipal advisors, the Commission is not making any other changes to the temporary registration rule and Form MA–T. The Commission believes that making other changes to the temporary rule and Form MA–T could cause those relying on the rule or form to need to make adjustments to their operations or amendments to their forms that may be applicable only until the permanent rules are considered by the Commission. The Commission also notes that the comment letters received in response to the Interim Release were addressed in the Proposing Release, and were considered for purposes of the proposed rules for the registration of municipal advisors.

The amendments to Rule 15Ba2–6T will be effective on December 31, 2011. The Administrative Procedure Act (''APA'') generally requires an agency to publish notice of a proposed rulemaking in the **Federal Register**.[11] This requirement does not apply, however, if the agency ''for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.'' [12] The Commission notes that extending the expiration date of Rule 15Ba2–6T will not affect the substantive provisions of that rule, and will allow municipal advisors to continue to comply with the statutory registration requirement until a permanent registration regime becomes effective. Further, the Commission notes that extending the expiration date of Rule 15Ba2–6T will prevent a regulatory gap from developing between the time at which the temporary rule expires and at which municipal advisors must be registered with the Commission under a permanent registration regime. For these reasons, and the reasons discussed throughout this release, the Commission believes that there is good cause to extend the expiration date of Rule 15Ba2–6T to September 30, 2012, and to find that notice and solicitation of comment on the extension is impracticable, unnecessary, or contrary to the public interest.[13]

The APA also generally requires that an agency publish a substantive rule in the **Federal Register** not less than 30 days before its effective date.[14] However, this requirement does not apply if the agency finds good cause and publishes such cause with the rule.[15] For reasons similar to those explained above, the Commission finds good cause not to delay the effective date of the extension.

In connection with the adoption of Rule 15Ba2–6T and Form MA–T, the Commission submitted to the Office of Management and Budget (''OMB'') a request for approval of the ''collection of information'' requirements contained in the temporary rule and form in accordance with the Paperwork Reduction Act of 1995.[16] OMB initially approved the collection of information on an emergency basis with an expiration date of March 31, 2011. The Commission subsequently submitted a request for extension of the approval, and OMB extended the approval to March 31, 2014. The collection of information to which Rule 15Ba2–6T and Form MA–T relates is ''Rule 15Ba2–6T and Form MA–T—Temporary Registration of Municipal Advisors.'' The OMB control number for the collection of information is 3235–0659. Since the Commission is not amending Rule 15Ba2–6T or the disclosure requirements contained in Form MA–T other than extending the expiration date for Rule 15Ba2–6T, this amendment will not change the ''collection of information'' previously approved by the OMB.

The Commission is sensitive to the costs and benefits of its rules. The Commission has previously considered and discussed the costs and benefits of Rule 15Ba2–6T.[17] Since the Commission is not amending Rule 15Ba2–6T and Form MA–T other than to extend the expiration date for that rule, the Commission believes that the same general analysis will continue to apply for the period of the extension. An important benefit of extending the expiration date for Rule 15Ba2–6T, however, will be to allow municipal advisors to continue to comply with the statutory registration requirement until a permanent registration regime becomes effective, and to avoid a regulatory gap from developing between the time at which the temporary rule expires and at which municipal

[10] *See supra* note 6.

[11] *See* 5 U.S.C. 553(b).

[12] 5 U.S.C. 553(b)(B).

[13] This finding also satisfies the requirements of 5 U.S.C. 808(2), allowing the rule amendments to become effective notwithstanding the requirements of 5 U.S.C. 801 (if a federal agency finds that notice and public comment are ''impracticable, unnecessary or contrary to the public interest,'' a rule ''shall take effect at such time as the Federal agency promulgating the rule determines''). Because the Commission is not publishing the rule amendments in a notice of proposed rulemaking, no analysis is required under the Regulatory Flexibility Act. *See* 5 U.S.C. 601(2) (for purposes of the Regulatory Flexibility Act, the term ''rule'' means any rule for which the agency publishes a general notice of proposed rulemaking).

[14] *See* 5 U.S.C. 553(d).

[15] *See* 5 U.S.C. 553(d)(3).

[16] 44 U.S.C. 3501 *et seq.*

[17] For a detailed description of the costs and benefits of Rule 15Ba2–6T, *see* Interim Release, *supra* note 6 at 54474–75.

advisors must be registered with the Commission under a permanent registration regime.

Since the Commission is only extending the expiration date for Rule 15Ba2–6T and is not substantively changing Rule 15Ba2–6T and Form MA–T, the Commission's estimated burden for each municipal advisor to complete and amend Form MA–T remains unchanged.[18] However, the Commission estimates that as a result of the amendment, approximately 162 [19] new municipal advisors will register between January 1, 2012 and September 30, 2012 at a total labor cost of approximately $168,000.[20] With regard to the 162 new municipal advisors and the municipal advisors already registered pursuant to Rule 15Ba2–6T, the Commission estimates that, between January 1, 2012 and September 30, 2012, there will be approximately 160 [21] amendments and withdrawals at a total labor cost of approximately $22,000.[22]

Section 3(f) of the Exchange Act requires the Commission, whenever it engages in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action would promote efficiency, competition and capital formation.[23] In addition, Section 23(a)(2) of the Exchange Act requires the Commission, when making rules under the Exchange Act, to consider the impact such rules would have on competition.[24] Section 23(a)(2) of the Exchange Act prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.[25] In the Interim Release, the Commission considered the effects of Rule 15Ba2–6T on efficiency, competition, and capital formation.[26] Since the Commission is not amending Rule 15Ba2–6T and Form MA–T other than extending the expiration date for Rule 15Ba2–6T, the Commission believes that the same analysis applies, and continues to believe that Rule 15Ba2–6T, as extended, will not result in a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.

II. Statutory Authority and Text of Rule and Amendments

Pursuant to the Exchange Act, and particularly Section 15B (15 U.S.C. 78*o*–4), the Commission is amending § 240.15Ba2–6T of Title 17 of the Code of Federal Regulations in the manner set forth below.

List of Subjects in 17 CFR Part 240

Reporting and recordkeeping requirements, Municipal advisors, Temporary registration requirements.

Text of Rule and Amendments

For the reasons set out in the preamble, Title 17, Chapter II, of the Code of Federal Regulations is amended as follows.

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

■ 1. The general authority citation for Part 240 continues to read as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–1, 78*l*, 78m, 78n, 78*o*, 78*o*–4, 78p, 78q, 78s, 78u–5, 78w, 78x, 78*ll*, 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, and 7201 *et seq.;* 18 U.S.C. 1350; and 12 U.S.C. 5221(e)(3), unless otherwise noted.

* * * * *

§ 240.15Ba2–6T [Amended]

■ 2. In § 240.15Ba2–6T, remove the words ''December 31, 2011'' wherever they appear and add, in their place, the words ''September 30, 2012''.

By the Commission.

Dated: December 21, 2011.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2011–33146 Filed 12–23–11; 8:45 am]

BILLING CODE 8011–01–P

[18] The Commission notes that in the Interim Release, it had estimated that approximately 1,000 municipal advisors would be required to complete Form MA–T. *See* Interim Release, *supra* note 6 at 54473. It further conservatively estimated that all 1,000 municipal advisors would have to amend their forms once between September 1, 2010 and December 31, 2011, recognizing that the actual number would likely be lower than 1,000. *See id.* As of November 31, 2011, the Commission has received 967 initial registrations, 102 amendments and 33 withdrawals.

[19] The Commission estimates that, between January 1, 2012 and September 30, 2012, there will be approximately 18 initial registrations per month, which is the average number of initial registrations the Commission has received per month during the first eleven months of 2011.

[20] 162 (estimated number of initial registrations) × 2.5 hours (estimated time to complete Form MA–T) = 405 hours; 405 hours × $273 (hourly rate for a Compliance Manager) = $110,565. 162 (estimated number of new municipal advisors that will hire outside counsel) × 1 hour (estimated time spent by outside counsel to help a new municipal advisor to comply with the rule) × $354 (hourly rate for an Attorney) = $57,348. $110,565 + $57,348 = $167,913. *See* Interim Release, *supra* note 6 at 54473–74. The estimated burden for each municipal advisor to complete Form MA–T and the estimated use of outside counsel by each municipal advisor remains unchanged from the Interim Release. The $273 per hour figure for a Compliance Manager and the $354 per hour figure for an Attorney are from SIFMA's *Management & Professional Earnings in the Securities Industry 2010,* modified by Commission staff to account for an 1,800-hour work year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead.

[21] The Commission estimated the number of amendments and withdrawals based on the number of amendments to, and withdrawals from, registration on Form MA–T that the Commission has received as of November 31, 2011.

[22] 160 (estimated number of amendments and withdrawals) × 0.5 hours (estimated time to amend Form MA–T) = 80 hours; 80 hours × $273 (hourly rate for a Compliance Manager) = $21,840. *See* Interim Release, *supra* note 6 at 54473–74. The $273 per hour figure for a Compliance Manager is from SIFMA's *Management & Professional Earnings in the Securities Industry 2010,* modified by Commission staff to account for an 1,800-hour work year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead.

[23] *See* 15 U.S.C. 78c(f).

[24] *See* 15 U.S.C. 78w(a)(2).

[25] *See id.*

[26] *See* Interim Release, *supra* note 6 at 54475.

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Parts 1910, 1915, and 1926

Corrections and Technical Amendments to 16 OSHA Standards

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Notice of corrections and technical amendments to standards.

SUMMARY: OSHA is correcting typographical errors in, and making non-substantive technical amendments to, 16 OSHA standards. The technical amendments include updating or revising cross-references and updating OSHA recordkeeping log numbers.

DATES: The effective date for the corrections and technical amendments to the standards is December 27, 2011.

FOR FURTHER INFORMATION CONTACT:

General information and press inquiries: Contact Frank Meilinger, Director, OSHA Office of Communications, Room N3647, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210; telephone: (202) 693–1999 or fax: (202) 693–1635.

Technical information: Contact Lisa Long, OSHA Directorate of Standards and Guidance, Room N3609, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210; telephone: (202) 693–2222.

SUPPLEMENTARY INFORMATION:

I. Summary and Explanation

OSHA is publishing technical amendments to 16 OSHA standards. These revisions do not affect the substantive requirements or coverage of

those standards, do not modify or revoke existing rights or obligations, and do not establish new rights or obligations.

A. Process Safety Management of Highly Hazardous Chemicals (§ 1910.119)

OSHA is correcting a typographical error in the reference to a chemical covered by the Process safety management of highly hazardous chemicals standard (29 CFR 1910.119; 57 FR 6403). Appendix A of the standard lists the covered chemicals. The chemical Oleum appears in Appendix A with an incorrect Chemical Abstracts Service (CAS) number of 8014–94–7. The correct CAS number for Oleum is 8014–95–7 (see The Merck Index, 13th Edition (2001)), and OSHA is correcting this error.

B. Hazardous Waste Operations and Emergency Response (§ 1910.120)

OSHA is updating a citation in the Hazardous waste operations and emergency response (HAZWOPER) Standard (29 CFR 1910.120; 54 FR 9294). In paragraph (a)(3) of the standard, OSHA defines the term ''hazardous substance.'' In that definition, OSHA refers to ''Section 101(14)'' of the Comprehensive Environmental Response Compensation, and Liability Act (CERCLA) (42 U.S.C. 9601). After OSHA published the standard, Congress redesignated Section 101(14) of CERCLA as Section 103(14). OSHA is revising the definition to include the new citation.

C. Permit-Required Confined Spaces (§ 1910.146)

OSHA is correcting a cross-reference in the Permit-required confined spaces standard (29 CFR 1910.146; 58 FR 4549). Paragraph (d)(4) of the standard lists equipment that the employer must provide and maintain for permit-space entry. Specifically, paragraph (d)(4)(vi) requires that the employer provide barriers and shields ''as required by paragraph (d)(3)(iv) of this section.'' Paragraph (d)(3) lists various means, procedures, and practices the employer must develop and implement for safe permit-space entry operations. When OSHA issued § 1910.146, paragraph (d)(3)(iv) listed as one of those practices ''providing pedestrian, vehicle, or other barriers as necessary to protect entrants from external hazards.'' When OSHA revised § 1910.146 in 1998, it inserted a new practice as paragraph (d)(3)(ii) and renumbered the remaining practices (63 FR 230). Consequently, OSHA redesignated paragraph (d)(3)(iv) as paragraph (d)(3)(v). However, during that rulemaking, OSHA did not revise the cross-reference to this provision. This notice corrects that oversight.

D. Medical Services and First Aid (§§ 1910.151 and 1926.50)

OSHA is updating cross-references in §§ 1910.151 and 1926.50, which establish requirements for medical services and first aid in general industry and construction, respectively. In 1998, OSHA added non-mandatory Appendix A to both standards to provide information about basic first-aid supplies and to instruct employers to use OSHA 200 logs and OSHA 101 forms to identify unique or changing first-aid needs.

After OSHA adopted Appendix A, it revised the rule on Recordkeeping and reporting occupational injuries and illnesses rule (29 CFR part 1904). As part of that rulemaking, OSHA revised the forms that employers must keep for recording and reporting workplace injuries and illnesses (§ 1904.29). OSHA replaced the 200 Log and Summary of Occupational Injuries and Illnesses with two separate forms—the OSHA 300 (Log of Work-Related Injuries and Illnesses) and the OSHA 300A (Summary of Work-Related Injuries and Illnesses). In addition, OSHA replaced Form 101 (Supplementary Record of Occupational Injuries and Illnesses) with OSHA Form 301 (Injury and Illness Incident Report). During this rulemaking, OSHA planned to revise all references to the recordkeeping forms in other OSHA standards. However, OSHA overlooked the appendices in both §§ 1910.151 and 1926.50. This notice is updating those references.

E. Servicing Multi-Piece and Single-Piece Rim Wheels (§ 1910.177)

OSHA originally published the standard for servicing multi-piece rim wheels, § 1910.177, on January 29, 1980 (45 FR 6706). OSHA amended the standard on February 3, 1984, to incorporate servicing requirements for single-piece rim wheels, and to make minor revisions to the multi-piece rim wheel servicing provisions (49 FR 4338). Having developed its own charts in the interim by revising the National Highway Traffic Safety Administration (NHTSA) charts, OSHA amended the standard to include these revisions and indicate the availability of the new charts from OSHA (53 FR 34736).

Appendix B of the standard states that the regulated community can obtain copies of the OSHA charts entitled ''Demounting and Mounting Procedures for Truck/Bus Tires'' and ''Multi-piece Rim Matching Chart'' directly from OSHA. However, OSHA has not had copies of these charts available for distribution for several years. Similarly, the NHTSA publications entitled ''Demounting and Mounting Procedures Truck/Bus Tires'' and ''Multi-piece Rim Matching Chart'' appear to be no longer available. Therefore, based on discussions with representatives from the tire, rubber, and wheel manufacturing industries, OSHA determined that new charts addressing current hazards in the tire-servicing industry are necessary.

Given the information technologies available in the 1980s, large posters containing the tire-servicing information appeared to OSHA to be the most effective means of providing workers with the information at the worksite necessary to perform tire-servicing operations safely. This approach involved printing and distributing large numbers of these posters. In updating this information, OSHA decided not to print large posters with the updated information, but to provide an 8½ inch by 11-inch printed manual containing this information that employers could use in the shop as an alternative to displaying the large posters. The manual would be more portable and accessible than a large poster, which employers typically mounted on a wall.

To reduce the distribution burden, OSHA will print and mail the manuals, but not the posters. The posters, as well as the manuals, will be available in electronic files (PDF) on the OSHA Web site at *http://www.osha.gov/publications* (and type ''tire chart'' in the search field). Since the file for the large poster will be available in various sizes (including 8½ inches by 11 inches), OSHA determined that, to be legible, posters located in the service area as specified by 29 CFR 1910.177(d)(5) must be at least 2 feet by 3 feet in size (*i.e.,* the size of the former posters supplied by OSHA).

OSHA also is revising the content of its two existing charts. The ''Multi-piece Rim Matching Chart'' will provide an updated list of multi-piece rim wheel components, both current and obsolete, while the ''Demounting and Mounting Procedures for Truck/Bus Tires'' chart will consist of two separate charts entitled ''Demounting and Mounting Procedures for Tubeless Truck and Bus Tires'' and ''Demounting and Mounting Procedures for Tube-Type Truck and Bus Tires.''

OSHA believes that the new charts will reduce tire-servicing accidents among employees and simplify compliance with the standard because the new charts summarize updated information from many sources, including the NHTSA and OSHA charts, rim manuals, and the OSHA standard,

and are more accessible and useable than the posters these charts are replacing. In addition, the updated manuals and posters will not increase the substantive obligation on employers under the standard to provide employees with tire-servicing information. Consistent with these revisions, OSHA is amending the definitions of ''charts'' in paragraph (b) of the standard to refer to the new Department of Labor charts (*i.e.,* manuals or posters), or to any other information or poster that provides at least the same instructions, safety precautions, and other information contained in OSHA's charts, and that is applicable to the types of rim wheels the employer is servicing. In addition, OSHA is revising Appendix B to provide current ordering information for the new OSHA manuals.

F. Mechanical Power Presses (§ 1910.217)

The Mechanical power presses standard (29 CFR 1910.217) requires that employers submit to OSHA reports of employees injured while operating such presses. Paragraph (g)(1) specifies that employers must submit the reports to federal OSHA or, for state-plan states, the state agency administering the plan. OSHA is revising this provision to include the new title of the federal OSHA office designated to receive the reports, and to provide an electronic address for submitting reports, which the Paperwork Reduction Act and associated regulations (44 U.S.C. chapter 35; 5 CFR 1320.8(a)(5)) encourages.

G. Pulp, Paper, and Paperboard Mills (§ 1910.261)

OSHA is correcting three errors involving incorrect cross references in this standard. On June 18, 1998 (63 FR 33450), OSHA removed or revised provisions in its standards that were outdated, duplicative, unnecessary, or inconsistent. Among other revisions, this action deleted paragraphs (b)(1) and (b)(3) from this standard, which referenced outdated American National Standards Institute national consensus standards B15.1–1953, Safety Code for Mechanical Power-Transmission Apparatus, and A12.1–1967, Safety Requirements for Floor and Wall Openings, Railings, and Toeboards, respectively. However, in doing so, OSHA did not amend paragraphs (e)(12)(i), which references deleted paragraph (b)(3), or paragraph (e)(12)(ii), which references deleted paragraph (b)(1). In addition, with the deletion of paragraphs (b)(1), (b)(2), and (b)(3), OSHA redesignated paragraph (b)(4) as paragraph (b)(1). However, OSHA did not revise the cross reference to redesignated paragraph (b)(1) in paragraph (e)(12)(iii). Therefore, with this notice, OSHA is removing the references to paragraphs (b)(3), (b)(1), and (b)(4) in existing paragraphs (e)(12)(i), (e)(12)(ii), and (e)(12)(iii), respectively, and replacing these references with the correct references (29 CFR 1910.23, 29 CFR 1910.219, and paragraph (b)(1) of 29 CFR 1910.261, respectively).

H. Sawmills (§ 1910.265)

OSHA is correcting a typographical error in a cross reference in this standard. Paragraph (e)(2)(iv) of the standard, which establishes safety requirements for twin circular-head saw rigs, provides: ''Twin circular head saw rigs such as scrag saws shall meet the specifications for single circular head saws in paragraph (e)(1)(iii) of this section where applicable.'' The cross reference to paragraph (e)(1)(iii) of the standard is incorrect. The provision should cross reference paragraph (e)(2)(iii), which specifies requirements for singular circular-head saws; OSHA is correcting the error.

I. Grain Handling Facilities (§ 1910.272)

The Grain handling facilities standard (29 CFR 1910.272) applies to general industry and, through incorporation by reference, to marine terminals that handle grain (29 CFR 1917.1(a)(2)(v)). In 1985, OSHA issued a compliance directive interpreting requirements of the standard as it applied to marine terminals (see CPL 02–00–066). The directive was the result of a settlement agreement with the National Grain and Feed Association, Inc.

In 2002, OSHA conducted a regulatory review of the standard pursuant to the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) and Executive Order 12866. During the review, stakeholders recommended that OSHA include in the standard a cross reference to the compliance directive. OSHA agreed and, accordingly, is inserting a note in paragraph (a) of the standard stating that OSHA will enforce the standard, as it applies to marine terminals, consistent with the 1985 compliance directive.

J. Commercial Diving Operations (§ 1910.440)

Phase III of the Standards Improvement Project (SIP III) revised requirements within OSHA standards that were confusing, outdated, duplicative, or inconsistent. One such revision to the Commercial Diving Operations standard at § 1910.440(b)(5) removed the requirement that employers transfer dive and employee medical records to the National Institute for Occupational Safety and Health (NIOSH) in the absence of a successor employer. However, subsequent review of the regulatory text at § 1910.440(b)(4) identified a provision requiring employers to transfer hospitalization and decompression-related records to NIOSH after the five-year retention period for these records expires. This record-transfer requirement involves records that are similar to the records specified in the record-transfer requirement in § 1910.440(b)(5), which OSHA removed from the standard under SIP III. Therefore, for the sake of consistency and accuracy, OSHA is revising § 1910.440(b)(4) by removing the record-transfer requirement in § 1910.440(b)(4).[1] The rationale for removing this record-transfer requirement is the same as the rationale expressed earlier by OSHA when it removed § 1910.440(b)(5) from the standard (see 76 FR 33590, 33598).

K. 13 Carcinogens (4-Nitrobiphenyl, etc.) (§ 1910.1003)

In the 13 Carcinogens standard (29 CFR 1910.1003), OSHA is deleting two cross references to a section of the standard that it removed in the second Standards Improvement Project rulemaking (70 FR 1116). In that rulemaking, OSHA deleted paragraph (f) of the standard, which required that employers submit to OSHA reports of operations involving any of the 13 carcinogens and incidents resulting in the release of any of them. However, during the rulemaking OSHA did not delete two cross references to paragraph (f) contained in paragraph (d)(2) of the standard (see paragraphs (d)(2)(v) and (d)(2)(iii)). OSHA is correcting this oversight.

L. Lead (§ 1910.1025 and § 1926.62)

The SIP III final rule also made revisions regarding medical surveillance in the Lead standards at § 1910.1025 (General Industry) and § 1926.62 (Construction). The purpose of these revisions was to achieve consistency among the action levels for employee notification across all OSHA Lead standards (see 76 FR 33590, 33598). Accordingly, the SIP III final rule revised the language in §§ 1910.1025(j) and 1926.62(j) regarding actionable

[1] OSHA received no comments on the proposal to remove § 1910.440(b)(5) from the standard. Accordingly, OSHA considers the action to remove the record-transfer requirement from § 1910.440(b)(4) described in this notice to be non-controversial, and unlikely to elicit an objection from any stakeholder.

blood-lead levels for employee notification from ''exceeds'' 40 μg/dl to ''is at or above'' 40 μg/dl.[2] Subsequent review of the regulatory text in §§ 1910.1025 (j)(2)(iv)(B) and 1926.62(j)(2)(iv)(B) found that these paragraphs used the term ''exceeds'' to describe the actionable blood-lead level for notifying employees of requirements for temporary medical removal and employee medical-removal protection benefits. For the sake of consistency and accuracy among action levels across all OSHA Lead standards, and in keeping with the original purpose specified in the SIP III rulemaking, OSHA is replacing the term ''exceeds'' in §§ 1910.1025 (j)(2)(iv)(B) and 1926.62(j)(2)(iv)(B) with the phrase ''is at or above'' to designate the actionable blood-lead levels (*i.e.,* 40 μg/dl) at which employers must notify their employees that the standard requires temporary medical removal with medical-removal protection benefits when an employee's blood-lead level is at or above a specified level.

M. Bloodborne Pathogens (§ 1910.1030)

OSHA is updating a cross reference to 29 CFR 1904.6 in the Bloodborne pathogens standard (29 CFR 1910.1030). On January 18, 2001, in conformance with the Needlestick Safety and Prevention Act (P.L. 106–430), OSHA revised the Bloodborne pathogens standard to require that employers maintain logs of percutaneous injuries from contaminated sharps (see § 1910.1030(i)(5)). The revised standard at § 1910.1030(i)(5)(iii) required that employers maintain the sharps injury log for the period required by 29 CFR 1904.6. OSHA subsequently revised the Recordkeeping rule (29 CFR 1904; 66 FR 6122). As part of that rulemaking, OSHA reordered many sections of the Recordkeeping rule, including § 1904.6, which became § 1904.33. Therefore, OSHA now is updating the cross reference in paragraph (i)(5)(iii) of the Bloodborne pathogens rule from 29 CFR 1904.6 to 29 CFR 1904.33.

N. Air Contaminants (§ 1915.1000)

OSHA is correcting a typographical error in the Air contaminants standard for shipyard employment (29 CFR 1915.1000). The standard contains requirements for limiting employee exposure to the hazardous substances listed in Table Z of the rule. Paragraph (d) of the standard contains a computation formula for determining exposure levels for employees exposed to more than one substance for which subpart Z of part 1915 lists an 8-hour time weighted average. Paragraph (d)(1)(ii) of the standard contains an example to illustrate the computation formula. In four places in this paragraph, the example incorrectly refers to the abbreviation for ''parts per million'' as ''p/m.'' In this notice, OSHA is correcting the abbreviation to read ''ppm.''

II. Exemption From Notice-and-Comment Procedures

OSHA determined that this rulemaking is not subject to the procedures for public notice and comment specified in Section 4 of the Administrative Procedures Act (5 U.S.C. 553), Section 6(b) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 655(b)), and 29 CFR 1911.5. This rulemaking does not affect or change any existing rights or obligations, and no stakeholder is likely to object to them. Therefore, the Agency finds good cause that public notice and comment are unnecessary within the meaning of 5 U.S.C. 553(b)(3)(B), 29 U.S.C. 655(b), and 29 CFR 1911.5.

List of Subjects

29 CFR Part 1910

Hazardous substances, Occupational safety and health, Reporting and recordkeeping requirements.

29 CFR Part 1915

Hazardous substances, Occupational safety and health, Reporting and recordkeeping requirements, Vessels.

29 CFR Part 1926

Construction industry, Hazardous substances, Occupational safety and health, Reporting and recordkeeping requirements.

III. Authority and Signature

David Michaels, MPH, Ph.D., Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210, authorized the preparation of this document. Accordingly, pursuant to Section 6 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 655), Section 107 of the Contract Work Hours and Safety Standards Act (Construction Safety Act) (40 U.S.C. 3704), Section 4 of the Administrative Procedures Act (5 U.S.C. 553), Secretary of Labor's Order No. 4–2010 (75 FR 55355), and 29 CFR 1911.5, 29 CFR parts 1910, 1915 and 1926 are amended as set forth below.

Signed at Washington, DC on December 19, 2011.

David Michaels,

Assistant Secretary of Labor for Occupational Safety and Health.

PART 1910—OCCUPATIONAL SAFETY AND HEALTH STANDARDS

Subpart H—Hazardous Materials [Amended]

■ 1. The authority citation for subpart H of part 1910 continues to read as follows:

Authority: 29 U.S.C. 653, 655, 657; Secretary of Labor's Order No. 12–71 (36 FR 8754), 8–76 (41 FR 25059), 9–83 (48 FR 35736), 1–90 (55 FR 9033), 6–96 (62 FR 111), 3–2000 (65 FR 50017), 5–2002 (67 FR 65008), 5–2007 (72 FR 31159), or 4–2010 (75 FR 55355), as applicable; and 29 CFR part 1911.

Sections 1910.103, 1910.106 through 1910.111, and 1910.119, 1910.120, and 1910.122 through 1910.126 also issued under 29 CFR part 1911.

Section 1910.119 also issued under Pub. L. 101–549, reprinted at 29 U.S.C. 655 Note.

Section 1910.120 also issued under 29 U.S.C. 655 Note, and 5 U.S.C. 553.

■ 2. In Appendix A to § 1910.119, revise the entry entitled ''Oleum'' to read as follows:

§ 1910.119 Process safety management of highly hazardous chemicals.

* * * * *

Appendix A to § 1910.119—List of Highly Hazardous Chemicals, Toxics and Reactives (Mandatory)

* * * * *

Chemical name	CAS *	TQ **
* * * * *		
Oleum (65% to 80% by weight; also called Fuming Sulfuric Acid)	8014–95–7	1,000
* * * * *		

■ 3. In paragraph (a)(3) of § 1910.120, revise paragraph (A) of the definition of ''Hazardous substance'' to read as follows:

§ 1910.120 Hazardous waste operations and emergency response.

* * * * *

(a) * * *

(3) * * *

Hazardous substance * * *

(A) Any substance defined under section 103(14) of the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) (42 U.S.C. 9601).

* * * * *

[2] OSHA received several comments in support of the proposal to revise this language, and no comments against it. Therefore, OSHA considers the revisions to §§ 1910.1025 (j)(2)(iv)(B) and 1926.62(j)(2)(iv)(B) described in this notice to be non-controversial, and unlikely to elicit an objection from any stakeholder.

Subpart J—General Environmental Controls

■ 4. Revise the authority citation for subpart J to read as follows:

Authority: 29 U.S.C. 653, 655, 657; Secretary of Labor's Order No. 12–71 (36 FR 8754), 8–76 (41 FR 25059), 9–83 (48 FR 35736), 1–90 (55–FR 9033), 6–96 (62 FR 111), 3–2000 (65 FR 50017), 5–2007 (72 FR 31159), or 4–2010 (75 FR 55355), as applicable.

Sections 1910.141, 1910.142, 1910.145, 1910.146, and 1910.147 also issued under 29 CFR part 1911.

■ 5. In of § 1910.146, revise paragraph (d)(4)(vi) to read as follows:

§ 1910.146 Permit-required confined spaces.

* * * * *

(d) * * *

(4) * * *

(vi) Barriers and shields as required by paragraph (d)(3)(v) of this section.

* * * * *

Subpart K—Medical and First Aid

■ 6. The authority citation for subpart K continues to read as follows:

Authority: 29 U.S.C. 653, 655, 657; Secretary of Labor's Order No. 12–71 (36 FR 8754), 8–76 (41 FR 25059), 9–83 (48 FR 35736), 1–90 (55 FR 9033), 6–96 (62 FR 111), 3–2000 (65 FR 50017), or 4–2010 (75 FR 55355), as applicable, and 29 CFR part 1911.

■ 7. In Appendix A to § 1910.151, revise the second paragraph to read as follows:

§ 1910. 151 Medical services and first aid.

* * * * *

Appendix A to § 1910.151—First Aid Kits (Non-Mandatory)

* * * * *

In a similar fashion, employers who have unique or changing first-aid needs in their workplace may need to enhance their first-aid kits. The employer can use the OSHA 300 log, OSHA 301 log, or other reports to identify these unique problems. Consultation from the local fire/rescue department, appropriate medical professional, or local emergency room may be helpful to employers in these circumstances. By assessing the specific needs of their workplace, employers can ensure that reasonably anticipated supplies are available. Employers should assess the specific needs of their worksite periodically and augment the first aid kit appropriately.

* * * * *

Subpart N—Materials Handling and Storage

■ 8. The authority citation for subpart N of part 1910 continues to read as follows:

Authority: 29 U.S.C. 653, 655, 657; Secretary of Labor's Order No. 12–71 (36 FR 8754), 8–76 (41 FR 25059), 9–83 (48 FR 35736), 1–90 (55 FR 9033), 6–96 (62 FR 111), 3–2000 (65 FR 50017), 5–2002 (67 FR 65008), 5–2007 (72 FR 31160), or 4–2010 (75 FR 55355), as applicable; and 29 CFR 1911.

Sections 1910.176, 1910.177, 1910.178, 1910.179, 1910.180, 1910.181, and 1910.184 also issued under 29 CFR part 1911.

■ 9–10. In § 1910.177:

■ a. In paragraph (b), revise the definition of ''charts''; and

■ b. Revise Appendix B.

The revisions read as follows:

§ 1910.177 Servicing of multi-piece and single-piece rim wheels.

* * * * *

(b) * * *

Charts means the U.S. Department of Labor, Occupational Safety and Health Administration publications entitled ''Demounting and Mounting Procedures for Tube-Type Truck and Bus Tires,'' ''Demounting and Mounting Procedures for Tubeless Truck and Bus Tires,'' and ''Multi-Piece Rim Matching Chart.'' These charts may be in manual or poster form. OSHA also will accept any other manual or poster that provides at least the same instructions, safety precautions, and other information contained in these publications, which is applicable to the types of wheels the employer is servicing.

* * * * *

Appendix B—Ordering Information for the OSHA Charts

The information on the OSHA charts is available on three posters, or in a manual containing the three charts, entitled ''Demounting and Mounting Procedures for Tubeless Truck and Bus Tires,'' ''Demounting and Mounting Procedures for Tube-Type Truck and Bus Tires,'' and ''Multi-piece Rim Matching Chart.'' Interested parties can download and print both the manuals and posters from OSHA's Web site at *http://www.osha.gov/publications* (and type ''tire chart'' in the search field). However, when used by the employer at a worksite to provide information to employees, the printed posters must be, at a minimum, 2 feet wide and 3 feet long. Copies of the manual also are available from the Occupational Safety and Health Administration (OSHA Office of Publications, Room N–3101, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210; telephone: (202) 693–1888; or fax: (202) 693–2498).

Subpart O—Machinery and Machine Guarding

■ 11. The authority section citation for subpart O of part 1910 continues to read as follows:

Authority: 29 U.S.C. 653, 655, 657; Secretary of Labor's Order No. 12–71 (36 FR 8754), 8–76 (41 FR 25059), 9–83 (48 FR 35736), 1–90 (55 FR 9033), 5–2002 (67 FR 65008), or 4–2010 (75 FR 55355), as applicable; 29 CFR part 1911. Sections 1910.217 and 1910.219 also issued under 5 U.S.C. 553.

■ 12. In § 1910.217, revise paragraph (g)(1) and add paragraph (g)(2) to read as follows:

§ 1910.217 Mechanical power presses.

* * * * *

(g) * * *

(1) The employer shall report, within 30 days of the occurrence, all point-of-operation injuries to operators or other employees to either (1) the Director of the Directorate of Standards and Guidance at OSHA, U.S. Department of Labor, Washington, DC 20210 (*http://www.osha.gov/pls/oshaweb/mechanical.html*), or

(2) The State agency administering a plan approved by the Assistant Secretary of Labor for Occupational Safety and Health.

* * * * *

Subpart R—Special Industries

■ 13. The authority citation for subpart R of part 1910 continues to read as follows:

Authority: 29 U.S.C. 653, 655, 657; Secretary of Labor's Order No. 12–71 (36 FR 8754), 8–76 (41 FR 25059), 9–83 (48 FR 35736), 6–96 (62 FR 111), 5–2007 (72 FR 31159), or 4–2010 (75 FR 55355), as applicable; and 29 CFR part 1911.

■ 14. In 1910.261, revise paragraphs (e)(12)(i), (ii), and (iii) to read as follows:

§ 1910.261 Pulp, paper, and paperboard mills.

* * * * *

(e) * * *

(12) * * *

(i) When platforms or floors allow access to the sides of the drums, a standard railing shall be constructed around the drums. When two or more drums are arranged side by side, proper walkways with standard handrails shall be provided between each set, in accordance with the requirements of 29 CFR 1910.23, Guarding floor and wall openings and holes.

(ii) Sprockets and chains, gears, and trunnions shall have standard guards, in accordance with the requirements of 29 CFR 1910.219, Mechanical power-transmission apparatus.

(iii) Whenever it becomes necessary for a workman to go within a drum, the driving mechanism shall be locked and tagged, at the main disconnect switch, in accordance with paragraph (b)(1) of this section.

* * * * *

■ 15. In § 1910.265 revise paragraph (e)(2)(iv) to read as follows:

§ 1910.265 Sawmills.

* * * * *

(e) * * *

(2) * * *

(iv) *Twin circular head saws.* Twin circular head saws rigs such as scrag saws shall meet the specifications for single circular head saws in paragraph (e)(2)(iii) of this section where applicable.

* * * * *

■ 16. In 1910.272, amend paragraph (a) by adding a note at the end of the paragraph to read as follows:

§ 1910.272 Grain handling facilities.

(a) * * *

Note to paragraph (a): For grain-handling facilities in the marine-terminal industry only, 29 CFR 1910.272 is to be enforced consistent with the interpretations in OSHA Compliance Directive 02–00–066, which is available on OSHA's Web page at *www.osha.gov.*

* * * * *

Subpart T—Commercial Diving Operations

■ 17. The authority citation for subpart T continues to read as follows:

Authority: 29 U.S.C. 653, 655, 657; 40 U.S.C. 333; 33 U.S.C. 941; Secretary of Labor's Order No. 8–76 (41 FR 25059), 9–83 (48 FR 35736), 1–90 (55 FR 9033), 6–96 (62 FR 111), 3–2000 (65 FR 50017), 5–2002 (67 FR 65008), 5–2007 (72 FR 31160), or 4–2010 (75 FR 55355) as applicable, and 29 CFR 1911.

■ 18. In § 1910.440, revise paragraph (b)(4) to read as follows:

§ 1910.440 Recordkeeping requirements.

* * * * *

(b) * * *

(4) The employer shall comply with any additional requirements set forth at 29 CFR 1910.1020,

* * * * *

Subpart Z—[Amended]

■ 19. The authority citation for subpart Z continues to read as follows:

Authority: 29 U.S.C. 653, 655, and 657; Secretary of Labor's Order No. 12–71 (36 FR 8754), 8–76 (41 FR 25059), 9–83 (48 FR 35736), 1–90 (55 FR 9033), 6–96 (62 FR 111), 3–2000 (65 FR 50017), 5–2002 (67 FR 65008), 5–2007 (72 FR 31160), or 4–2010 (75 FR 55355), as applicable, and 29 CFR 1911.

All of subpart Z issued under section 6(b) of the Occupational Safety and Health Act, except those substances that have exposure limits listed in Tables Z–1, Z–2, and Z–3 of 29 CFR 1910.1000. The latter were issued under section 6(a) (29 U.S.C. 655(a)).

Section 1910.1000, Tables Z–1, Z–2, and Z–3 also issued under 5 U.S.C. 553, Section 1910.1000 Tables Z–1, Z–2, and Z–3, but not under 29 CFR 1911, except for the arsenic (organic compounds), benzene, cotton dust, and chromium (VI) listings.

Section 1910.1001 also issued under 40 U.S.C. 3704 and 5 U.S.C. 553.

Section 1910.1002 also issued under 5 U.S.C. 553, but not under 29 U.S.C. 655 or 29 CFR 1911.

Sections 1910.1018, 1910.1029, and 1910.1200 also issued under 29 U.S.C. 653.

Section 1910.1030 also issued under Pub. L. 106–430, 114 Stat. 1901.

Section 1910.1201 also issued under 49 U.S.C. 1801–1819 and 5 U.S.C. 533.

■ 20. Amend § 1910.1003 by:

■ a. Revising paragraph (d)(2)(iii); and

■ b. Removing paragraph (d)(2)(v) and redesignating paragraphs (d)(2)(vi) as paragraph (d)(2)(v).

The revision reads as follows:

§ 1910.1003 13 Carcinogens (4-Nitrobiphenyl, etc.).

* * * * *

(d) * * *

(2) * * *

(iii) Special medical surveillance by a physician shall be instituted within 24 hours for employees present in the potentially affected area at the time of the emergency.

* * * * *

■ 21. In § 1910.1025, revise paragraph (j)(2)(iv)(B) to read as follows:

§ 1910.1025 Lead.

* * * * *

(j) * * *

(2) * * *

(iv) * * *

(B) That the standard requires temporary medical removal with Medical Removal Protection benefits when an employee's blood lead level is at or above the numerical criterion for medical removal under paragraph (k)(1)(i) of this section.

* * * * *

■ 22. In § 1910.1030, revise paragraph (i)(5)(iii) to read as follows:

§ 1910.1030 Bloodborne pathogens.

* * * * *

(i) * * *

(5) * * *

(iii) The sharps injury log shall be maintained for the period required by 29 CFR 1904.33.

* * * * *

PART 1915—OCCUPATIONAL SAFETY AND HEALTH STANDARDS FOR SHIPYARD EMPLOYMENT

■ 23. The authority citation for part 1915 continues to read as follows:

Authority: 33 U.S.C. 941; 29 U.S.C. 653, 655, 657; Secretary of Labor's Order No. 12–71 (36 FR 8754), 8–76 (41 FR 25059), 9–83 (48 FR 35736), 1–90 (55 FR 9033), 6–96 (62 FR 111), 3–2000 (65 FR 50017), 5–2002 (67 FR 65008), 5–2007 (72 FR 31160), or 4–2010 (75 FR 55355), as applicable.

Section 1915.100 also issued under 49 U.S.C. 1801–1819 and 5 U.S.C. 553.

Sections 1915.120 and 1915.152 of 29 CFR also issued under 29 CFR 1911.

Subpart Z—Toxic and Hazardous Substances

■ 24. In § 1915.1000, revise paragraph (d)(1)(ii) to read as follows:

§ 1915.1000 Air contaminants.

* * * * *

(d) * * *

(1)(i) * * *

(ii) To illustrate the formula prescribed in paragraph (d)(1)(i) of this section, assume that Substance A has an 8-hour time weighted average limit of 100 ppm noted in Table Z—Shipyards. Assume that an employee is subject to the following exposure:

Two hours exposure at 150 ppm
Two hours exposure at 75 ppm
Four hours exposure at 50 ppm

Substituting this information in the formula, we have

$(2 \times 150 + 2 \times 75 + 4 \times 50) \div 8 = 81.25$ ppm

Since 81.25 ppm is less than 100 ppm, the 8-hour time weighted average limit, the exposure is acceptable.

* * * * *

PART 1926—SAFETY AND HEALTH REGULATIONS FOR CONSTRUCTION

Subpart D—Occupational Health and Environmental Controls

■ 25. The authority citation for subpart D continues to read as follows:

Authority: 40 U.S.C. 3701 *et seq.;* 29 U.S.C. 653, 655, 657; and Secretary of Labor's Order No. 12–71 (36 FR 8754), 8–76 (41 FR 25059), 9–83 (48 FR 35736), 1–90 (55 FR 9033), 6–96 (62 FR 111), 3–2000 (65 FR 50017), 5–2002 (67 FR 65008), 5–2007 (72 FR 31160), or 4–2010 (75 FR 55355), as applicable; and 29 CFR 1911.

Sections 1926.58, 1926.59, 1926.60, and 1926.65 also issued under 5 U.S.C. 553 and 29 CFR 1911.

Section 1926.61 also issued under 49 U.S.C. 1801–1819 and 5 U.S.C. 553.

Section 1926.62 of 29 CFR also issued under 42 U.S.C. 4853.

Section 1926.65 of 29 CFR also issued under 29 U.S.C. 655 note, and 5 U.S.C.

■ 26. In Appendix A to § 1926.50, revise the second paragraph to read as follows:

§ 1926.50 Medical services and first aid.

* * * * *

Appendix A to § 1926.50—First Aid Kits (Non-Mandatory)

* * * * *

In a similar fashion, employers who have unique or changing first-aid needs in their workplace may need to enhance their first-aid kits. The employer can use the OSHA 300 log, OSHA 301 log, or other reports to identify these unique problems. Consultation from the local fire/rescue department, appropriate medical professional, or local emergency room may be helpful to employers in these circumstances. By assessing the specific needs of their workplace, employers can ensure that reasonably anticipated supplies are available. Employers should assess the specific needs of their worksite periodically and augment the first aid kit appropriately.

* * * * *

■ 27. In § 1926.62, revise paragraph (j)(2)(iv)(B) to read as follows:

§ 1926.62 Lead.

* * * * *

(j) * * *

(2) * * *

(B) The employer shall notify each employee whose blood lead level is at or above 40 μg/dl that the standard requires temporary medical removal with Medical Removal Protection benefits when an employee's blood lead level is at or above the numerical criterion for medical removal under paragraph (k)(1)(i) of this section.

* * * * *

[FR Doc. 2011–32853 Filed 12–23–11; 8:45 am]

BILLING CODE 4510–26–P

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 199

[DOD–2011–HA–0134; RIN 0720–AB55]

TRICARE: Certified Mental Health Counselors

AGENCY: Office of the Secretary, Department of Defense.

ACTION: Interim final rule.

SUMMARY: This rule is submitted as an interim final rule (IFR) in order to meet the Congressional requirement set forth in the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2011, Section 724, which required the Department of Defense to prescribe regulations by June 20, 2011, to establish the criteria, as had previously been studied in accordance with Section 717 of the NDAA 2008, that would allow licensed or certified mental health counselors to be able to independently provide care to TRICARE beneficiaries and receive payment for those services. Under current TRICARE requirements, mental health counselors (MHCs) are authorized to practice only with physician referral and supervision. This interim final rule establishes a transition period to phase out the requirement for physician referral and supervision for MHCs and to create a new category of allied health professionals, to be known as certified mental health counselors (CMHCs), who will be authorized to practice independently under TRICARE.

During this transition period the MHCs who do not meet the requirements for independent practice as established in this rule, may continue to provide services to TRICARE beneficiaries under the requirements of physician referral and ongoing supervision. This transition period, ending December 31, 2014, will allow time for those MHCs who seek to continue providing services under the TRICARE program to meet the independent practice requirements as outlined in this notice. After December 31, 2014, the Department of Defense will no longer recognize those mental health counselors who do not meet the criteria for a CMHC and will no longer allow them to provide services even upon the referral and supervision of a physician.

DATES: This rule is effective on December 27, 2011. Written comments received at the address indicated below by February 27, 2012 will be accepted.

ADDRESSES: You may submit comments, identified by docket number and or Regulatory Information Number (RIN) number and title, by either of the following methods:

- *Federal eRulemaking Portal: www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Federal Docket Management System Office, 4800 Mark Center Drive, 2nd Floor, East Tower, Suite 02G09, Alexandria, VA 22350–3100.

Instructions: All submissions received must include the agency name and docket number or RIN for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Dr. Patricia Moseley, TRICARE Management Activity, Office of the Chief Medical Officer, telephone (703) 681–0064.

SUPPLEMENTARY INFORMATION: TRICARE serves over 9.6 million beneficiaries comprised of active duty service members, retirees, and their families, among others. The nature of the conflicts in Iraq and Afghanistan, their duration, and the Department of Defense's appreciation and sensitivity to the impact of combat on a service member's mental health have driven strong efforts to ensure that quality mental health care is available and accessible to TRICARE beneficiaries. One element of these efforts is ongoing attention to increasing the number of quality providers that can assess and treat TRICARE beneficiaries.

The National Defense Authorization Act for Fiscal Year 2006 Conference Report, No. 109–360, p. 753–4, requested from DoD a report to Congress on actions taken to improve the efficiency and effectiveness of procedures to facilitate physician referral and supervision of licensed professional counselors (LPCs), including a description of ''best practices'' employed throughout the military health system to ensure access to services provided by mental health counselors under the TRICARE Program. That report concluded that there remained significant variability among the States in training programs and requirements for licensure as a mental health counselor and that while there was evidence that the extent of training variability had decreased over time, it continued to be evident that professional counselors licensed to practice had quite varying exposure to classroom education and supervised clinical experiences in the assessment and treatment of persons with mental disorders. In conclusion the report noted: ''Given the practical obstacles to physician supervision of LPCs and the perceived impediment to accessing services caused by the physician referral requirement, it would be prudent to explore issues of supervision, referral, provider credentialing, and scope of practice to develop options that would preserve quality of care, safeguard the health and well-being of Service members and maximize access to mental health care for all beneficiaries. An examination of these issues would certainly support other activities having the goal of improving mental health care to veterans, active duty service members and their families, including the recent creation of the DoD Task Force on Mental Health.''

Section 717 of the National Defense Authorization Act of Fiscal Year 2008 directed the Secretary of Defense to study the credentials, preparation, and training of individuals practicing as licensed mental health counselors and to make recommendations for permitting licensed mental health counselors to practice independently

under the TRICARE program. The study, completed by the Institute of Medicine of the National Academies of Science, recommended allowing LMHCs who meet certain training, education, experience, certification, and licensure requirements to practice independently under the TRICARE program. This interim final rule implements changes to 32 CFR part 199 based on those recommendations.

The certification criteria established in this IFR are largely consistent with the recommendations found in ''Provision of Mental Health Counseling Services under TRICARE,'' a study funded by DoD and completed in 2010 by the Institute of Medicine (IOM) of the National Academies of Science *http://www.iom.edu/Reports/2010/Provision-of-Mental-Health-Counseling-Services-Under-TRICARE.aspx.*

The IOM recommendations specify that independent practice of mental health counselors (MHCs) in TRICARE should occur under certain circumstances: ''A master's or higher-level degree in counseling from a program in mental health counseling or clinical mental health counseling that is accredited by Council for Accreditation of Counseling and Related Educational Programs (CACREP); a state license in mental health counseling at the ''clinical'' or the higher or highest level available in states that have tiered licensing schemes; the passage of the National Clinical Mental Health Counseling examination (NCMHCE); and a well-defined scope of practice for practitioners.'' The new rule will implement these standards over time while preserving the requirement for 3,000 hours of supervised clinical practice and 100 hours of face-to-face supervision. TRICARE is committed to ensuring that the quality standards recommended by the IOM are adopted by TRICARE, but understands that the availability of CACREP accredited mental health counseling training programs and the use of the NCMHCE as a quality standard are not yet widespread in the field. Therefore, with this rule, TRICARE will adopt new quality standards for the independent practices of mental health counselors as of January 1, 2015, and in addition will recognize mental health counselors as independent providers who have met certain currently recognized quality standards on or before December 31, 2014. Specifically, in order to practice independently, those mental health counselors must have met, in part, one of the following two quality standards on or before December 31, 2014: (1) Possess a master's or higher-level degree from a mental health counseling program of education and training accredited by CACREP and must have passed the National Counselor Examination (NCE); or (2) possess a master's or higher-level degree from a mental health counseling program of education and training from either a CACREP or regionally accredited institution and have passed the NCMHCE. The many professional mental health counselors who meet these quality standards are a resource that TRICARE is anxious to make available to Service members, retirees and their families and their inclusion as independent practitioners under the TRICARE program will ensure that ready access to quality providers is preserved for TRICARE beneficiaries.

Independent practice by mental health counselors would mean a change from working under the supervision and referral of a physician to autonomous practice and third party reimbursement. While access to care was not a direct focus of the IOM study, increasing the availability of fully qualified providers would benefit TRICARE beneficiaries.

This interim final rule establishes a transition period to phase out the requirement for physician referral and supervision for mental health counselors and to create a new category of allied health professionals, to be known as certified mental health counselors (CMHCs), who will be authorized to practice independently under TRICARE.

During this transition period the MHCs who do not meet the requirements for independent practice as established in this rule, may continue to provide services to TRICARE beneficiaries under the requirements of physician referral and ongoing supervision. This transition period, ending December 31, 2014, will allow time for those MHCs who seek to continue providing services under the TRICARE program to meet the independent practice requirements as outlined in this notice. After that date persons who do not meet the requirements for being a CMHC will no longer be recognized by TRICARE and payment for their services will no longer be allowed even if they work under the supervision of a physician.

Lastly, although this rule sets forth the currently accepted and recommended criteria for an individual to be recognized as a CMHC, Section 199.6(c)(3)(iii)(N)*(3)* has been added to allow the Director, TRICARE Management Activity to amend or modify existing requirements or add other qualifications or criteria in the future to accommodate professional quality and licensing standards as they may change over time.

The rule meets DoD's goal to balance the implementation of quality standards for mental health counselors with beneficiary access to their services. The implementation period of the provider requirements elaborated in this rule permits DoD to preserve patient access to experienced and well-trained mental health professionals while permitting other providers to meet those standards by January 1, 2015. This rule is expected to encourage greater participation of MHCs in the TRICARE network, result in improved access to quality mental health treatment for TRICARE beneficiaries, and sets provider quality standards typical of other mental health providers authorized under TRICARE.

Regulatory Procedures

Executive Order 12866, ''Regulatory Planning and Review'' and Executive Order 13563, ''Improving Regulation and Regulatory Review''

Section 801 of Title 5, United States Code, Executive Order (E.O.) 12866, and E.O. 13563 require certain regulatory assessments and procedures for any major rule or significant regulatory action, defined as one that would result in an annual effect of $100 million or more on the national economy or which would have other substantial impacts. It has been certified that this rule is not economically significant, and has been reviewed by the Office of Management and Budget as required under the provisions of E.O. 12866 and E.O. 13563.

Public Law 104–4, Section 202, ''Unfunded Mandates Reform Act''

Section 202 of Public Law 104–4, ''Unfunded Mandates Reform Act,'' requires that an analysis be performed to determine whether any federal mandate may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector of $100 million in any one year. It has been certified that this rule does not contain a Federal mandate that may result in the expenditure by State, local and tribal governments, in aggregate, or by the private sector, of $100 million or more in any one year, and thus this rule is not subject to this requirement.

Public Law 96–354, ''Regulatory Flexibility Act'' (RFA) (5 U.S.C. 601)

Public Law 96–354, ''Regulatory Flexibility Act'' (RFA) (5 U.S.C. 601), requires that each Federal agency prepare a regulatory flexibility analysis when the agency issues a regulation which would have a significant impact

on a substantial number of small entities. This rule is not an economically significant regulatory action, and it has been certified that it will not have a significant impact on a substantial number of small entities. Therefore, this rule is not subject to the requirements of the RFA.

Public Law 96–511, ''Paperwork Reduction Act'' (44 U.S.C. Chapter 35)

This rule does not contain a ''collection of information'' requirement, and will not impose additional information collection requirements on the public under Public Law 96–511, ''Paperwork Reduction Act'' (44 U.S.C. chapter 35).

Executive Order 13132, ''Federalism''

E.O. 13132, ''Federalism,'' requires that an impact analysis be performed to determine whether the rule has federalism implications that would have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. It has been certified that this rule does not have federalism implications, as set forth in E.O. 13132.

List of Subjects in 32 CFR Part 199

Claims, Dental health, Health care, Health insurance, Individuals with disabilities, Military personnel.

Accordingly, 32 CFR Part 199 is amended as follows:

PART 199—[AMENDED]

■ 1. The authority citation for Part 199 continues to read as follows:

Authority: 5 U.S.C. 301; 10 U.S.C. chapter 55.

■ 2. Section 199.4 is amended by revising paragraph (c)(3)(ix)(A) introductory text to read as follows:

§ 199.4 Basic program benefits.

* * * * *

(c) * * *

(3) * * *

(ix) * * *

(A) *Covered diagnostic and therapeutic services.* Subject to the requirements and limitations stated, CHAMPUS benefits are payable for the following services when rendered in the diagnosis or treatment of a covered mental disorder by a CHAMPUS-authorized, qualified mental health provider practicing within the scope of his or her license. Qualified mental health providers are: psychiatrists or other physicians; clinical psychologists, certified psychiatric nurse specialists, certified clinical social workers, certified marriage and family therapists, certified mental health counselors, pastoral counselors under a physician's supervision, and until December 31, 2014, mental health counselors under a physician's supervision. No payment will be made for any service listed in paragraph (c)(3)(ix)(A) of this section rendered by an individual who does not meet the criteria of § 199.6 of this part for his or her respective profession, regardless of whether the provider is an independent professional provider or an employee of an authorized professional or institutional provider.

* * * * *

■ 3. Section 199.6 is amended by adding paragraph (c)(3)(iii)(N) and revising (c)(3)(iv)(C) to read as follows:

§ 199.6 TRICARE—authorized providers.

* * * * *

(c) * * *

(3) * * *

(iii) * * *

(N) *Certified mental health counselor.* For the purposes of CHAMPUS, a certified mental health counselor (CMHC) must be licensed for independent practice in mental health counseling by the jurisdiction where practicing. In jurisdictions with two or more licenses allowing for differing scopes of independent practice, the licensed mental health counselor may only practice within the scope of the license he or she possesses. In addition, a CMHC must meet all of the requirements contained in this paragraph (c)(3)(iii)(N)(*1*) or the requirements of paragraph (c)(3)(iii)(N)(*2*) of this section.

(*1*) The requirements of this paragraph are that the CMHC:

(*i*) Must have passed the National Clinical Mental Health Counselor Examination (NCMHCE) or its successor as determined by the Director, TMA; and

(*ii*) Must possess a master's or higher-level degree from a mental health counseling program of education and training accredited by the Council for Accreditation of Counseling and Related Educational Programs (CACREP); and

(*iii*) Must have a minimum of two (2) years of post-master's degree supervised mental health counseling practice which includes a minimum of 3,000 hours of supervised clinical practice and 100 hours of face-to-face supervision. This supervision must be provided by a mental health counselor who is licensed for independent practice in mental health counseling in the jurisdiction where practicing and must be conducted in a manner that is consistent with the guidelines for supervision of the American Mental Health Counselors Association.

(*2*) The requirements of this paragraph are that the CMHC, prior to January 1, 2015:

(*i*) Possess a master's or higher-level degree from a mental health counseling program of education and training accredited by CACREP and must have passed the National Counselor Examination (NCE); or

(*ii*) Possess a master's or higher-level degree from a mental health counseling program of education and training from either a CACREP or regionally accredited institution and have passed the NCMHCE; and

(*iii*) Must have a minimum of two (2) years of post-master's degree supervised mental health counseling practice which includes a minimum of 3,000 hours of supervised clinical practice and 100 hours of face-to-face supervision. This supervision must be provided by a mental health counselor who is licensed for independent practice in mental health counseling in the jurisdiction where practicing and must be conducted in a manner that is consistent with the guidelines for supervision of the American Mental Health Counselors Association.

(*3*) The Director, TRICARE Management Activity may amend or modify existing or specify additional certification requirements as needed to accommodate future practice and licensing standards and to ensure that all CMHCs continue to meet educational, licensing and clinical training requirements considered appropriate.

(iv) * * *

(C) *Supervised mental health counselor.* For the purposes of TRICARE, a supervised mental health counselor is an individual who does not meet the requirements of a certified mental health counselor in paragraph (c)(3)(iii)(N) of this section, but meets the requirements of this paragraph (c)(3)(iv)(C). After December 31, 2014, this category of provider will no longer be recognized by TRICARE and no reimbursement may be made to any person for services provided by this category of provider. However, prior to January 1, 2015, a supervised mental health counselor is one who meets all of the following requirements and conditions of practice:

(*1*) Minimum of a master's degree in mental health counseling or allied mental health field from a regionally accredited institution; and

(*2*) Two years of post-masters experience which includes 3,000 hours

of clinical work and 100 hours of face-to-face supervision; and

(*3*) Is licensed or certified to practice as a mental health counselor by the jurisdiction where practicing (see paragraph (c)(3)(iv)(D) of this section for more specific information); and

(*4*) May only be reimbursed when:

(*i*) The TRICARE beneficiary is referred for therapy by a physician; and

(*ii*) A physician is providing ongoing oversight and supervision of the therapy being provided; and

(*iii*) The mental health counselor certifies on each claim for reimbursement that a written communication has been made or will be made to the referring physician of the results of the treatment. Such communication will be made at the end of the treatment, or more frequently, as required by the referring physician (refer to § 199.7 of this part); and

(*iv*) The date of services provided is on or before December 31, 2014.

* * * * *

Dated: December 21, 2011.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2011–33109 Filed 12–23–11; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[DOD–2010–OS–0043; RIN 0790–AI62]

32 CFR Part 222

DoD Mandatory Declassification Review (MDR) Program

AGENCY: Department of Defense.

ACTION: Final rule.

SUMMARY: This part implements policy established in DoD Instruction 5200.01. It assigns responsibilities and provides procedures for members of the public to request a declassification review of information classified under the provisions of Executive Order 13526, or predecessor orders.

DATES: *Effective Date:* This rule is effective January 26, 2012.

FOR FURTHER INFORMATION CONTACT: Robert Storer, (571) 372–0483.

SUPPLEMENTARY INFORMATION: The Department of Defense published a proposed rule on September 27, 2010 (75 FR 59176–59179). Three sets of comments were received and are addressed below.

Comment 1: As an initial matter, this proposed rule contains no paragraph (j), and there appears to be no current paragraph (j) to which this could be referring. While it is entirely reasonable for the DoD to amend this rule later to cover the issue of fees, it is improper for the DoD to include a reference *now* to a potential later amendment that will itself have to go through the notice and comment rulemaking procedure. It is far more reasonable to leave this subparagraph out of the current iteration and add it when the actual paragraph (j) is added to the rule.

Response 1: Paragraph revised to be consistent with section 2001.33(e) of 32 CFR (see section 222.10).

Comment 2: It is entirely proper that a requester shall not be given MDR appeal rights for records withheld pursuant to FOIA exemptions. However, it is not proper for records to be withheld pursuant to FOIA exemptions as part of the MDR process without providing the proper appeal rights that accompany all FOIA withholding decisions.

Response 2: The FOIA and MDR process are separate and distinct processes. A MDR is not a FOIA Request; a requester does not have the right to appeal MDR's denied under FOIA exemptions without having filed a FOIA Request. If a requester is denied under the rules of FOIA, the requester must submit a FOIA request for those records in order to have the exemptions examined. (See par 4 and par 5(c)3(d) of section 222.5.)

Comment 3: Proposed Section 222.5(a)(vii) reads as follows: ''This section shall not apply to any request for a review made to an element of the Intelligence Community that is made by a person other than an individual as that term is defined by 5 U.S.C. 552a(a)(2), or by a foreign government entity or any representative thereof.''

This language differs meaningfully from the interpretive guidance rules in Section 32 CFR 2001.33(i), which say, in part, ''requests for mandatory declassification review made to an element of the Intelligence Community by anyone other than a citizen of the United States or an alien lawfully admitted for permanent residence may be denied by the receiving Intelligence Community element.''

Response 3: Section removed from final rule.

4: Comments from DoD Internal review of proposed rule:

a. Change the Executive Order in the last line of Paragraph 1 from 12958 to 13526.

b. Appoint an appellate authority and process MDR appeals for information originating in the OSD, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, and DoD components not listed in the Appendix to Enclosure 2.

c. Insert reference to DoD 5200.1–R so the paragraph reads ''The DoD Components shall process MDR requests * * * in accordance with DoD 5200.1–R and Part 2001 of title 32 * * *''

d. Replace paragraph 7.b with the following (or similar) statement: ''The DoD Component shall consult with DOS as necessary to determine whether the information is subject to a treaty or international agreement that would prevent its declassification. The office to consult is * * *'' (U//FOUO) The purpose of the statement is to allow DoD intelligence organizations that have existing, authorized agreements for coordinating actions on FGI to continue to use those arrangements with counterpart organizations of foreign governments for the purposes of coordinating Mandatory Declassification actions.

e. Updated all DoD Component contact information.

Response to Internal Comments: Internal comments from staffing reviews were incorporated as appropriate. Changes were made in the following sections: references, paragraph (d), § 222.5 MDR processing procedures of the final in response to the comments received.

Executive Order 12866, ''Regulatory Planning and Review'' and Executive Order 13563, ''Improving Regulation and Regulatory Review''

It has been certified that 32 CFR part 222 does not:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy; a section of the economy; productivity; competition; jobs; the environment; public health or safety; or State, local, or tribunal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another Agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in these Executive Orders.

Sec. 202, Public Law 104–4, ''Unfunded Mandates Reform Act''

It has been certified that 32 CFR part 222 does not contain a Federal mandate that may result in the expenditure by State, local and tribunal governments, in aggregate, or by the private sector, of $100 million or more in any one year.

Public Law 96–354, ''Regulatory Flexibility Act'' (5 U.S.C. 601)

It has been certified that 32 CFR part 222 is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities. The rule implements the procedures for the effective administration of the DoD MDR Program.

Public Law 96–511, ''Paperwork Reduction Act'' (44 U.S.C. Chapter 35)

It has been certified that 32 CFR part 222 does not impose reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995.

Executive Order 13132, ''Federalism''

It has been certified that 32 CFR part 222 does not have federalism implications, as set forth in Executive Order 13132. This rule does not have substantial direct effects on:

(1) The States;

(2) The relationship between the National Government and the States; or

(3) The distribution of power and responsibilities among the various levels of Government.

List of Subjects in 32 CFR Part 222

Declassification, Security information.

■ Accordingly, 32 CFR part 222 is added to read as follows:

PART 222—DOD MANDATORY DECLASSIFICATION REVIEW (MDR) PROGRAM

Sec.
222.1 Purpose.
222.2 Applicability.
222.3 Definitions.
222.4 Responsibilities.
222.5 MDR processing procedures.

Appendix A to Part 222—Addressing MDR requests.

Authority: 5 U.S.C. 552.

§ 222.1 Purpose.

This part implements policy established in DoD Instruction 5200.01. It assigns responsibilities and provides procedures for members of the public to request a declassification review of information classified under the provisions of Executive Order 13526, or predecessor orders.

§ 222.2 Applicability.

This part applies to the Office of the Secretary of Defense, the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within DoD (hereafter referred to collectively as the ''DoD Components'').

§ 222.3 Definitions.

Unless otherwise noted, these terms and their definitions are for the purpose of this part.

Foreign Government Information (FGI). Defined in DoD 5200.1–R (available at *http://www.dtic.mil/whs/directives/corres/pdf/520001r.pdf*).

Formal Control System. A system designed to ensure DoD Component accountability and compliance. For each MDR request, the system shall contain, at a minimum, a unique tracking number, requester's name and organizational affiliation, information requested, date of receipt, and date of closure.

Formerly Restricted Data. Defined in DoD 5200.1–R.

MDR. The review of classified information for declassification in response to a declassification request that meets the requirements under section 3.5 of Executive Order 13526, ''Classified National Security Information,'' December 29, 2009.

Restricted Data. Defined in DoD 5200.1–R.

§ 222.4 Responsibilities.

(a) The Director, Washington Headquarters Services, shall process MDR requests for OSD, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, and DoD Components not listed in the Appendix A to this part.

(b) *Heads of the DoD Components.* The Heads of the DoD Components listed in the Appendix A to this part shall:

(1) Establish procedures for the processing of MDR requests and appeals for information originating within the Component.

(2) Appoint an appellate authority to adjudicate MDR appeals for the Component.

§ 222.5 MDR processing procedures.

(a) *General.* The DoD Components shall process MDR requests from the public for classified information originating within the DoD Component in accordance with DoD 5200.1–R and 32 CFR part 2001.

(b) Information not subject to review for public release under the MDR includes:

(1) Unclassified information (to include documents) or previously classified documents that are declassified prior to the receipt of the MDR request. These documents must be requested under the provisions of 5 U.S.C. 552(b) (also known and hereinafter referred to as the ''Freedom of Information Act'' (FOIA) and 32 CFR part 286.

(2) Information (to include documents) reviewed for declassification within 2 years preceding the date of receipt of the MDR request. If this is the case, the requester shall be provided the documents as previously released and advised of the right to appeal to the DoD Component within 60 days unless the documents are already under appeal to the Interagency Security Classification Appeals Panel (ISCAP).

(3) Information exempted from search and review by statute of 50 U.S.C. 431, 432, 432a, 432b, and 432d.

(4) Documents originated by the incumbent President; the incumbent President's White House Staff; committees, commissions, or boards appointed by the incumbent President; or other entities within the Executive Office of the President that solely advise and assist the incumbent President.

(5) Information marked as Restricted Data or Formerly Restricted Data.

(6) Information that is the subject of pending litigation.

(c) *MDR Requester Guidelines.* Members of the public seeking the declassification of DoD documents under the provisions of section 3.5 of Executive Order 13526, and 50 U.S.C. 431, 432, 432a, 432b, and 432d shall:

(1) Address the written request to the appropriate DoD Component listed in the appendix to this enclosure.

(2) Identify the requested document or information with sufficient specificity to enable the DoD Component to locate it with a reasonable amount of effort. Information that would provide the sufficient specificity would include a document identifier such as originator, date, title, subject, the National Archives and Records Administration accession number, or other applicable unique document identifying number. Broad or topical MDR requests for records on a particular subject, such as ''any and all documents concerning'' a subject do not meet this standard.

(3) Include a correct return mailing address with the request.

(4) Include a statement that the requester understands that the request may incur processing charges in accordance with paragraph (k) of this section.

(d) *Receipt and Control.* Upon receipt of an MDR request, the DoD Component shall send the requester an acknowledgement and open a file in a formal control system. The acknowledgement shall include the

tracking number and date of receipt of the request.

(e) *Simultaneous MDR and FOIA Requests.* DoD Components should be aware of possible requests under both the MDR and the FOIA. In accordance with 32 CFR part 286, if a requester asks for the same information under the FOIA and the MDR, the DoD Component shall ask the requester to select only one process. If the requester does not select a process, the DoD Component shall process the requested information under the FOIA.

(f) *MDR Document Review Process.* (1) Requests normally will be processed on a first in first out basis by date of receipt.

(2) Every effort shall be made to ensure that a response to an MDR request is provided to the requester within 1 year from the date of receipt.

(3) The DoD Components shall conduct line-by-line reviews of documents responsive to an MDR request to determine if the information contained within the documents continues to adhere to the standards for classification according to Executive Order 13526 Classified National Security Information. This line-by-line review must take into account the unique sensitivity of FGI as outlined in paragraph (h) of this section. In accordance with section 3.6(b) of Executive Order 13526 Classified National Security Information, classified information originating with another U.S. Government agency contained in records of the DoD Components will be referred to the originating agency for a declassification and release determination. Likewise, classified information in a DoD Component's records originating with another DoD Component will be referred to the originating Component. It is the responsibility of the DoD Component originally receiving the MDR request to manage these referrals and to incorporate the other agency's or DoD Component's determinations when preparing the final decision on the request. The review of each document will determine if the document:

(i) No longer meets the standards for classification as established by Executive Order 13526 ''Classified National Security Information'', and is therefore declassified in full.

(ii) Contains portions still meeting the standards for classification and is therefore declassified in part and denied in part.

(iii) Still meets the standards for classification in its entirety and is therefore denied in full.

(4) For documents meeting the criteria of paragraphs (f)(3)(i) and (f)(3)(ii) of this section, the DoD Components shall not release any unclassified information exempt from public release pursuant to Exemptions 2 through 9 of the FOIA. DoD 5400.7–R, ''DoD Freedom of Information Act Program'' provides a more detailed explanation of the FOIA exemptions.

(5) When this process is complete, the DoD Components shall redact all information, both classified and unclassified, determined to be exempt from release as warranted under applicable law and authority. All of the remaining information within the documents, which is determined to be publicly releasable information, shall be provided promptly to the requester.

(g) *Public Access.* In the interest of transparency, the DoD Components should make efforts to post documents released under the MDR program on DoD Component Web sites.

(h) *FGI.* Every effort must be made to ensure that FGI is not subject to declassification without the prior consent of the originating government. Therefore, if a requested document originated with a foreign government or organization and was classified by that government or organization, the DoD Component shall conduct MDR of the document in accordance with DoD 5200.1–R and 32 CFR part 2001.

(i) *Denial of Information.* (1) When classified information is denied, the DoD Component shall advise the requester, in writing:

(i) That information currently and properly classified has been denied (whether a document in its entirety or partially) in accordance with the appropriate sections of Executive Order 13526 Classified National Security Information.

(ii) Of the right to appeal the denial to the DoD Component within 60 days of receipt of the denial.

(iii) Of the mailing address for the appellate authority.

(2) When unclassified information is withheld because it is determined to be exempt from release pursuant to Exemptions 2 through 9 of the FOIA (whether or not classified information was also withheld within the same document), the DoD Component shall advise the requester that:

(i) Section 3.5(c) of Executive Order 13526 Classified National Security Information allows for the denial of information when withholding it is authorized and warranted under applicable law.

(ii) Unclassified information exempt from public release pursuant to one or more exemptions of the FOIA has been withheld.

(3) For the denial of unclassified information, the requester shall not be given MDR appeal rights because the MDR applies only to the denial of classified information and because the request was not processed under the FOIA.

(4) The DoD Component is not required to confirm or deny the existence or nonexistence of requested information whenever the fact of its existence or nonexistence is itself classified pursuant to Executive Order 13526 Classified National Security Information.

(f) *MDR Appeals.* MDR appeals are for the denial of classified information only. DoD Components shall make an appellate decision within 60 working days of receipt of an MDR appeal. If additional time is required to make a determination, the appellate authority shall notify the requester of the additional time needed and provide the requester with the reason for the extension. When the appellate review is complete, the appellate authority shall notify the requester in writing of the final determination and of the reasons for any denial. If the appellate authority determines that some information remains classified under the provisions of Executive Order 13526 Classified National Security Information, the requester will be advised of the right to appeal the final decision to the ISCAP within 60 days of the final Component decision, in accordance with section 5.3 of Executive Order 13526 Classified National Security Information.

(k) *FEES.* In responding to MDR requests, the DoD Components may charge fees as permitted by 32 CFR Part 2001. Fees for search, review, and reproduction shall be in accordance with the fee schedule in Appendix 2 of Chapter 4 of Volume 11A of DoD 7000.14–R (available at *http://comptroller.defense.gov/fmr/11a/11a_04.pdf*).

Appendix A to Part 222—Addressing MDR Requests

(a) *General.* The Department of Defense does not have a central repository for DoD records. MDR requests therefore should be addressed to the DoD Component that has custody of the requested record. If a requester is not sure which DoD Component has custody or if the DoD Component is not listed below, the MDR request should be directed to the Washington Headquarters Services in paragraph (b)(1) of this appendix.

(b) *DoD Component MDR Addresses:*

(1) *OSD and the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff.* Department of Defense, Washington Headquarters Services, Records and Declassification Division, Suite 02F09–02, 4800 Mark Center Drive, Alexandria, VA

22350–3100. EXCEPTION: DoD Inspector General. DoD Office of Inspector General, 400 Army Navy Drive, Arlington, VA 22202–4704.

(2) *Department of the Army.* U.S. Army Declassification Activity, Attention: AHRC–RDD, 8850 Richmond Highway, Suite 300, Alexandria, VA 22309.

(3) *Department of the Navy.*

(i) Department of the Navy, Chief of Naval Operations, CNO N09N2, 2000 Navy Pentagon, Washington, DC 20350–2000. (Collateral MDR).

(ii) Department of the Navy, Chief of Naval Operations, CNO N2/N6, 2000 Navy Pentagon, Washington, DC 20350–2000. (Sensitive Compartmented Information MDR).

(4) *Department of the Air Force.* Department of the Air Force, HAF/IMIO (MDR), 1000 Air Force Pentagon, Washington, DC 20330–1000.

(5) *United States Marine Corps.* Commandant of the Marine Corps, HQMC Code PP&O, Security Division (PS), 3000 Marine Corps Pentagon, Room 4A324, Washington, DC 20350–3000

(6) *Defense Advanced Research Projects Agency.* Defense Advanced Research Projects Agency, 3701 N. Fairfax Drive, Arlington, VA 22203–1714.

(7) *Defense Contract Audit Agency.* Director, Defense Contract Audit Agency, Attention: CPS, 8725 John J. Kingman Road, Suite 2135, Fort Belvoir, VA 22060–6219.

(8) *Defense Information Systems Agency.* Defense Information Systems Agency, Attention: Security Division, MPS 6, 5111 Leesburg Pike, Suite 100, Falls Church, VA 22041.

(9) *Defense Intelligence Agency.* Defense Intelligence Agency, Attention: DAN–1A (FOIA), Washington, DC 20340–5100.

(10) *Defense Logistics Agency.* Defense Logistics Agency, Attention: DLA/DSS–S, 8725 John J. Kingman Road, Suite 2533, Fort Belvoir, VA 22060–6221.

(11) *Defense Security Service.* Defense Security Service, Office of FOIA & Privacy, 1340 Braddock Place, Alexandria, VA 22314–1651.

(12) *Defense Threat Reduction Agency.* Defense Threat Reduction Agency, Attention: SCR 8725 John J. Kingman Road, Fort Belvoir, VA 22060–6201.

(13) *Missile Defense Agency.* Missile Defense Agency, Attention: MDA/DS, 7100 Defense Pentagon, Washington, DC 20301–7100.

(14) *National Geospatial-Intelligence Agency.* National Geospatial-Intelligence Agency, Mail Stop D–10, 4600 Sangamore Road, Bethesda, MD 20816–5003.

(15) *National Reconnaissance Office.* National Reconnaissance Office, NRO–MSO–ASG–IMSC–IART', 14675 Lee Road, Chantilly, VA 20151–1715.

(16) *National Security Agency/Central Security Service.* National Security Agency, Declassification Office, DJP5, 9800 Savage Road, Suite 6884, Fort George G. Meade, MD 20755–6884.

(17) *North American Aerospace Defense Command.* HQ NORAD/CSO, 250 Vandenberg St. Ste B016, Peterson AFB, CO 80914.

(18) *U.S. Africa Command.* US Africa Command, Unit 29951, ATTN: COS–FOIA, APO AE 09751.

(19) *U.S. Central Command.* U.S. Central Command, Attention: CCJ6–RDD, 7115 South Boundary Blvd., MacDill AFB, FL 33621–5101.

(20) *U.S. European Command.* U.S. European Command, Attention: ECJ1–AX, Unit 30400, APO AE 09131.

(21) *U.S. Joint Forces Command.* U.S. Joint Forces Command, Code J02SM, 1562 Mitscher Ave., Suite 200, Norfolk, VA 23511–2488.

(22) *U.S. Northern Command.* U.S. Northern Command, HQ USNORTHCOM/CSO, 250 Vandenberg Street, Suite B016, Peterson AFB, CO 80914–3804.

(23) *U.S. Pacific Command.* U.S. Pacific Command, Attention: J151 FOIA, Box 64017, Camp Smith, HI 96861–4017.

(24) *U.S. Southern Command.* U.S. Southern Command, Attention: SCJ2–SM–CFO (FOIA)''.3511 NW 91st Avenue, Miami, FL 33172–1217.

(25) *U.S. Special Operations Command.* U.S. Special Operations Command, Attention: SOCS–SJS–SI (FOIA), 7701 Tampa Point Blvd., MacDill AFB, FL 33621–5323.

(26) *U.S. Strategic Command.* U.S. Strategic Command, Attention: CS50, 901 SAC Blvd., STE 1C17, Offutt AFB, NE 68113–6000.

(27) *U.S. Transportation Command.* U.S. Transportation Command, Chief, Command Information Management, ATTN: TCCSIM, 508 Scott Drive, Scott AFB IL 62225–5357.

(28) Interagency Security Classification Appeals Panel *http://www.archives.gov/isoo/oversight-groups/iscap/index.html.*

(29) Principal Mandatory Declassification Review (MDR) Contacts at Federal Agencies *http://www.archives.gov/isoo/contact/mdr-contact.html.*

Dated: December 21, 2011.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2011–33104 Filed 12–23–11; 8:45 am]

BILLING CODE 5001–06–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R10–OAR–2011–0767, FRL–9494–9]

Approval and Promulgation of Implementation Plans; Oregon: New Source Review/Prevention of Significant Deterioration Rule Revisions and Air Quality Permit Streamlining Rule Revisions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is taking final action to approve the amendments to the Oregon State Implementation Plan (SIP) that were proposed on September 23, 2011. No comments were received on the proposal and today EPA is taking final action to approve the proposed SIP amendments without change. EPA is approving the SIP submission provided by the State of Oregon for the purpose of addressing the third element of the interstate transport provisions of Clean Air Act (CAA or the Act) for the 1997 8-hour ozone National Ambient Air Quality Standards (NAAQS or standards) and the 1997 and 2006 fine particulate matter ($PM_{2.5}$) NAAQS. The third element of the CAA requires that a state not interfere with any other state's required measures to prevent significant deterioration (PSD) of its air quality. EPA is also approving numerous revisions to the Oregon SIP that were submitted to EPA by the State of Oregon on October 8, 2008; October 10, 2008; March 17, 2009; June 23, 2010; December 22, 2010 and May 5, 2011. The revisions include updating Oregon's new source review (NSR) rules to be consistent with current Federal regulations, adding greenhouse gases (GHGs) to the list of pollutants whose emissions are subject to control under the State's NSR permitting process; and streamlining Oregon's air quality rules by clarifying requirements, removing duplicative rules, and correcting errors. The Federal Implementation Plan (FIP) that EPA promulgated on December 9, 2010, providing for federal implementation of PSD permitting for GHGs is also withdrawn as part of this action because it is being replaced through the approval of the State's regulations providing authority for PSD permitting of GHG emissions. The revisions were submitted in accordance with the requirements of section 110 and part D of the Act. Finally, EPA has identified a technical error in its most recent codification of the Oregon SIP and is making a technical correction to reinstate text that had been unintentionally omitted from that section.

DATES: This action is effective on January 26, 2012.

ADDRESSES: EPA has established a docket for this action under Docket Identification No. EPA–R10–OAR–2011–0767. All documents in the docket are listed on the *http://www.regulations.gov* Web site. Although listed in the index, some information may not be publicly available, *i.e.,* Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket

materials are available either electronically through *http://www.regulations.gov* or in hard copy at EPA Region 10, Office of Air, Waste, and Toxics, AWT–107, 1200 Sixth Avenue, Seattle, Washington 98101. EPA requests that you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Scott Hedges at telephone number: (206) 553–0296, email address: *hedges.scott@epa.gov,* or the above EPA, Region 10 address.

SUPPLEMENTARY INFORMATION: Throughout this document, wherever ''we,'' ''us,'' or ''our'' is used, we mean the EPA. Information is organized as follows:

Table of Contents

I. Background
A. Third PSD Element of Oregon's Interstate Transport SIP for the 1997 Ozone and 1997 and 2006 p.m.$_{2.5}$ NAAQS
B. Oregon's NSR/PSD Permitting Program
C. Agricultural Operations (as specified in Oregon Revised Statute 468A.020)
D. Permitting Rule Corrections, Clarifications and Streamlining
II. Final Action
A. Rules to Approve into SIP
B. Rules on which No Action is Taken
III. Statutory and Executive Order Reviews

I. Background

Title I of the CAA, as amended by Congress in 1990, specifies the general requirements for states to submit State Implementation Plans (SIPs) to attain and/or maintain the NAAQS and EPA's actions regarding approval of those SIPs. On October 8, 2008, October 10, 2008, March 17, 2009, June 23, 2010, December 22, 2010 and May 5, 2011, the Oregon Department of Environmental Quality (ODEQ) submitted numerous revisions to the SIP for the State of Oregon. On September 23, 2011 (76 FR 59090), EPA solicited public comment on a proposal to approve specified portions of the State's submissions. See 76 FR 59090. No public comments were received on the proposal and we are now taking final action to approve the SIP revisions as described in the September 23, 2011, proposal.

A. Third PSD Element of Oregon's Interstate Transport SIP for the 1997 Ozone and 1997 and 2006 $PM_{2.5}$ NAAQS

On July 18, 1997, EPA promulgated the 1997 8-hour ozone [1] NAAQS and the 1997 $PM_{2.5}$ NAAQS [2]. Additionally on December 18, 2006, EPA revised the 1997 24-hour $PM_{2.5}$ standard.[3] Today's actions relate to these revised standards (the 1997 8-hour ozone NAAQS and the 1997 and 2006 $PM_{2.5}$ NAAQS).

The interstate transport SIP provisions in section 110(a)(2)(D)(i) (also called ''good neighbor'' provisions) require each state to submit a SIP that contains provisions that prohibit emissions that adversely affect another state in the ways contemplated in the statute. Section 110(a)(2)(D)(i) identifies four distinct elements related to the evaluation of impacts of interstate transport of air pollutants. In this rulemaking EPA is approving Oregon's SIP with respect to the third element of that section. The third element of section 110(a)(2)(D)(i) requires a SIP to contain adequate provisions prohibiting emissions that interfere with any other state's required measures to prevent significant deterioration of its air quality.

As a part of its SIP submittal addressing interstate transport, ODEQ submitted an analysis entitled ''Oregon SIP Infrastructure for Addressing the Interstate Transport of Ozone and Fine Particulate Matter'', dated November 5, 2009, to EPA on December 22, 2010.[4] EPA finds that ODEQ's submission, when evaluated in conjunction with the NSR/PSD rule revisions that EPA is also approving in today's action, meets the requirements under the CAA necessary to avoid interference with another state's SIP measures for preventing significant deterioration of air quality. We are, therefore, approving Oregon's SIP submission for purposes of meeting the requirements of CAA section 110(a)(2)(D)(i) that addresses the third PSD element of the interstate transport provisions for the 1997 8-hour ozone NAAQS and the 1997 and 2006 $PM_{2.5}$ NAAQS.

B. Oregon's NSR/PSD Rule Revisions

On December 31, 2002, EPA published final rule changes to the PSD and nonattainment NSR programs (67 FR 80186) and on November 7, 2003, EPA published a notice of final action on the reconsideration of the December 31, 2002 final rule changes (68 FR 63021). The December 31, 2002 and the November 7, 2003, final actions, are collectively referred to as the ''2002 NSR Reform Rules.''

The 2002 NSR Reform Rules require that state agencies adopt and submit revisions to their SIP permitting programs implementing the minimum program elements of the 2002 NSR Reform Rules no later than January 2, 2006. To meet this requirement, ODEQ submitted an NSR reform equivalency demonstration report on December 22, 2005.

For the reasons discussed in EPA's proposed action, EPA has determined that Oregon's PSD program for reviewing and controlling emissions from new and modified sources is at least as strict as EPA's program. We have reviewed Oregon's NSR/PSD program and ODEQ's recent rule revisions and have determined that the NSR/PSD program meets the current requirements in 40 CFR 51.165 and 51.166. Accordingly, EPA is taking final action to approve these measures into the federally approved SIP.

On May 5, 2011, ODEQ submitted a series of additional rule changes as revisions to the Oregon SIP. These rule changes are necessary to align its rules with significant changes made to EPA's air quality permitting regulations, including the 2002 NSR Reform Rules (published on December 31, 2002, effective date March 3, 2003), and the permitting of $PM_{2.5}$ (direct $PM_{2.5}$ and $PM_{2.5}$ precursors) and GHG emissions. The SIP submittal covers revisions to OAR chapter 340, divisions 200, 202, 216, 224, 225, and 228.

The rule revisions include the adoption of a threshold or significant emission rate of 10 tons per year of $PM_{2.5}$ as a significant change at an existing facility. Facilities would trigger

[1] *See* 62 FR 38856. The level of the 1997 8-hour ozone NAAQS is 0.08 parts per million (ppm). 40 CFR part 50.10. The 8-hour ozone standard is met when the 3-year average of the annual 4th highest daily maximum 8-hour ozone concentrations is 0.08 ppm or less (*i.e.,* less than 0.085 ppm based on the rounding convention in 40 CFR part 50, appendix I). This 3-year average is referred to as the ''design value.''

[2] *See* 62 FR 38652. The level of the 1997 $PM_{2.5}$ NAAQS are 15.0 μg/m^3 (annual arithmetic mean concentration) and 65 μg/m^3 (24-hour average concentration). 40 CFR part 50.7. The annual standard is met when the 3-year average of the annual mean concentrations is 15.0 μg/m^3 or less (*i.e.,* less than 15.05 μg/m^3 based on the rounding convention in 40 CFR part 50, appendix N section 4.3). The 24-hour standard is met when the 3-year average annual 98th percentile of 24-hour concentrations is 65 μg/m^3 or less (*i.e.,* less than 65.5 μg/m^3 based on the rounding convention in 40 CFR part 40 appendix N section 4.3). *Id.* These 3-year averages are referred to as the annual $PM_{2.5}$ and 24-hour $PM_{2.5}$ ''design values,'' respectively.

[3] See 71 FR 61144 . In 2006, the 24-hour $PM_{2.5}$ NAAQS standard was changed from 65 μg/m^3 to 35 μg/m^3 (24-hour average concentration). The annual $PM_{2.5}$ standard was not changed. 40 CFR 50.13.

[4] This interstate transport report was inadvertently left out of the original June 23, 2010, SIP submittal.

NSR/PSD permitting only if a physical or operational change increased emissions above this threshold. The rule revisions also include the adoption of levels to determine if additional ambient air quality analysis is required, track the cumulative impact of emissions growth in areas that meet air quality standards, and determine if preconstruction monitoring is required for $PM_{2.5}$.

In addition, the May 5, 2011, SIP submittal includes rules to allow the permitting of GHG emissions under Oregon's NSR/PSD program. Oregon's definition of ''federal major source'' is almost identical to EPA's definition of ''major stationary source'' and as such, Oregon has tailored its PSD rules in a manner identical to EPA's with respect to major sources of GHG emissions. That is, for a ''federal major source'' to be ''major'' for GHGs under the Oregon PSD program, it must have the potential to emit GHGs equal to or greater than 100,000 tons per year on a carbon dioxide equivalent (CO2e) basis and a potential to emit GHGs equal to or greater than 100/250 tons per year on a mass basis.[5] However, Oregon's definition of ''major modification'' is substantially different than (but equivalent to) EPA's definition of ''major modification'' so Oregon has tailored its PSD rule in a different manner in order to produce the same outcome with respect to major modifications for GHGs as EPA's Tailoring Rule.

In order for Oregon's PSEL-based definition to have the same effect as EPA's definition of ''major modification'' with respect to GHG emissions (*i.e.,* an increase greater than 75,000 tons per year on a CO2e basis and an increase greater than ''zero'' on a mass basis), Oregon's rule requires the establishment of PSELs on a CO2e basis and an increase in the PSEL of more than 75,000 tons per year on a CO2e basis, before a ''major modification'' under the Oregon rules will have occurred.[6] This approach is consistent with how the Oregon program defines major modifications for all other NSR regulated pollutants and results in the same outcome as EPA's Tailoring Rule with respect to major modifications for GHG emissions.

EPA finds that these provisions are consistent with EPA's GHG Tailoring Rule and is approving the GHG PSD permitting provisions into the federally approved Oregon SIP, providing Oregon with the authority to issue PSD permits addressing GHG emissions. EPA is simultaneously withdrawing the FIP codified in 40 CFR 52.1987(d) that ensures the availability of a PSD-permitting authority for GHG-emitting sources in Oregon to reflect the fact that analogous provisions are now a part of the federally-approved SIP. EPA has identified a technical error in 40 CFR 52.1987 whereby subsections (a), (b), and (c) were erroneously omitted from the code of federal regulations when EPA promulgated the GHG FIP and added subsection (d).[7] In this action, EPA is clarifying that subsections (a), (b), and (c) should not have been omitted from the text of the CFR as EPA never provided notice of its intent (and did not intend) to remove those provisions from the SIP.

C. Agricultural Operations (as Specified in Oregon Revised Statute 468A.020)

The CAA does not provide an exemption for agricultural operations while, prior to 2007, Oregon's State law exempted most agricultural operations from air quality regulations. To address this discrepancy, the 2007 Oregon Legislature (in accordance with Oregon Senate Bill 235) updated Oregon's air quality law (Oregon Revised Statute (ORS) 468.020 and 468A.020) to be consistent with the Federal CAA enabling the regulation of air emissions from agricultural sources if necessary to implement the Federal CAA. The Oregon Environmental Quality Commission in turn adopted rule amendments to OAR (340) 200–0030, (340) 210–0205, and (340) 264–0040 to align these rules with ORS 468A.020 and to make revisions to Oregon's SIP and the Oregon Title V operating permit program. The revisions to OAR (340) 200–0030, (340) 210–0205, and (340) 264–0040 were submitted to EPA by ODEQ on October 8, 2008. OAR rules now allow agricultural air quality pollution sources to be regulated in Oregon as necessary to meet CAA requirements.

EPA believes that the revised ORS 468A.020 (in conjunction with the corresponding revisions to the OAR (340) 200–0030, (340) 210–0205, and (340) 264–0040) meet CAA requirements and, therefore, are approving these revised OAR provisions into the federally approved Oregon SIP.

D. Permitting Rule Corrections, Clarifications and Streamlining

EPA is also approving portions of the October 10, 2008, March 17, 2009, and June 23, 2010, SIP submittals from ODEQ that correct previous errors, provide clarification and streamline air quality permitting rules in the State of Oregon.

On November 5, 1999, ODEQ submitted a complete rule renumbering to EPA for approval. On January 22, 2003 (68 FR 2891), we approved most of these new divisions but at that time did not take action on division 208 (Visible Emissions and Nuisance Requirements). We are now approving rules 0010 (Definitions), 0100 (Visible Emissions, Applicability), 0110 (Visible Emissions, Visible Air Contaminant Limitations), 0200 (Fugitive Emissions Requirements, Applicability) and 0210 (Fugitive Emissions Requirements) of division 208 into the Oregon SIP which replace division 21, rules 015, 050, 055, and 060, which are simultaneously being removed from the SIP (codified in 40 CFR 52.1970(c)(153)(i)(G)).

We are also approving Oregon's current excess emission rules (division 214, rules 0300 through 0360 that were included in the October 10, 2008 SIP submittal) into the Oregon SIP. These division 214 rules replace the federally-approved division 28, rules 1400, 1410, 1420, 1430, 1440, and 1450, which are simultaneously removed from the SIP in this action (codified in 40 CFR 52.1970(c)(153)(i)(G)). EPA finds that the division 214 rules conform to Federal standards related to excess emissions. Oregon's excess emission provisions specify the factors that the State will take into account regarding the exercise of its enforcement discretion in response to excess emissions.

Additionally, as part of October 10, 2008 SIP submittal, ODEQ submitted a revision to repeal outdated rules governing wigwam waste burners with a statewide prohibition on their use (division 234, rules 0110, 0120, and 0130) and redundant kraft pulp mill rules (division 234, rules 0230 and 0260). These rules are removed from the SIP in this action (codified in 40 CFR 52.1970(c)(154)(i)(A)).

These rules are described with additional specificity in our proposal for this action (76 FR 59090).

II. Final Action

EPA is taking final action to approve into Oregon's federally-approved SIP

[5] Carbon dioxide equivalent or CO2e is a unit of measurement that allows the effect of different GHGs to be compared using carbon dioxide as a standard unit for reference.

[6] Oregon's rules use the terms ''significant emission threshold'' or ''significant emission rate (SER)'' for GHG PSD permitting purposes. However, these terms do not have the same meaning as ''significant'' as used in the context of EPA's PSD regulation at 40 CFR 51.166. EPA has not established a significant emission rate for GHGs under 40 CFR 51.166(b)(23)(i). Oregon's PSEL PSD permitting program establishes a GHG threshold of 75,000 CO2e to tailor the application of its PSD permitting program in a manner similar to EPA's GHG Tailoring Rule.

[7] *See* 75 FR 82246, 82254 (December 20, 2010).

the provisions discussed in the September 23, 2011, proposal. This action will result in the following changes to the Oregon SIP in 40 CFR part 52, subpart MM.

A. Rules Approved Into SIP

EPA is approving into the Oregon SIP at 40 CFR part 52, subpart MM, the following revisions to chapter 340 of the OAR listed in Table 1. It is important to note that in those instances where ODEQ submitted multiple revisions to a single rule of chapter 340 of the OAR, the most recent version of that rule (based on State effective date) is being incorporated into the SIP since it supersedes all previous revisions.

TABLE 1—ODEQ REGULATIONS BEING APPROVED

State citation	Title/subject	State effective date	Explanation
OAR 340–200—General Air Pollution Procedures and Definitions			
0010	General, Purpose and Application	11/8/2007	
0020	General, General Air Quality Definitions	5/1/2011	Including Tables 1–5.
0025	General, Abbreviations and Acronyms	5/1/2011	
0030	General, Exceptions	9/17/2008	
OAR 340–202—Ambient Air Quality Standards and PSD Increments			
0010	Definitions	5/1/2011	
0060	Ambient Air Quality Standards, Suspended Particulate Matter	5/1/2011	
0090	Ambient Air Quality Standards, Ozone	5/21/2010	
0130	Ambient Air Quality Standards, Ambient Air Quality Standard for Lead.	5/21/2010	
0210	Prevention of Significant Deterioration Increments, Ambient Air Increments.	5/1/2011	Including Table 1.
OAR 340–204—Designation of Air Quality Areas			
0010	Definitions	5/21/2010	
0030	Designation of Nonattainment Areas	5/21/2010	
OAR 340–206—Air Pollution Emergencies			
0010	Introduction	5/21/2010	
0030	Episode Stage Criteria for Air Pollution Emergencies	5/21/2010	Including Table 2.
OAR 340–208—Visible Emissions and Nuisance Requirements			
0010	Definitions	11/8/2007	
0100	Visible Emissions, Applicability	2/5/2001	
0110	Visible Emissions, Visible Air Contaminant Limitations	11/8/2007	
0200	Fugitive Emission Requirements, Applicability	2/5/2001	
0210	Fugitive Emission Requirements, Requirements	2/5/2001	
OAR 340–209—Public Participation			
0040	Public Notice Information	11/8/2007	
0070	Hearings and Meeting Procedures	11/8/2007	
0080	Issuance or Denial of a Permit	11/8/2007	
OAR 340–210—Stationary Source Notification Requirements			
0205	Notice of Construction and Approval of Plans, Applicability	9/17/2008	
OAR 340–214—Stationary Source Reporting Requirements			
0010	Definitions	11/8/2007	
0300 (Formally OAR–340–28–1400).	Excess Emissions and Emergency Provision, Purpose and Applicability.	11/8/2007	
0310 (Formally OAR–340–28–1410).	Excess Emissions and Emergency Provision, Planned Startup and Shutdown.	11/8/2007	
0320 (Formally OAR–340–28–1420).	Excess Emissions and Emergency Provision, Scheduled Maintenance.	11/8/2007	
0330 (Formally OAR–340–28–1430).	Excess Emissions and Emergency Provision, All Other Excess Emissions.	11/8/2007	
0340 (Formally OAR–340–28–1440).	Excess Emissions and Emergency Provision, Reporting Requirements.	11/8/2007	
0350 (Formally OAR–340–28–1450).	Excess Emissions and Emergency Provision, Enforcement Action Criteria.	11/8/2007	
0360	Emergency as an Affirmative Defense	11/8/2007	

TABLE 1—ODEQ REGULATIONS BEING APPROVED—Continued

State citation	Title/subject	State effective date	Explanation
OAR 340–216—Air Contaminant Discharge Permits			
0020	Applicability	5/1/2011	Including Tables 1 and 2.
0040	Application Requirements	5/1/2011	
0060	General ACDPs	5/1/2011	
0064	Simple ACDP	5/1/2011	
0082	Termination or Revocation of an ACDP	11/8/2007	
OAR 340–222—Stationary Source Plant Site Emission Limits			
0020	Applicability	8/29/2008	
OAR 340–224 Major New Source Review			
0010	Applicability and General Prohibitions	5/1/2011	
0050	Requirements for Sources in Nonattainment Areas	5/1/2011	
0060	Requirements for Sources in Maintenance Areas	5/1/2011	
0070	Prevention of Significant Deterioration Requirements for Sources in Attainment or Unclassified Areas.	5/1/2011	
OAR 340–225—Air Quality Analysis Requirements			
0020	Definitions	5/1/2011	Including Table 1.
0030	Procedural Requirements	5/1/2011	
0045	Requirements for Analysis in Maintenance Areas	5/1/2011	
0050	Requirements for Analysis in PSD Class II and Class III Areas	5/1/2011	
0060	Requirements for Demonstrating Compliance with Standards and Increments in PSD Class I Areas.	5/1/2011	
0090	Requirements for Demonstrating a Net Air Quality Benefit	5/1/2011	Except 0090(2)(a)(C) addressing interpollutant offset ratios.
OAR 340–228—Requirements for Fuel Burning Equipment and Fuel Sulfur Content			
0020	Definitions	11/8/2007	
0200	General Emission Standards for Fuel Burning Equipment, Sulfur Dioxide Standards.	11/8/2007	
0210	General Emission Standards for Fuel Burning Equipment, Grain Loading Standards.	11/8/2007	
OAR 340–232—Emission Standards for VOC Sources			
0010	Introduction	11/8/2007	
OAR 340–234—Emission Standards for Wood Products Industries			
0010	Definitions	11/8/2007	Except 0010(24), 0010(26)(a) and 0010(44) addressing total reduced sulfur (TRS) emission-related definitions.
0100	Wigwam Waste Burners, Wigwam Waste Burners	11/8/2007	
0110	Wigwam Waste Burners, Authorization to Operate a Wigwam Burner	11/8/2007	Rule repealed, remove from SIP.
0120	Wigwam Waste Burners, Emission and Operation Standards for Wigwam Waste Burners.	11/8/2007	Rule repealed, remove from SIP.
0130	Wigwam Waste Burners, Monitoring and Reporting	11/8/2007	Rule repealed, remove from SIP.
0140	Wigwam Waste Burners, Existing Administrative Agency Orders	11/8/2007	
0210	Kraft Pulp Mills, Emission Limitations	11/8/2007	Except 0210(1) addressing TRS emission limitations.
0230	Kraft Pulp Mills, Plans and Specifications	11/8/2007	Rule repealed, remove from SIP.
0240	Kraft Pulp Mills, Monitoring	11/8/2007	Except 0240(1) addressing TRS monitoring provisions.
0250	Kraft Pulp Mills, Reporting	11/8/2007	Except 0250(1) and 0250(2) addressing TRS reporting provisions.
0260	Kraft Pulp Mills, Upset Conditions	11/8/2007	Rule repealed, remove from SIP.
0500	Board Product Industries, Applicability and General Provisions	11/8/2007	
0510	Board Product Industries, Veneer and Plywood Manufacturing Operations.	11/8/2007	
0520	Board Product Industries, Particleboard Manufacturing Operations	11/8/2007	
0530	Board Product Industries, Hardboard Manufacturing Operations	11/8/2007	

TABLE 1—ODEQ REGULATIONS BEING APPROVED—Continued

State citation	Title/subject	State effective date	Explanation
OAR 340–236—Emission Standards for Specific Sources			
0010	Definitions	11/8/2007	
0410	Hot Asphalt Plants, Control Facilities Required	11/8/2007	
OAR 340–264—Rules for Open Burning			
0040	Exemptions, Statewide	9/17/2008	

B. Rules on Which No Action Is Taken

The following provisions were included in the SIP submittals discussed above. However, EPA is taking no action to incorporate them into Oregon's federally approved SIP at this time.

OAR 340–200—General Air Pollution Procedures and Definitions, rule 0040, General, ''State of Oregon Clean Air Act Implementation Plan''.

OAR 340–215—Greenhouse Gas Reporting Requirements.

OAR 340–218—Oregon Title V Operating Permits, rules 0010, 0020, 0040, 0050, 0120, 0150, 0180, 0190 and 0250.

OAR 340–225—Air Quality Analysis Requirements, rule 0090, Requirements for Demonstrating a Net Air Quality Benefit, paragraph (a)(C) addressing interpollutant offset ratios for $PM_{2.5}$.

OAR 340–228—Requirements for Fuel Burning Equipment and Fuel Sulfur Content, rules 0672, 0673, 0676, and 0678 (Mercury Rules for Coal-Fired Power Plants).

OAR 340–228—Requirements for Fuel Burning Equipment and Fuel Sulfur Content, rule 0300, Federal Acid Rain Program, Federal Regulations Adopted by Reference.

OAR 340–230—Incinerator Regulations.

OAR 340–234—Standards for Wood Products Industries—Specific references to TRS emission limits or definitions.

OAR 340–246—Oregon State Air Toxics Program, rule 0230, Safety Net Source Air Toxics Emissions Reduction Measures in Permit.

III. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this proposed action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this proposed action:

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: November 9, 2011.

Dennis J. McLerran,

Regional Administrator, Region 10.

Part 52, chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

■ 1. The authority citation for Part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart MM—Oregon

■ 2. Section 52.1970 is amended by adding paragraphs (c)(153) and (154) to read as follows:

§ 52.1970 Identification of plan.

* * * * *

(c) * * *

(153) On October 8, 2008, October 10, 2008, March 17, 2009, June 23, 2010, December 22, 2010, and May 5, 2011, the Oregon Department of Environmental Quality submitted numerous amendments to the Oregon Administrative Rules as revisions to the Oregon State implementation plan. The revisions include updating Oregon's new source review rules to be consistent with current Federal regulations and streamlining Oregon's air quality rules by clarifying requirements, removing duplicative rules, and correcting errors.

(i) Incorporation by reference.

(A) The following revised sections of the Oregon Administrative Rules, Chapter 340, effective February 5, 2001:

(*1*) Division 208, Visible Emissions and Nuisance Requirements: Rule 0100, Visible Emissions, Applicability; Rule 0200, Fugitive Emission Requirements, Applicability; Rule 0210, Fugitive Emission Requirements, Requirements.

(B) The following revised sections of the Oregon Administrative Rules, Chapter 340, effective November 8, 2007:

(*1*) Division 200, General Air Pollution Procedures and Definitions: Rule 0010, General, Purpose and Application;

(*2*) Division 208, Visible Emissions and Nuisance Requirements: Rule 0010, Definitions; Rule 0110, Visible Emissions, Visible Air Contaminant Limitations;

(*3*) Division 209, Public Participation: Rule 0040, Public Notice Information; Rule 0070, Hearing and Meeting Procedures; Rule 0080, Issuance or Denial of a Permit;

(*4*) Division 214, Stationary Source Reporting Requirements: Rule 0010, Definitions; Rule 0300, Excess Emissions and Emergency Provision, Purpose and Applicability; Rule 0310, Excess Emissions and Emergency Provision, Planned Start-up and Shutdown; Rule 0320, Excess Emissions and Emergency Provision, Scheduled Maintenance; Rule 0330, Excess Emissions and Emergency Provision, All Other Excess Emissions; Rule 0340, Excess Emissions and Emergency Provision, Reporting Requirements; Rule 0350, Excess Emissions and Emergency Provision, Enforcement Action Criteria; Rule 0360, Excess Emissions and Emergency Provision, Emergency as an Affirmative Defense;

(*5*) Division 216, Air Contaminant Discharge Permits: Rule 0082, Termination or Revocation of an ACDP;

(*6*) Division 228, Requirements for Fuel Burning Equipment and Fuel Sulfur Content: Rule 0020, Definitions; Rule 0200, General Emission Standards for Fuel Burning Equipment, Sulfur Dioxide Standards; Rule 0210, General Emission Standards for Fuel Burning Equipment, Grain Loading Standards;

(*7*) Division 232, Emission Standards for VOC Point Sources: Rule 0010, Introduction;

(*8*) Division 234, Emission Standards for Wood Products Industries: Rule 0010, Definitions (except for paragraphs (24), (26)(a) and (44)); Rule 0100, Wigwam Waste Burners, Wigwam Waste Burners; Rule 0140, Wigwam Waste Burners, Existing Administrative Agency Orders; Rule 0210, Kraft Pulp Mills, Emission Limitations (except for paragraph (1)); Rule 0240, Kraft Pulp Mills, Monitoring (except for paragraph (1)); Rule 0250, Kraft Pulp Mills, Reporting (except for paragraphs (1) and (2)); Rule 0500, Board Products Industries (Veneer, Plywood, Particleboard, Hardboard), Applicability and General Provisions; Rule 0510, Board Products Industries (Veneer, Plywood, Particleboard, Hardboard), Veneer and Plywood Manufacturing Operations; Rule 0520, Board Products Industries (Veneer, Plywood, Particleboard, Hardboard), Particleboard Manufacturing Operations; Rule 0530, Board Products Industries (Veneer, Plywood, Particleboard, Hardboard), Hardboard Manufacturing Operations;

(*9*) Division 236, Emission Standards for Specific Industries: Rule 0010, Definitions; Rule 0410, Hot Mix Asphalt Plants, Control Facilities Required.

(C) The following revised sections of the Oregon Administrative Rules, Chapter 340, effective August 29, 2008:

(*1*) Division 222, Stationary Source Plant Site Emission Limits: Rule 0020, Applicability.

(D) The following revised sections of the Oregon Administrative Rules, Chapter 340, effective September 17, 2008:

(*1*) Division 200, General Air Pollution Procedures and Definitions: Rule 0030, General, Exceptions;

(*2*) Division 210, Stationary Source Notification Requirements: Rule 0205, Notice of Construction and Approval of Plans, Applicability;

(*3*) Division 264, Rules for Open Burning: Rule 0040, Exemptions, Statewide.

(E) The following revised sections of the Oregon Administrative Rules, Chapter 340, effective May 21, 2010:

(*1*) Division 202, Ambient Air Quality Standards and PSD Increments: Rule 0090, Ambient Air Quality Standards, Ozone; Rule 0130, Ambient Air Quality Standards, Ambient Air Quality Standard for Lead;

(*2*) Division 204, Designation of Air Quality Areas: Rule 0010, Definitions; Rule 0030, Designation of Nonattainment Areas;

(*3*) Division 206, Air Pollution Emergencies: Rule 0010, Introduction; Rule 0030, Episode Stage Criteria for Air Pollution Emergencies (including Table 2, Air Pollution Episode Warning Conditions Emission Reduction Plan).

(F) The following revised sections of the Oregon Administrative Rules, Chapter 340, effective May 1, 2011:

(*1*) Division 200, General Air Pollution Procedures and Definitions: Rule 0020, General, General Air Quality Definitions (including Table 1, Significant Air Quality Impact; Table 2, Significant Emission Rates; Table 3, Significant Emission Rates for the Medford-Ashland Air Quality Maintenance Area; Table 4, De Minimus Emission Levels; Table 5, General PSELs); Rule 0025, General, Abbreviations and Acronyms;

(*2*) Division 202, Ambient Air Quality Standards and PSD Increments: Rule 0010, Definitions; Rule 0060, Ambient Air Quality Standards, Suspended Particulate Matter; Rule 0210, Prevention of Significant Deterioration Increments, Ambient Air Increments (including Table 1, Maximum Allowable Increase);

(*3*) Division 216, Air Contaminant Discharge Permits: Rule 0020, Applicability (including Table 1, Air Contaminant Discharge Permits; Table 2, Part 1 Initial Permitting Application Fees, Part 2 Annual Fees, Part 3 Specific Activity Fees, Part 4 Late Fees); Rule 0040, Application Requirements; Rule 0060, General Air Contaminant Discharge Permits; Rule 0064, Simple ACDP;

(*4*) Division 224, Major New Source Review: Rule 0010, Applicability and General Prohibitions; Rule 0050, Requirements for Sources in Nonattainment Areas; Rule 0060, Requirements for Sources in Maintenance Areas, Rule 0070, Prevention of Significant Deterioration Requirements for Sources in Attainment or Unclassified Areas;

(*5*) Division 225, Air Quality Analysis Requirements: Rule 0020, Definitions (including Table 1, Constant K for Range of Influence Calculation); Rule 0030, Procedural Requirements; Rule 0045, Requirements for Analysis in Maintenance Areas; Rule 0050, Requirements for Analysis in PSD Class II and Class III Areas; Rule 0060, Requirements for Demonstrating Compliance With Standards and Increments in PSD Class I Areas; and Rule 0090, Requirements for Demonstrating a Net Air Quality Benefit (except paragraph (2)(a)(C)).

(G) Remove the following rules from section 340 to the OAR from the current incorporation by reference: Divisions 21, Rules 015, 050, 055 and 060; and Division 28. See paragraph(s) (c)(116)(i)(A), (c)(116)(i)(C), (c)(118)(i)(B) and (c)(139)(i)(B) of this section.

(154) On October 10, 2008, the Oregon Department of Environmental Quality submitted a SIP revision to repeal outdated rules governing wigwam waste burners with a statewide prohibition on their use, and to repeal redundant kraft pulp mill rules.

(i) Incorporation by reference.

(A) Remove the following rules of section 340 of the OAR from the current incorporation by reference: Division 234, Rules 0110, 0120, 0130, 0230 and

0260. See paragraph (c)(139)(i)(A) of this section.

■ 3. Section 52.1987 is revised to read as follows:

§ 52.1987 Significant deterioration of air quality.

(a) The Oregon Department of Environmental Quality rules for the prevention of significant deterioration of air quality (provisions of OAR Chapter 340, Divisions 200, 202, 209, 212, 216, 222, 224, 225 (except 225–0090(2)(a)(C) on interpollutant offset ratios), and 268, as in effect on May 1, 2011, are approved as meeting the requirements of title I, part C, subpart 1 of the Clean Air Act, as in effect on July 1, 2011, for preventing significant deterioration of air quality.

(b) The Lane Regional Air Pollution Authority rules for permitting new and modified major stationary sources (Title 38 New Source Review) are approved, in conjunction with the Oregon Department of Environmental Quality rules, in order for the Lane Regional Air Pollution Authority to issue prevention of significant deterioration permits within Lane County.

(c) The requirements of sections 160 through 165 of the Clean Air Act are not met for Indian reservations since the plan does not include approvable procedures for preventing the significant deterioration of air quality on Indian reservations and, therefore, the provisions in § 52.21 except paragraph (a)(1) are hereby incorporated and made part of the applicable plan for Indian reservations in the State of Oregon.

■ 4. In § 52.1989, paragraph (a) is revised to read as follows:

§ 52.1989 Interstate Transport for the 1997 8-hour ozone NAAQS and 1997 24-hour $PM_{2.5}$ NAAQS.

(a) On June 23, 2010 and December 22, 2010, the Oregon Department of Environmental Quality submitted a SIP revision, adopted by the Oregon Environmental Quality Commission on April 30, 2010, to meet the requirements of Clean Air Act section 110(a)(2)(D)(i). EPA approves the portion of this submittal relating to significant contribution to nonattainment of the NAAQS in any other state and interference with maintenance of the NAAQS by any other state. EPA also approves the portion of the submittal addressing the requirement in Clean Air Act section 110(a)(2)(D)(i)(II) that a state not interfere with any other state's required measures to prevent significant deterioration (PSD) of its air quality (the third PSD element).

* * * * *

■ 5. Section 52.1990 is added to read as follows:

§ 52.1990 Interstate Transport for the 2006 24-hour $PM_{2.5}$ NAAQS.

(a) EPA approves the portion of Oregon's SIP revision submitted June 23, 2010, and December 22, 2010 (referenced in § 52.1989(a)) addressing the requirement in Clean Air Act section 110(a)(2)(D)(i)(II) that a state not interfere with any other state's required measures to prevent significant deterioration (PSD) of its air quality (the third PSD element).

(b) [Reserved]

[FR Doc. 2011–33012 Filed 12–23–11; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R07–OAR–2011–0675; FRL–9611–3]

Approval and Promulgation of Implementation Plans; State of Kansas: Regional Haze

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is taking final action to approve a revision to the State Implementation Plan (SIP) for Kansas, submitted by the Kansas Department of Health and Environment on October 26, 2009, that addresses Regional Haze for the first implementation period. EPA has determined that the plan submitted by Kansas satisfies the requirements of the Clean Air Act (CAA or Act), for states to prevent any future and remedy and existing anthropogenic impairment of visibility in Class I areas caused by emissions of air pollutants located over a wide geographic area (also known as the ''regional haze'' program). EPA proposed to approve these revisions on August 23, 2011 (76 FR 52604).

DATES: *Effective Date:* This rule will be effective January 26, 2012.

ADDRESSES: EPA has established a docket for this action under Docket Identification No. EPA–R07–OAR–2011–0675. All documents in the docket are listed on the *http://www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, *i.e.,* Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at the Air Planning and Development Branch, Air and Waste Management Division, U.S. Environmental Protection Agency, Region 7, 901 North 5th Street, Kansas City, KS 66101. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section for further information. The regional office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Chrissy Wolfersberger, Air Planning and Development Branch, U.S. Environmental Protection Agency, Region 7, 901 N. 5th Street, Kansas City, Kansas 66101; by telephone at (913) 551–7864; or by email at *wolfersberger.chris@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, the terms ''we,'' ''us,'' and ''our'' refer to EPA.

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I. Background
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I. Background

On August 23, 2011 (76 FR 52604), EPA published a notice of proposed rulemaking (NPR) for the State of Kansas, proposing approval of Kansas' regional haze plan for the first implementation period (through 2018). A detailed explanation of the CAA's visibility requirements and the regional haze rule as it applies to Kansas was provided in the NPR and will not be restated here. EPA's rationale for proposing approval of the Kansas SIP revision was described in detail in the proposal, and is further described in this final rulemaking.

II. Public comments and EPA responses

The publication of EPA's proposed rule on August 23, 2011 initiated a 30 day public comment period that ended on September 22, 2011. During the public comment period we received written comments from the State of Colorado, the Kansas Department of Health and Environment on behalf of the State of Kansas (State), Kansas City Power & Light, Westar Energy, and the National Parks Conservation Association (NPCA). We have summarized the comments and provided our responses below. Full copies of the comment letters are available in the docket for this rulemaking.

Comment #1: The State of Colorado submitted comments supportive of EPA's proposed approval and applauding the State of Kansas' efforts to evaluate and promulgate cost effective emission controls that will improve visibility in a number of Class I areas, including Rocky Mountain National Park and Great Sand Dunes National Park & Preserve.

Response #1: We appreciate the State of Colorado's comments on our proposed action.

Comment #2: The State and Westar Energy noted some transcription errors in table 7 of the proposed notice, titled ''Control or work practice strategies for Westar units to meet Kansas long term strategy requirements.'' Some limits for sulfur dioxide (SO_2) were recorded as limits for nitrogen oxides (NO_X), and vice versa. The specific errors were:

- *Lawrence Unit 3:* the limit of 0.18 lbs/mmBtu is for NO_X, not SO_2
- *Lawrence Unit 4:* the limit of 0.18 lbs/mmBtu is for NO_X, not SO_2; and the limit of 0.15 lbs/mmBtu is for SO_2, not NO_X
- *Tecumseh Unit 7/9:* the limit of 0.18 lbs/mmBtu is for NO_X, not SO_2
- *Tecumseh Unit 8/10:* limit of 0.18 lbs/mmBtu for NO_X, not SO_2.

Response #2: EPA agrees that there were transcription errors in table 7. Table 7 is corrected to read as follows:

Facility/unit	Emission rate or work practice
Gordon Evans Energy Center—Unit 1	a fuel switch to natural gas at all times, with the exception of a gas curtailment order from the gas supplier, in which case the facility will be allowed to utilize backup #6 fuel oil.
Hutchinson—Unit 4	a fuel switch to natural gas at all times, with the exception of a gas curtailment order from the gas supplier, in which case the facility will be allowed to utilize backup #6 fuel oil.
Murray Gill—Units 1, 2, 3 and 4	a fuel switch to natural gas at all times, with the exception of a gas curtailment order from the gas supplier, in which case the facility will be allowed to utilize backup #6 fuel oil.
Neosho—Unit 7	a fuel switch to natural gas at all times, with the exception of a gas curtailment order from the gas supplier, in which case the facility will be allowed to utilize backup #6 fuel oil.
Jeffrey Energy Center—Unit 3	an emission limit of 0.15 lbs/MMBtu for both SO_2 and NO_X.
Lawrence—Unit 3	an emission limit of 0.18 lbs/MMBtu for NO_X.
Lawrence—Unit 4	an emission limit of 0.18 lbs/MMBtu for NO_X; an emission limit of 0.15 lbs/MMBtu for SO_2.
Lawrence—Unit 5	an emission limit of 0.15 lbs/MMBtu for both SO_2 and NO_X.
Tecumseh—Units 7/9	an emission limit of 0.18 lbs/MMBtu for NO_X.
Tecumseh—Units 8/10	an emission limit of 0.18 lbs/MMBtu for NO_X.

Comment #3: Westar Energy noted errors in table 8 of the proposed approval, titled, ''Estimated NO_X and SO_2 emission reductions for implementation of controls or work practices required by Kansas' long term strategy''. Errors in table 8 included listing the 2002 SO_2 emissions for Lawrence Unit 5 as 4,546.3 tons (the correct value is 4,353.7 tons), and listing the post-control NO_X emissions for Lawrence Unit 4 at 835.4 tons (the correct value is 1002.4 tons).

Response #3: EPA agrees that there were errors in table 8. Table 8 is corrected as follows:

Facility	Unit	2002 NO_X Emissions (tpy)	2002 SO_2 Emissions (tpy)	Post control NO_X (tpy)	Post control SO_2 (tpy)	NO_X Reductions (tpy)	SO_2 Reductions (tpy)
Gordon Evans	1	258.7	617.7	211.9	0.5	46.8	617.2
Hutchinson	4	267.1	734.3	158.5	0.6	108.5	733.7
Jeffrey	3	10,807.4	23,206.0	4,913.1	4,913.1	5,894.3	18,292.9
Lawrence	3	728.4	1,965.4	0.0	1,965.4	728.4	0.0
Lawrence	4	1,986.5	1,430.0	1,002.4	835.4	984.1	594.7
Lawrence	5	3,546.3	4,353.7	2,564.7	2,564.7	981.6	1,789.0
Gill	1	0.0	0.0	0.0	0.0	0.0	0.0
Gill	2	4.5	0.0	4.0	0.0	0.5	0.0
Gill	3	181.6	452.1	148.6	0.3	33.0	451.8
Gill	4	103.8	333.3	85.2	0.2	18.7	333.1
Neosho	7	0.0	0.0	0.0	0.0	0.0	0.0
Tecumseh	7	1,530.6	2,692.7	691.6	2,692.7	839.0	0.0
Tecumseh	8	1,876.9	4,514.9	1,103.1	4,514.9	773.8	0.0
Total						10,408.7	22,812.5

Comment #4: As noted in the proposal, the State entered into Consent Agreements with Kansas City Power and Light and Westar Energy to incorporate the Best Available Retrofit Technology (BART) emission rates, compliance schedules, monitoring, recordkeeping, reporting, and enforceability requirements. EPA proposed to disapprove specific startup, shutdown and malfunction (SSM) provisions in the State's regional haze Consent Agreements with Westar Energy and Kansas City Power and Light that were submitted as part of the regional haze SIP. The State commented that EPA's proposed exclusion of periods of SSM from the Consent Agreements has the effect of making the BART emission limits more stringent. The State requested that EPA consider fully

approving the SIP revision. Kansas City Power and Light commented that the proposed approval of the Kansas Regional Haze SIP excluding the SSM provisions fundamentally changes the basis of the emission limits, and because the SSM provisions were agreed to through good faith negotiations with the State, Kansas City Power and Light asked that the Agreements be renegotiated. Westar Energy made similar comments, disagreeing with the proposed disapproval of the SSM provisions in the Consent Agreement between the State and Westar Energy.

Response #4: As EPA explained in the proposed notice, the Consent Agreements exempted periods of startup and shutdown for both Kansas City Power and Light and Westar Energy from compliance with applicable emission limits, which were not narrowly defined, and exempted periods of malfunction for Westar Energy. EPA proposed to disapprove the exemptions because they are inconsistent with the Clean Air Act and EPA's September 20, 1999, guidance, ''State Implementation Plans: Policy Regarding Excess Emissions during Malfunctions, Startup and Shutdown.'' [1]

EPA subsequently received a letter from the State dated December 1, 2011, withdrawing the SSM provisions in the Consent Agreements in their entirety from the regional haze SIP. Specifically, the following four provisions were withdrawn from EPA's consideration for approval in the regional haze SIP:

1. All references to, ''excluding periods of startup and shutdown'' in Paragraph 23 of the Kansas City Power and Light Company regional haze agreement;

2. The reference to, ''excluding periods of startup, shutdown and malfunction'' in footnote 1 of Appendix A to the Westar Energy, Inc. regional haze agreement;

3. All references to, ''excluding periods of startup and shutdown'' in Chapter 9.3.1 of the Kansas regional haze SIP;

4. And the sentence, ''The Agreements between KDHE and the affected BART sources currently exclude emissions associated with startup, shutdowns, and malfunctions (SSM) in the agreed upon emission limits'' in Chapter 9.5 of the Kansas regional haze SIP.

Since the SSM provisions were withdrawn by the State, and are therefore no longer before EPA, neither EPA's proposed disapproval of these exemptions nor the comments on that proposed disapproval are relevant to this final action.

Comment #5: NPCA commented that Kansas' regional haze plan is incomplete and insufficient, because of what NPCA considers an incomplete five step BART analysis at Westar Energy Jeffrey Energy Center Units 1 and 2, and at Kansas City Power and Light La Cygne Units 1 and 2. NPCA states that requiring presumptive limits does not negate the need for a State to determine BART for each source subject to BART on a case-by-case basis through a five factor analysis. NPCA stated that the most stringent emissions rate the various technologies are capable of achieving needs to be analyzed for cost and visibility improvement in order to make an adequate BART determination. NPCA offered a number of specific comments about these units, which are listed and addressed separately below.

NPCA asserted that selective catalytic reduction (SCR) is a cost-effective technology to control NO_X emissions. As such, NPCA believes that SCR should be required as BART for Westar Energy Jeffrey Units 1 and 2. The original BART analysis for these units examined SCR at an emission rate of 0.10 lbs/MMBtu and determined that the cost effectiveness was $2,211/ton of NO_X removed and $1,738/ton of NO_X removed for Units 1 and 2, respectively. NPCA states that these costs, while reasonable, are improperly inflated due to the State's low control efficiency assumptions; and that SCR is capable of achieving a lower emissions rate than what the State assumed in its BART analysis, such as 0.05 lbs/MMBtu.

Response #5: On December 1, 2011, the State provided supplemental information on incremental cost and visibility improvement for various control strategies for Westar Energy Jeffrey Energy Center Units 1 and 2, and Kansas City Power and Light La Cygne Units 1 and 2. This information is available in the docket for this rulemaking. The supplemental dispersion modeling provided by the State was conducted with the CALPUFF model using the same inputs that were used during the original BART analysis, except that the emissions rates were changed to determine visibility improvement from various control options. Visibility impacts were evaluated at five Class I areas: Caney Creek and Upper Buffalo in Arkansas, Hercules Glades and Mingo in Missouri, and Wichita Mountains in Oklahoma. The State also obtained or developed annualized costs for the additional equipment that would be required to be installed in order to achieve lower emission rates.

The BART cost analysis for SCR at Jeffrey Units 1 and 2 was performed based on an emission limit of 0.10 lbs/MMBtu, which is within the range of effectiveness that the State believed to be reasonable as a retrofit control on older tangential-fired units. The State assumed a control efficiency of 79–80 percent, which is in the mid-range of control efficiencies demonstrated for SCR, as noted by NPCA in their comments. EPA believes the State's decision to choose a control efficiency within the middle of the range for the purpose of estimating cost is a reasonable approach and is acceptable according to the BART Guidelines.[2] In the BART analysis, SCR operated at a rate of 0.10 lbs/MMBtu was evaluated for incremental cost improvements and was excluded as BART based on the high incremental cost for the associated low incremental visibility improvements.

The State subsequently provided additional cost and visibility information for SCR at Jeffrey Units 1 and 2, assuming an emissions rate of 0.08 lbs/MMBtu. The State asserted that the 0.05 lb/MMBtu rate was not reasonable to evaluate as retrofit for 35 year old tangential-fired units. The difference in modeled impact for Jeffrey Unit 1 between the SCR scenario (0.08 lbs NO_X/MMBtu) and the low NO_X burner (LNB) scenario (0.15 lbs NO_X/MMBtu) at Hercules Glades, the most impacted Class I area, is 0.048 deciviews (dv) of additional improvement. The difference in the cumulative improvement across all five Class I areas for this scenario is 0.161 dv. The annualized incremental cost of these controls is $13,362,820 in 2005 dollars, which we calculated to be $5,374 per ton.

The use of SCR at Jeffrey Unit 2 has similar incremental costs as for Jeffrey Unit 1, but less visibility improvement. Incremental visibility improvement resulting from tightening the presumptive NO_X rate of 0.15 lbs/MMBtu to a rate of 0.08 lbs/MMBtu is 0.042 dv at Upper Buffalo, and 0.153 dv cumulatively across the five Class I areas. The incremental annual cost of these controls is $13,345,950, for an incremental cost per ton of $5,367.

The State concluded that these additional NO_X reduction costs are high

[1] Steven Herman, Assistant Administrator for Enforcement and Compliance Assurance, and Robert Perciasepe, Assistant Administrator for Air and Radiation, ''State Implementation Plans (SIPs): Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown,'' September 20, 1999; and 52 FR (45109 November 24, 1987).

[2] 40 CFR part 51, Appendix Y: Guidelines for BART Determinations Under the Regional Haze Rule.

for the associated low incremental visibility improvements for Jeffrey Units 1 and 2, and changes to the proposed BART emission limits are not warranted. EPA agrees that based on the low visibility improvements and high costs of additional control, it is reasonable to determine that no changes to the proposed BART emission limits are warranted. It is also consistent with the BART Guidelines, which provide the State flexibility to determine the weight and significance of the five factors. EPA finds little support in the State's information for the statement that a rate of 0.05 lbs/MMBtu is not reasonable to evaluate for older tangential-fired units. However, it is reasonable to conclude that the costs and visibility improvement of SCR operated at a rate of 0.05 lbs/MMBtu would lead to a similar conclusion that the additional costs would be high for the associated low incremental visibility improvement. Therefore, EPA finds that no changes to the BART determinations or to the SIP are needed in response to this comment.

In addition, EPA notes that following the State's BART determinations and submission of the regional haze SIP, Westar Energy, EPA, and the State entered into a Federal Consent Decree in resolution of alleged violations of the Clean Air Act.[3] Under the Consent Decree, Westar Energy is required to install an SCR on Jeffrey Unit 1, 2, or 3 by December 31, 2014 in order to achieve and maintain a 30-day rolling average unit emission rate for NO_X of no greater than 0.080 lbs/MMBtu. By December 31, 2012 Westar Energy must elect to install a second SCR on one of the other two Jeffrey units, or meet a 0.100 lbs/MMBtu plant-wide 12-month rolling average emission rate for NO_X. If Westar Energy elects to install the second SCR, it is to be installed by December 31, 2016 to achieve and maintain a 30-day rolling average unit emission rate for NO_X of no greater than 0.070 lbs/MMBtu. Additionally, the Jeffrey plant must comply with a plant-wide 12 month rolling tonnage limitation of 9600 tons. Therefore, following implementation of the regional haze requirements and the Consent Decree provisions, the Westar Jeffrey Units will be well controlled for NO_X.

Comment #6: NPCA commented that overfire air and selective non-catalytic reduction (SNCR) were determined to be feasible technologies during the BART analysis, but were not evaluated for cost or visibility impacts at Jeffrey Units 1 and 2. NPCA commented that LNB or ultra LNB with SCR was likewise not evaluated, despite the BART analysis noting that such combinations can achieve reductions up to 97 percent.

Response #6: Overfire air was considered along with LNB, so this combination of controls was included in the cost and visibility analysis submitted by the State. Likewise, LNB was included with the consideration of SCR, as it makes the SCR less expensive to build.

The State subsequently provided cost and visibility information for SNCR operated at 0.10 lbs/MMBtu at these units. For Jeffrey Unit 1, the change in visibility improvement between the SNCR scenario (0.10 lbs NO_X/MMBtu) and the LNB scenario (0.15 lbs NO_X/MMBtu) at Hercules Glades was 0.030 dv. The difference in the cumulative improvement across all five Class I areas for this scenario was 0.090 dv. The annual incremental cost of these controls is $3,103,877, for an incremental cost per ton of $1,748.

The results for SNCR at Jeffrey Unit 2 are similar—0.020 dv of improvement at Wichita Mountains and 0.080 dv cumulative improvement across all five Class I areas. The annual incremental cost of these controls is $3,103,877, for an incremental cost per ton of $1,478.

The State concluded that the additional NO_X reduction costs are high for the associated low incremental visibility improvements for Jeffrey Units 1 and 2, and do not warrant changes to the proposed BART controls. Although the costs are likely cost effective on a per ton basis, the BART Guidelines provide the State flexibility to determine the weight and significance of the five factors, and EPA agrees that the State reasonably determined that the costs of further control are not warranted based on the low additional visibility improvements. Therefore, EPA finds that no changes to the BART determinations or to the SIP are needed in response to this comment.

Comment #7: NPCA commented that the BART determinations for La Cygne Units 1 and 2 were flawed due to an incomplete analysis of SCR and other NO_X control options. La Cygne Unit 1 has an existing SCR, but NPCA asserted that the most stringent rate the SCR is capable of achieving at Unit 1 was not analyzed. NPCA commented that a control technology has not actually been selected for Unit 2; rather, an overall emissions rate was established as BART. NPCA claims that SCR with the lowest achievable emissions rate should be evaluated as BART for Unit 2 and would likely be shown to be cost effective. NPCA commented that other combinations of NO_X controls should also be evaluated for Unit 2, including overfire air, LNB, and the combination of SCR with feasible combustion controls.

Response #7: The State's evaluation of the BART analysis for La Cygne Units 1 and 2 for NO_X resulted in the decision that establishing a combined emissions limit for both units with a rate of 0.13 lbs/MMBtu was BART.

For Unit 1, as a part of the BART analysis, the State reviewed EPA's Clean Air Markets Division and the Energy Information Agency's databases for emissions data on cyclone boilers equipped with SCR technology. A relatively small number of cyclone boilers were so equipped at that time and their emission rates varied both above and below the presumptive NO_X rate. Based on this information, the State determined that a rate of 0.10 lbs/MMBtu was a reasonably stringent rate to evaluate for the existing control.

NPCA is correct that SCR was not specified as BART for Unit 2; rather, a combined rate for La Cygne Units 1 and 2 was specified as BART. While a range of control technologies must be evaluated in order to make a BART determination, EPA believes that it is acceptable to establish an enforceable emission limit as BART, rather than specifying a control technology to achieve it.

The State subsequently provided additional visibility and cost information to show the incremental visibility improvement that would result from requiring lower NO_X emission rates for Unit 2. The annualized cost for SCR on Kansas City Power and Light La Cygne Unit 2 was obtained from Table 5.5 of the BART analysis.[4] The State claimed that in order to achieve a lower emissions rate, the size of the SCR would need to be scaled up, resulting in concurrent increases in electrical demand, in raw materials, and maintenance. The incremental annualized cost for these additional capital and operational costs was estimated to be 20 percent greater than the initial cost projection for the SCR. The change in visibility improvement between the proposed BART emission rate (0.23 lbs NO_X/MMBtu) and the Unit 2 SCR scenario (0.08 lbs NO_X/MMBtu) was 0.082 dv for Upper Buffalo. The difference in the cumulative improvement across all five Class I areas is 0.25 dv. The annualized incremental cost of controls in this

[3] *United States and Kansas* v. *Westar Energy, Inc.,* Civil Action No. 09–CV–2059 JAR/DJW (D. Kan. March 26, 2010).

[4] BART Five Factor Analysis for Kansas City Power and Light La Cygne Generating Station, prepared by Trinity Consultants, August 2007.

scenario is $2,981,706, for an incremental cost per ton of $548.

As with the Jeffrey units, overfire air was considered along with LNB, so this combination of control technologies has already been evaluated.

The annualized cost for SNCR control on Kansas City Power and Light La Cygne Unit 2 was determined by using SNCR costs obtained from Jeffrey Unit 1, and scaling the dollar amount using heat input and NO_X rates. The change in visibility improvement between the proposed BART emissions rate (0.23 lbs NO_X/MMBtu) and the Unit 2 SNCR scenario (0.14 lbs NO_X/MMBtu) is 0.044 dv for Hercules Glades. The difference in the cumulative improvement across all five Class I areas is 0.12 dv. The annualized incremental cost of controls in this scenario is $972,747, for an incremental cost per ton of $298.

The State concluded that the additional NO_X reduction costs are high for the associated low incremental visibility improvements for La Cygne Units 1 and 2, and do not warrant changes to the proposed BART controls. The BART Guidelines provide the State the flexibility to determine the weight and significance of the five factors. Although the costs appear to be reasonable on a cost per ton basis, EPA has some concern with the scaling methodology utilized by the State to arrive at cost estimates for the lower NO_X rates. However, given the low visibility improvements associated with the additional control, EPA agrees it is reasonable to determine that the costs of further control are not warranted and no changes to the BART determinations or to the SIP are needed in response to this comment.

EPA also notes that since the time of the State's BART determinations and submission of the regional haze SIP, Kansas City Power and Light applied for a permit to install SCR on La Cygne Unit 2. The permit was effective March 16, 2011.[5] In order for the permit to remain valid, Kansas City Power and Light must commence construction within 18 months of the permit's effective date (by September 2012).

Comment #8: NPCA commented that while La Cygne Units 1 and 2 and Jeffrey Units 1 and 2 have proposed to either install or upgrade scrubbers at all four units to control SO_2 emissions, the State's analysis was incomplete in that it lacked an evaluation of the most stringent emission limits the technology is capable of achieving. NPCA claims that scrubbers, both wet and dry, are capable of emission reductions below the proposed BART emission rates of 0.15 lbs/MMBtu at Jeffrey and 0.10 lbs/MMBtu at La Cygne. NPCA suggests that scrubbers are capable of achieving 0.03 to 0.05 lbs/MMBtu at each unit.

Response #8: The State's evaluation of the BART analysis for Jeffrey Units 1 and 2 for SO_2 resulted in the determination that rebuilding the existing wet scrubber units and meeting a rate of 0.15 lbs/mmBtu was BART. The State did not believe that it was feasible to achieve an emissions rate of 0.05 lbs/MMBtu with rebuilt technology, so costs and visibility improvements were subsequently provided for the installation of a new scrubber operating at 0.05 lbs/MMBtu for both Jeffrey units. The State obtained annualized costs for new scrubbers on Jeffrey Units 1 and 2 from Westar Energy. The change in visibility improvement between the new wet scrubber scenario (0.05 lbs SO_2/MMBtu) and the proposed BART emission limit (0.15 lbs SO_2/MMBtu) for Jeffrey Unit 1 was 0.052 dv at Hercules Glades. The difference in the cumulative improvement across all five Class I areas is 0.168 dv. The annualized incremental cost of controls in this scenario is $23,567,203, for an incremental cost per ton of $6,635.

The differences for Jeffrey Unit 2 under these scenarios are comparable to Unit 1—0.057 dv improvement at Hercules Glades, and 0.160 cumulatively. The annualized incremental cost of controls in this scenario was $23,567,203, for an incremental cost per ton of $6,635.

The State concluded that the additional SO_2 reduction costs are high given the low incremental visibility improvements for Jeffrey Units 1 and 2, and do not warrant changes to the proposed BART emission rates. EPA has some concern with the assumptions used by the State in arriving at the cost estimates, however, given the very low visibility improvement modeled for the additional control, consistent with the BART Guidelines which provide the State flexibility to determine the weight and significance of the five factors, EPA agrees it is reasonable to determine that the costs of further control are not warranted and no changes to the BART determinations or to the SIP are needed in response to this comment.

EPA also notes, as was referenced above, since the time of the State's BART determinations and submission of the regional haze SIP, Westar Energy, EPA and the State entered into a Federal Consent Decree in resolution of alleged violations of the Clean Air Act. The Consent Decree requires that Jeffrey Units 1 and 2 each meet a 30-day rolling average unit removal efficiency for SO_2 of at least 97 percent or a 30-day rolling average unit emission rate for SO_2 of 0.070 lbs/MMBtu. Therefore, following implementation of the regional haze requirements and the Consent Decree, Jeffrey Units 1 and 2 will be well controlled for SO_2.

The State's evaluation of the BART analysis for La Cygne Units 1 and 2 for SO_2 resulted in the determination that a combined emissions limit for both units at rate of 0.10 lbs/MMBtu was BART. Unit 1 has an existing scrubber that will be modified to separate the PM control from the SO_2 control resulting in increased SO_2 removal efficiency. Unit 2, which did not have an existing scrubber, will be retrofitted with a new scrubber. The combined BART emission rate chosen for SO_2 controls is within the range of expected removal efficiencies, considering one unit is a retrofitted scrubber.

The State subsequently provided additional cost and visibility information to further evaluate lower SO_2 emission rates. The State estimated the incremental annualized cost estimate to be 20 percent greater than the initial cost projection for the scrubber, because of the increased electrical demand, raw material costs, and maintenance costs associated with achieving a more stringent emissions rate.

For the Unit 1 scrubber at La Cygne, the change in visibility improvement from the presumptive BART emissions rate (0.15 lbs SO_2/MMBtu) to a lower rate (0.05 lbs SO_2/mmBtu) is 0.04 dv at Caney Creek. The difference in the cumulative improvement across all five Class I areas for this scenario is 0.12 dv. The annualized incremental cost of controls in this scenario is $6,098,239, for an incremental cost per ton of $1,495. The La Cygne Unit 2 scrubber scenario is comparable: 0.04 dv improvement at Hercules Glades, and 0.097 dv cumulative improvement. The annualized incremental cost of controls in this scenario is $5,427,642, for an incremental cost per ton of $1,495.

The State concluded that the additional SO_2 reduction costs are high given the associated low incremental visibility improvements for La Cygne Units 1 and 2, and changes to the proposed BART controls are not warranted. Although the costs appear to be reasonable on a cost per ton basis, EPA has some concern with the scaling methodology utilized by the State to arrive at the cost estimates for the lower SO_2 rate. However, given the low additional visibility improvement, consistent with the BART Guidelines

[5] Construction Permit issued to Kansas City Power and Light Company for the La Cygne Generating Station. Permit effective March 16, 2011.

which provide the State flexibility to determine the weight and significance of the five factors, EPA agrees it is reasonable to determine that the costs of further control are not warranted and no changes to the BART determinations or to the SIP are needed in response to this comment.

Comment #9: NPCA commented that the proposed SIP fails to address cumulative impact of Kansas BART sources on all Class I areas impacted. NPCA says that the modeling results presented in the proposed approval do not provide for a determination of the cumulative impact from Jeffrey Units 1 and 2 or La Cygne Units 1 and 2. NPCA notes that the four BART units mentioned above impact nine Class I areas, but the State only provided visibility information for five Class I areas.

Response #9: In order to keep the size of the modeling domain manageable, the State chose to conduct refined modeling on the five most impacted Class I areas. Given the level of the modeled impacts at these five Class I areas, EPA does not believe that the State was unreasonable in streamlining its modeling exercise to exclude the other four Class I areas from its visibility analysis. Given the overall modeled impacts at the most impacted Class I areas, taking into account the impacts at the other four areas would have been unlikely to significantly change the State's conclusions about BART emission limits. Therefore, EPA believes that no changes to the BART determinations or to the SIP are needed in response to this comment.

III. Final Action

EPA is taking final action to approve the State of Kansas' Regional Haze SIP, submitted on November 9, 2009, with supplemental information provided in December 2011, including a letter dated December 1, 2011, in which the State withdrew specific SSM provisions of the regional haze SIP from EPA's consideration. EPA finds that the Kansas regional haze SIP submittal meets all of the applicable Regional Haze requirements set forth in section 169A and 169B of the Act and in the Federal regulations codified at 40 CFR 51.300–308, and the requirements of 40 CFR Part 51, Subpart F and Appendix V.

IV. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve State choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves State law as meeting Federal requirements and does not impose additional requirements beyond those imposed by State law. For that reason, this action:

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' This rule does not have tribal implications, as specified in Executive Order 13175. It will not have substantial direct effects on tribal governments. Thus, Executive Order 13175 does not apply to this rule.

List of Subjects in 40 CFR Part 52

Air pollution control, Environmental protection, Incorporation by reference, Intergovernmental relations, Nitrogen oxides, Particulate matter, Reporting and recordkeeping requirements, Sulfur dioxide, Volatile organic compounds.

Dated: December 15, 2011.

Karl Brooks,

Regional Administrator, Region 7.

40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

■ 1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart R—Kansas

■ 2. In § 52.870:

■ a. The table in paragraph (d) is amended by revising the table headings and adding entries (3) and (4) in numerical order.

■ b. The table in paragraph (e) is amended by adding entry (33) in numerical order.

The revisions and additions read as follows:

§ 52.870 Identification of plan.

* * * * *

(d) * * *

EPA—APPROVED KANSAS SOURCE—SPECIFIC REQUIREMENTS

Name of source	Permit or case No.	State effective date	EPA approval date	Explanation
*	*	*	*	*
(3) Kansas City Power and Light Company.	.....	12/5/07	12/27/11, [Insert **Federal Register** citation].	Certain provisions withdrawn from plan as identified in letter dated 12/1/11 from Kansas.

EPA—APPROVED KANSAS SOURCE—SPECIFIC REQUIREMENTS—Continued

Name of source	Permit or case No.	State effective date	EPA approval date	Explanation
(4) Westar Energy, Inc		2/29/08	12/27/11, [Insert **Federal Register** citation].	Certain provisions withdrawn from plan as identified in letter dated 12/1/11 from Kansas.
* *	*	*	*	*

* * * * * (e) * * *

EPA—APPROVED KANSAS NONREGULATORY PROVISIONS

Name of nonregulatory SIP provision	Applicable geographic or non-attainment area	State submittal date	EPA approval date	Explanation
* *	*	*	*	* *
(33) Regional Haze Plan for the first implementation period.	Statewide	11/9/09	12/27/11, [Insert **Federal Register** citation].	Certain provisions withdrawn from plan as identified in letter dated 12/1/11 from Kansas.

[FR Doc. 2011–32998 Filed 12–23–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 97

[EPA–HQ–OAR–2009–0491; FRL–9609–9]

RIN 2060–AR01

Federal Implementation Plans for Iowa, Michigan, Missouri, Oklahoma, and Wisconsin and Determination for Kansas Regarding Interstate Transport of Ozone

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: In this final rule, EPA is concluding that emissions from Iowa, Kansas, Michigan, Missouri, Oklahoma, and Wisconsin significantly contribute to downwind nonattainment or interfere with maintenance of the 1997 ozone National Ambient Air Quality Standards (NAAQS)in other states. Each of these states except Oklahoma is already included in the annual NO_X program that was finalized in July 2011. However, this rule does not affect that program.

EPA is finalizing Federal Implementation Plans (FIPs) to address the emissions in each of these states except for Kansas, for which EPA is not finalizing a FIP at this time. The FIPs apply the requirements of the ozone season NO_X program in the Transport Rule (Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone in 27 States; Correction of SIP Approvals for 22 States) to sources in Iowa, Michigan, Missouri, Oklahoma, and Wisconsin. In addition, this action finalizes the budgets; associated variability limits, new unit set-asides, and Indian country new unit set-asides; and unit-level allowance allocations for each state under the FIPs.

DATES: This final rule is effective on January 26, 2012.

ADDRESSES: EPA has established a docket for this action under Docket ID No. OAR–EPA–HQ–OAR–2009–0491. All documents in the docket are listed on the *http://www.regulations.gov* Web site. Although listed on the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at the EPA Docket Center, EPA West, Room B102, 1301 Constitution Ave. NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742. This Docket Facility is open from 8 a.m. to 5:30 p.m., Monday through Friday, excluding legal holidays. The Docket telephone number is (929) 566–1742, fax (202) 566–1741.

FOR FURTHER INFORMATION CONTACT: For general questions concerning this action, contact Ms. Gabrielle Stevens, Clean Air Markets Division, Office of Atmospheric Programs, Mail Code 6204J, Environmental Protection Agency, 1200 Pennsylvania Avenue NW., Washington, DC 20460; telephone number: (202) 343–9252; fax number: (202) 343–2356; email address: *stevens.gabrielle@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Glossary of Terms and Abbreviations

The following are abbreviations of terms used in final rule:

CFR Code of Federal Regulations
EGU Electric Generating Unit
FIP Federal Implementation Plan
FR **Federal Register**
EPA U.S. Environmental Protection Agency
ICR Information Collection Request
NAAQS National Ambient Air Quality Standards
NODA Notice of Data Availability
NO_X Nitrogen Oxides
SIP State Implementation Plan
OMB Office of Management and Budget
$PM_{2.5}$ Fine Particulate Matter, Less Than 2.5 Micrometers
PM Particulate Matter
RIA Regulatory Impact Analysis
SNPR Supplemental Notice of Proposed Rulemaking
SO_2 Sulfur Dioxide
TSD Technical Support Document

II. General Information

A. Does this action apply to me?

Regulated Entities. Entities regulated by this action primarily are fossil fuel-

fired boilers, turbines, and combined cycle units that serve generators that produce electricity for sale or cogenerate electricity for sale and steam. Regulated categories and entities include:

Category	NAICS code	Examples of potentially regulated industries
Industry	2211, 2212, 2213	Electric service providers.

This table is not intended to be exhaustive, but rather to provide a guide for readers regarding entities likely to be regulated by this action. This table lists the types of entities which EPA is now aware could potentially be regulated by this action. Other types of entities not listed in this table could also be regulated. To determine whether your facility, company, business, organization, *etc.,* is regulated by this action, you should carefully examine the applicability criteria in §§ 97.404, 97.504, and 97.604 of title 40 of the Code of Federal Regulations. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

B. Where can I get a copy of this document and other related information?

In addition to being available in the docket, an electronic copy of this rule will also be available on the World Wide Web. Following signature by the EPA Administrator, a copy of this action will be posted on the EPA Web site at *http://www.epa.gov/crossstaterule.*

C. How is the preamble organized?

I. Glossary of Terms and Abbreviations
II. General Information
III. Executive Summary
A. EPA's Authority for This Rule
B. Finalizing FIPs To Address Significant Contribution to Nonattainment and Interference With Maintenance in:
i. Iowa
ii. Michigan
iii. Missouri
iv. Oklahoma
v. Wisconsin
C. Kansas
D. Allegan County, Michigan, Receptor
E. Ozone Season NO_X Emission Budgets for Five States
F. Implementation of the Transport Rule NO_X Ozone Season Trading Program
IV. Statutory and Executive Order Reviews
A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review
B. Paperwork Reduction Act
C. Regulatory Flexibility Act
D. Unfunded Mandates Reform Act
E. Executive Order 13132: Federalism
F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments
G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks
H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution or Use
I. National Technology Transfer Advancement Act
J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations
K. Congressional Review Act
L. Judicial Review

III. Summary

In this final rule, EPA finalizes its conclusion that Iowa, Kansas, Michigan, Missouri, Oklahoma, and Wisconsin significantly contribute to nonattainment or interfere with maintenance of the 1997 ozone National Ambient Air Quality Standards (NAAQS) in other states. These states' final ozone-season NO_X budgets are presented and discussed in section III.E below, and more detailed information can be found in the ''Determination of State Budgets for the Final Ozone Supplemental of the Transport Rule'' TSD found in the docket for this rulemaking.

In addition, EPA is finalizing FIPs to address the interstate transport requirements of the relevant NAAQS using a program created in the Transport Rule[1] that was finalized on July 6, 2011 (76 FR 48208, August 8, 2011). EPA is implementing the ozone season NO_X program in the Transport Rule (with minor revisions) as the FIPs for Iowa, Michigan, Missouri, Oklahoma, and Wisconsin to address the emissions identified as significantly contributing to nonattainment or interfering with maintenance with respect to the 1997 ozone NAAQS. With respect to Kansas, EPA is not finalizing the proposed FIP because we do not have the authority to do so at this time, as discussed in section III.C below.

As explained in the final Transport Rule preamble (76 FR 48208), EPA improved and updated both steps of its significant contribution analysis from the Transport Rule proposal. EPA updated its modeling platforms and modeling inputs in response to public comments received on the proposed Transport Rule and subsequent Notices of Data Availability (NODAs), and performed other standard updates. It updated and improved the modeling platforms and modeling inputs used to identify states with contributions to certain downwind receptors that meet or exceed specified air quality thresholds. It also updated and improved its analysis for identifying any emissions within such states that constitute the state's significant contribution to nonattainment or interference with maintenance. Therefore, the results of the analysis conducted for the final Transport Rule differed somewhat from the results of the analysis conducted for the proposal.

With respect to the 1997 ozone NAAQS, the analysis EPA conducted for the Transport Rule proposal did not identify Wisconsin, Iowa, and Missouri as states that significantly contribute to nonattainment and/or interfere with maintenance of the ozone NAAQS in another state. However, the analysis conducted for the final Transport Rule showed that emissions from these three states interfere with maintenance of the ozone NAAQS in another state. The analysis also showed that emissions from Missouri significantly contribute to nonattainment in another state. Additionally, the analysis identified two ozone maintenance receptors that were not identified by the modeling conducted for the proposal. These two ozone maintenance receptor sites are located in Allegan County, Michigan and Harford County, Maryland. Five states (Iowa, Kansas, Michigan, Oklahoma, and Wisconsin), which EPA identified as interfering with maintenance problems at the Allegan County and/or Harford County receptors, based on modeling for the final rule, uniquely contribute to these receptors, *i.e.,* absent these receptors the states would not be covered by the Transport Rule ozone-season program (although the states, except for Oklahoma, are covered by the Transport Rule annual programs). EPA did not issue FIPs with respect to the 1997 ozone NAAQS or finalize ozone season

[1] Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone in 27 States; Correction of SIP Approvals for 22 States: Final Rule. Available on the Web at *http://www.epa.gov/crossstaterule.*

NO_X budgets for these states in the final Transport Rule. Instead, EPA published a supplemental notice of proposed rulemaking (76 FR 40662) to provide an opportunity for public comment on our conclusion that these states significantly contribute to nonattainment or interfere with maintenance of the 1997 ozone NAAQS.

EPA did not change its methodology between the proposed Transport Rule and the final Transport Rule for identifying upwind states that significantly contribute to nonattainment or interfere with maintenance in other states; nor did EPA change its methodology for identifying receptors of concern with respect to maintenance of the 1997 ozone NAAQS. The final Transport Rule's air quality modeling identified the new states and new receptors described above based on modeling using updated input information (including emission inventories), much of which was provided to EPA through public comment on the proposal and subsequent NODAs.

In the proposal for this supplemental rulemaking, EPA took comment only on (a) its conclusions that the six states identified above have emissions that significantly contribute to nonattainment and/or interfere with maintenance of the 1997 ozone NAAQS and (b) its decision to use the final Transport Rule programs as the FIPs to address these emissions in the six states.

EPA did not reconsider or take comment on any aspect of the final Transport Rule, including any aspect of the methodology used to identify receptors for nonattainment; the methodology used to identify receptors for maintenance; the methodology used to identify any specific state's significant contribution and interference with maintenance; the methodologies used to establish state budgets, variability limits, and state assurance levels; and the methodologies used to allocate allowances to existing units, to establish new unit set-asides and Indian country new unit set-asides, and to allocate allowances in these set-asides. EPA provided an adequate opportunity for public comment on all of these issues during the comment period for the proposed Transport Rule and during the comment periods for the associated NODAs.[2] EPA received numerous comments on the proposed Transport Rule and on the associated NODAs and considered all significant comments received during the comment periods for these actions before finalizing the Transport Rule. Responses to those comments are available in the public docket for the final Transport Rule.

In the proposal for this rulemaking, EPA also did not reconsider or take comment on the emission inventories used for the final Transport Rule modeling, including the emission inventories for the six states identified above. EPA provided ample opportunity for comment on these inventories during the comment period for the proposed Transport Rule and the comment periods for the NODAs associated with that proposal. Inventories for all states included in the modeling domain were made available for public comment during that process. The public had ample reason to comment on the inventories for these six states, moreover, not only because these inventories affect the modeling for all states in the modeling domain, but also because EPA was proposing to include all six states in at least one of the Transport Rule trading programs and the inventories were used in the analysis supporting that proposal. For instance, EPA proposed to include Kansas and Michigan in the ozone-season NO_X, annual NO_X, and annual SO_2 programs; proposed to include Oklahoma in the ozone-season NO_X program; and proposed to include Iowa, Missouri, and Wisconsin in the SO_2 and annual NO_X programs. Commenters therefore had reason to look closely at all of the emission data for all six states that EPA made available in the proposal and the NODAs. Ultimately, EPA made numerous changes to these inventories in response to public comments.

A. EPA's Authority for this Rule

The statutory authority for this action is provided by the CAA, as amended, 42 U.S.C. 7401 *et seq.* Section 110(a)(2)(D) of the CAA, often referred to as the ''good neighbor'' provision of the Act, requires states to prohibit certain emissions because of their impact on air quality in downwind states. Specifically, it requires all states, within 3 years of promulgation of a new or revised NAAQS, to submit SIPs that prohibit certain emissions of air pollutants because of the impact they would have on air quality in other states. 42 U.S.C. § 7410(a)(2)(D). Section 301(a)(1) of the CAA gives the Administrator of EPA general authority to prescribe such regulations as are necessary to carry out her functions under the Act. 42 U.S.C. 7601(a)(1). Section 110(c)(1) requires the Administrator to promulgate a FIP at any time within 2 years after the Administrator (a) finds that a state has failed to make a required SIP submission or that such a submission is incomplete or (b) disapproves a SIP submission, unless the state corrects the deficiency and the Administrator approves the SIP revision. 42 U.S.C. 7410(c)(1). Tribes are not required to submit state implementation plans. However, as explained in EPA's regulations outlining Tribal Clean Air Act authority, EPA is authorized to promulgate FIPs for Indian country as necessary or appropriate to protect air quality if a tribe does not submit and obtain EPA approval of an implementation plan. *See* 40 CFR 49.11(a).

For each FIP in this rule, EPA either (a) found that the state has failed to make a required section 110(a)(2)(D)(i)(I) SIP submission or (b) disapproved a SIP submission. In addition, EPA has determined, in each case, that there has been no approval by the Administrator of a SIP submission correcting the deficiency prior to promulgation of the FIP. EPA's obligation to promulgate a FIP arose when the finding of failure to submit or disapproval was made, and in no case has it been relieved of that obligation. (The specific findings made and actions taken by EPA are described in greater detail in the TSD entitled ''Status of CAA 110(a)(2)(D)(i)(I) SIPs Supplemental Rule TSD,'' which is available in the public docket for this rule.)

As noted in the SNPR, EPA proposed a SIP Call under CAA 110(k)(5) for Kansas (76 FR 763, January 6, 2011), based on its conclusion that Kansas significantly contributes to nonattainment or interferes with maintenance of the 1997 ozone NAAQS. On March 9, 2007, EPA approved a section 110(a)(2)(D)(i) SIP submission from the state of Kansas for the 1997 ozone and 1997 $PM_{2.5}$ NAAQS (72 FR 10608, March 9, 2007). This SIP submission did not rely on compliance with the Clean Air Interstate Rule

[2] Notice of Data Availability Supporting Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone (75 FR 53613; September 1, 2010). This NODA provided additional information on an updated version of the power sector modeling platform and data inputs EPA proposed to use to support the final Transport Rule.

Notice of Data Availability Supporting Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone: Revisions to Emission Inventories (75 FR 66055; October 27, 2010).

Notice of Data Availability for Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone: Request for Comment on Alternative Allocations, Calculation of Assurance Provision Allowance Surrender Requirements, New-Unit Allocations in Indian Country, and Allocations by States (76 FR 1109; January 7, 2011).

(CAIR)[3] to satisfy the requirements of section 110(a)(2)(D)(i)(I). The analysis for the proposed Transport Rule, however, demonstrated that emissions from Kansas significantly contribute to nonattainment or interfere with maintenance of the 1997 ozone NAAQS in other states. Because the approved Kansas SIP does not prohibit these emissions, EPA proposed to find it substantially inadequate to meet the requirements of section 110(a)(2)(D)(i)(I) with respect to the 1997 ozone NAAQS. EPA intends to take final action on this proposal concurrent with this action or shortly thereafter. See section C below for more information on Kansas.

The five states addressed in this final rule for which EPA's analysis identifies the state's full reduction responsibility under section 110(a)(2)(D)(i)(I) with respect to the 1997 ozone NAAQS are Iowa, Kansas, Michigan, Oklahoma, and Wisconsin. The one state addressed in this final rule for which EPA's analysis identifies reductions that are necessary but may not be sufficient to satisfy section 110(a)(2)(D)(i)(I) with respect to the 1997 ozone NAAQS is Missouri. This is because, in the final Transport Rule air quality modeling control scenario in 2014, Missouri is estimated to be significantly contributing to residual nonattainment and/or interfering with residual maintenance at receptors in Brazoria and Harris Counties (Houston) in Texas, and Houston is the only area projected to remain in nonattainment in 2014. As described in the final Transport Rule (TR) preamble (*e.g.,* Page 48210) 76 FR 48208, August 8, 2011, only one area (Houston) is projected to remain in nonattainment for the 1997 ozone NAAQS in 2014 with the Transport Rule in place. For the upwind states linked to the receptors in this area (including Missouri), additional reductions may be necessary to fully eliminate each state's significant contribution to nonattainment and/or interference with maintenance. .Missouri was also found to contribute above the threshold to the new maintenance receptor, Allegan County, Michigan.[4]

EPA has not yet determined whether additional reductions in ozone-forming emissions are necessary to address Missouri's significant contribution to downwind nonattainment and interference with maintenance, which may not be fully quantified in this rulemaking with respect to the 1997 ozone NAAQS. Additional technical analysis will be necessary to complete this determination. See section B.iii below for further discussion.

B. Finalizing FIPs to Address Significant Contribution to Nonattainment and Interference with Maintenance

EPA concludes in this final rule that application of the methodologies to identify nonattainment and maintenance receptors and to determine significant contribution to nonattainment and interference with maintenance with respect to the 1997 ozone NAAQS, as described in the final Transport Rule, demonstrates that Iowa, Kansas, Michigan, Missouri, Oklahoma, and Wisconsin significantly contribute to nonattainment or interfere with maintenance of the 1997 ozone NAAQS in other states. EPA also concludes in this final rule that the Transport Rule NO_X Ozone Season Trading Program set forth in the final Transport Rule (with minor revisions discussed in section III.F of this preamble) should be used as the FIP for five of the six states with regard to the 1997 ozone NAAQS. As discussed below, EPA received comments concerning whether, and in what amount, some of the states significantly contribute or interfere with maintenance. EPA did not receive any comments claiming that EPA should not use the Transport Rule NO_X Ozone Season Trading Program as the FIP if the state is found to significantly contribute or interfere with maintenance.

i. Iowa

EPA is finalizing a FIP for Iowa that, through implementation of the Transport Rule ozone season program, limits power plant NO_X emissions starting in the 2012 ozone season.

The analysis for the final Transport Rule identified Iowa as a state that interferes with maintenance of the 1997 ozone NAAQS only for a newly-identified maintenance receptor in Allegan County, Michigan. EPA specifically requested comment in the proposed notice for this supplemental action on whether there are errors in the Agency's application of the Transport Rule methodologies with respect to Iowa's significant contribution to nonattainment and/or interference with maintenance of the 1997 ozone NAAQS. There were no public comments that identified any errors in EPA's determination of state budgets for Iowa, which demonstrated EPA's quantification of emission reductions necessary to eliminate significant contribution and interference with maintenance.

One commenter noted that inclusion of Iowa is justified. Another commenter questioned the Allegan County, Michigan receptor. For more information on the Allegan receptor, see section D below in this preamble. Other comments concerning the 2005 baseline, and ''sunk costs'', are outside the scope of the proposed rule in this rulemaking, and, while these issues are not reopened in this rulemaking, EPA notes the issues have been addressed in the record of the final Transport Rule. See the docket for this rulemaking at *www.regulations.gov,* EPA–HQ–OAR–2009–0491.

ii. Michigan

EPA is finalizing a FIP for Michigan that, through implementation of the Transport Rule ozone season program, limits power plant NO_X emissions starting in the 2012 ozone season.

In its 2010 Transport Rule proposal, EPA proposed to determine that Michigan significantly contributes to nonattainment or interferes with maintenance of the 1997 ozone NAAQS and also proposed to include Michigan in the Transport Rule ozone-season NO_X program. In the analysis conducted for the final Transport Rule, Michigan is linked only to a newly-identified ozone maintenance receptor in Harford County, Maryland. EPA specifically requested comment in the proposed notice for this supplemental action on whether there are errors in the Agency's application of the Transport Rule methodologies with respect to Michigan's interference with maintenance of the 1997 ozone NAAQS.

There were two major comments relating to Michigan. One comment regarded the use of the FIP and requested a delay for a minimum of 18 months so the state could submit an approvable SIP. The matter of EPA's authority under the Clean Air Act is discussed in detail in the final Transport Rule and above in section III.A. The second comment addressed the Indian country new unit set-aside and suggested that the state is the appropriate authority to allocate new source allowances, even to units located

[3] Rule To Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule); Revisions to Acid Rain Program; Revisions to the NO_X SIP Call promulgated May 12, 2005 (70 FR 25162).

[4] See the Air Quality Modeling Final Rule TSD (EPA–HQ–OAR–2009–0491–4140). The estimated average and maximum design values for the receptors in Brazoria and Harris Counties (monitor identification numbers 480391004, 482010051, 482010055) in the final air quality modeling of the control scenario were 84.4, 86.5 ppb; 84.1, 88.6 ppb; and 91.1, 93.2 ppb, respectively. Thus, the first two receptors were estimated to have residual maintenance issues, while the latter receptor is estimated to have a residual nonattainment issue. Missouri contributes at or above the one percent contribution threshold to all three of these receptors. (Note that average design values are used to assess attainment/nonattainment and maximum design values are used to assess maintenance.)

on tribal lands. The comment, concerning the authority to allocate allowances from the Indian country new unit set-aside, is outside the scope of the proposed rule in this rulemaking, and, while issues concerning the Indian country new unit set-aside are not reopened in this rulemaking, EPA notes the issues have been addressed in the preamble to the final Transport Rule at 76 FR 48317 and 48293.

iii. Missouri

EPA is finalizing the FIP for Missouri that, through implementation of the Transport Rule ozone season program, limits power plant NO_X emissions starting in the 2012 ozone season.

The analysis for the final Transport Rule identified Missouri as a state that significantly contributes to nonattainment and/or interferes with maintenance of the 1997 ozone NAAQS in Harris County, Texas, Brazoria County, Texas, and Allegan County, Michigan. EPA requested comment in the proposed notice for this supplemental action specifically on whether there are errors in the Agency's application of the Transport Rule methodologies with respect to Missouri's significant contribution to nonattainment and interference of the 1997 ozone NAAQS.

One commenter challenged the methodology used by EPA to quantify significant contribution, arguing that it was flawed because EPA's base year does not include CAIR and does not represent current air quality. As explained in the proposal, EPA did not reopen for comment the methodology developed in the final Transport Rule to quantify emissions that significantly contribute to or interfere with maintenance in another state. These comments are outside the scope of the proposed rule in this rulemaking, and, while these issues are not reopened in this rulemaking, the issues have been addressed in the record of the final Transport Rule.

One commenter stated that the proposal for this action would not require full elimination of Missouri's significant contribution. EPA stated in the preamble to this rule's proposal that for Missouri, our analysis identifies reductions that are necessary but may not be sufficient to satisfy section 110(a)(2)(D)(i)(I) with respect to the 1997 ozone NAAQS. This is because Missouri is estimated to be significantly contributing to nonattainment and/or interfering with maintenance in Brazoria and Harris Counties in Texas, as demonstrated in the final Transport Rule air quality modeling of the control scenario in 2014 (see the Air Quality Modeling Final Rule TSD in the docket to this rulemaking, for additional details).

EPA intends to conduct further analysis and provide appropriate guidance and/or rulemaking to address any remaining significant contribution to nonattainment and interference with maintenance with respect to the 1997 ozone NAAQS for any state (*e.g.,* Missouri) identified in the final Transport Rule and in the associated supplemental notice, for which EPA was unable to fully quantify the emissions that must be prohibited to satisfy the requirements of section 110(a)(2)(D)(i)(I) with respect to the 1997 ozone NAAQS.

A commenter questioned whether the compliance deadline established by EPA in the FIP with regard to the 1997 ozone season NAAQS is feasible or valid in light of, among other things, the commenter's suggestion that the Transport Rule NO_X ozone season allowance market will not be viable. EPA has determined it is feasible for sources in Missouri to meet the 2012 budget finalized in this rule. The 2012 budget relies on control strategies that Missouri sources are already preparing to implement for the annual NO_X program. These include running existing or already planned controls and making changes in dispatch (how electricity is distributed across units at a facility) that could include shifting generation from higher emitting units to lower emitting units. Sources also have further flexibility through the opportunity to purchase allowances. Twenty states have already been finalized as participants in the Transport Rule ozone season program and NO_X ozone season allowances have already been traded. Trading began prior to the formal distribution of allowances, and trading volume has increased since distribution, with prices steadily decreasing. This market is following a common pattern of emission allowance markets in their introductory stages—prices are initially high and then drop as parties become familiar with the characteristics of the market through repeated iterations of bids, offers, and trades. Observed market allowance prices for the NO_X ozone season program are trending toward the projected equilibrium values included in EPA's analysis of the final Transport Rule.[5]

[5] Recent price estimates provided in the subscription publication Argus Air Daily, an international provider of price data related to the energy sector. Also see the Regulatory Impact Assessment for the final Transport Rule at *http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2009-0491-4547*.

iv. Oklahoma

EPA is finalizing the FIP for Oklahoma that, through implementation of the Transport Rule ozone season program, limits power plant NO_X emissions starting in the 2012 ozone season.

In its 2010 Transport Rule proposal, EPA proposed to determine that Oklahoma significantly contributes to nonattainment or interferes with maintenance of the 1997 ozone NAAQS and also proposed to include Oklahoma in the Transport Rule ozone-season program. In the analysis conducted for the final Transport Rule, Oklahoma was linked only to a newly-identified ozone maintenance receptor in Allegan County, Michigan. Oklahoma was not linked to any nonattainment receptors. EPA specifically requested comment in the proposed notice for this supplemental action on whether there are errors in the Agency's application of the Transport Rule methodologies with respect to Oklahoma's significant contribution to nonattainment and/or interference with maintenance of the 1997 ozone NAAQS.

Several commenters generally question the validity of EPA's conclusion that Oklahoma interferes with maintenance of the 1997 ozone NAAQS in downwind states, especially regarding the Allegan County, Michigan receptor. See the discussion of the Allegan receptor below in section III.D. Other comments regarding the CAMx air quality model, emissions inventory data, and choice of base year are outside the scope of the proposed rule in this rulemaking, and, while these issues are not reopened in this rulemaking, the issues have been addressed in the record of the final Transport Rule and this supplemental rule.

EPA also received comments regarding the size of the proposed ozone season NO_X budget for Oklahoma. Some commenters argued the Oklahoma ozone season budget was incorrectly calculated because it assumed reductions that could not be feasibly achieved by the 2012 ozone season. The analysis conducted for the proposal showed that reductions in Oklahoma could be achieved through, among other actions, installation of low-NO_X burners (LNBs) at about 4.4 gigawatts (GW) of coal-fired generation capacity in the state, and the shifting of dispatch to cleaner generators. Commenters disputed the ability of sources in Oklahoma to effect sufficient reductions through either of these strategies in time to meet the proposed 2012 state budget. Each identified issue is addressed below.

As to the LNBs, in the final Transport Rule, EPA found that it is technically feasible to install LNBs within a 6-month period. The shutdown of a unit and physical installation of LNBs at the unit necessarily occurs near the end of the 6-month period. Because of the timing of this final action, the units in Oklahoma would have to shut down to install the LNBs during the ozone season—the summer peak demand period for electricity in Oklahoma. Taking these units off-line during the summer peak demand period would reduce the amount of available capacity in the reliability subregion of the Southwest Power Pool that includes Oklahoma. EPA's policy case modeling suggests that this reduction in available capacity could shift this subregion below its assured planning reserve margin which is based on North American Electricity Reliability Corporation (NERC) planning reserve margins. See ''Determination of State Budgets for the Final Ozone Supplemental of the Transport Rule'' TSD. Because physical installation of the LNBs during the 2012 summer peak on units in Oklahoma could potentially cause the region to miss this important reliability target, EPA concludes that installation of these LNBs during the ozone season is not technically feasible.[6] Therefore, EPA is assuming that no low-NO_X burners can be installed in Oklahoma prior to or during the 2012 ozone-season and is setting the Oklahoma 2012 ozone season NO_X budget at a level that reflects emission reductions achievable through actions (such as changes in generation unit dispatch) that do not include additional LNB installations. EPA is setting the Oklahoma ozone season NO_X budget for 2013 and beyond at the level that was proposed, *i.e.,* to reflect NO_X levels achievable with additional LNB installations that can be completed before the 2013 ozone season without necessitating the shutdown of units during the summer peak demand period in 2012.

EPA does not believe that this issue relating to LNB installation timing applies to the other four states for which EPA is finalizing a FIP in this action. Because those four states are already required to meet Transport Rule annual NO_X reduction requirements (which start January 2012), and were notified of that requirement with the July 6, 2011 finalization of the Transport Rule, physical installation of LNBs near the end of the 6-month period for LNBs are not expected to occur during peak electricity demand periods. Moreover, information in the record indicates that, for units in Iowa, Michigan, Missouri, and Wisconsin, LNBs were already planned and are in the process of being installed. Therefore, EPA believes that the issue raised is unique to Oklahoma and does not justify adjusting the 2012 ozone season budgets for the four other states subject to this final action. As discussed below, EPA is finalizing the 2012 ozone season budgets as proposed for the four states, except for a few corrections in the Michigan and Wisconsin budgets addressed in section III.E, below.

Some commenters also argued that EPA erred in assuming emissions from oil/gas steam units could be significantly reduced by the 2012 ozone season. Including Oklahoma, there are a total of five ozone-season-only states subject to the Transport Rule—that is, five states that are subject to the ozone-season NO_X program without also being subject to the annual NO_X program. The ozone-season budgets for the four other states (Mississippi, Arkansas, Florida, and Louisiana) were finalized in the final Transport Rule which was signed and widely disseminated in July 2011. EPA did not finalize an ozone-season budget for Oklahoma at that time. EPA is finalizing the ozone-season budget for Oklahoma more than 5 months after the budgets for the other states included in the ozone-season program were finalized and less than six months before the start of the 2012 ozone season. In this respect, therefore, Oklahoma is uniquely situated.

EPA believes that units in Oklahoma will have sufficient time for compliance planning to include modest adjustments of NO_X emissions at covered sources in Oklahoma (*e.g.,* fine-tuning of existing combustion controls). However, EPA agrees that Oklahoma utilities may not have time between finalization of this rule and the 2012 ozone season to realign firm power supply to dispatch cleaner, more cost-effective sources of generation to meet local electricity demand that is currently being met by oil/gas steam generators. Therefore, EPA is adjusting the Oklahoma state budget for the 2012 ozone season specifically on the basis of revised projected emissions at oil/gas steam generators reflecting an immediate-term dispatch pattern that maintains the firm power supply arrangements already in place to serve local electricity demand. In light of Oklahoma's unique situation, EPA is assuming for the purposes of this adjustment that projected 2012 emissions from oil/gas steam units in Oklahoma will be consistent with recently observed dispatch of this class of units in the state. EPA believes this situation is unique to Oklahoma due to the fact that sources in the other states covered by this rulemaking are already covered by a pre-existing Transport Rule FIP addressing NO_X emission control, and that these sources will have had substantially more compliance planning time to consider adjustments to dispatch in advance of the 2012 ozone season.

EPA believes that the original projections of Oklahoma EGU emissions of ozone-season NO_X at the Transport Rule's threshold cost-per-ton level remain achievable, through a combination of reduction measures, including LNB installations and increased dispatch of cleaner generating sources, in time for compliance in the 2013 ozone season and beyond, under the state budget as proposed. EPA is only adjusting the final Oklahoma state budget for the 2012 ozone season. See the technical support document, ''Determination of 2012 Ozone Season State Emission Budgets for the Final Transport Rule Ozone Supplemental,'' in the docket to this rulemaking for more details.

v. Wisconsin

EPA is finalizing the FIP for Wisconsin that, through implementation of the Transport Rule ozone season program, limits power plant NO_X emissions starting in the 2012 ozone season.

The analysis for the final Transport Rule identified Wisconsin as a state that interferes with maintenance only for a newly-identified 1997 ozone NAAQS maintenance receptor in Allegan County, Michigan. EPA specifically requested comment in the proposed notice for this supplemental action on whether there are errors in the Agency's application of the Transport Rule methodologies with respect to Wisconsin's significant contribution to nonattainment and interference of the 1997 ozone NAAQS. There were no comments with respect to Wisconsin's significant contribution to nonattainment and/or interference of the 1997 ozone NAAQS or with respect to EPA's proposed use of the Transport Rule ozone season program as the FIP.

C. Kansas

EPA is finalizing its determination that Kansas significantly contributes to

[6] Because, in the case of Oklahoma, physical installation of LNBs during the latter portion of the 6-month period would occur during the summer peak demand period, this conclusion concerning Oklahoma is distinguishable from EPA's general conclusion that installation of LNBs in 6 months is technically feasible. See EPA–HQ–OAR–2009–0491–4529. Physical installation of LNBs near the end of a 6-month period and outside of the summer peak demand period will not threaten achievement of target planning reserve margins and, thus, electric reliability.

nonattainment or interferes with maintenance in another state with respect to the 1997 ozone NAAQS. EPA is not finalizing the proposed FIP for Kansas at this time. As explained below, EPA intends to take final action on its proposed SIP Call for Kansas concurrent with this action or shortly thereafter. If Kansas fails to submit a SIP that meets the requirements of 110(a)(2)(D)(i)(I) with respect to the 1997 ozone standards by any deadline established in any final SIP Call, EPA would take action as appropriate to satisfy its obligation to promulgate a FIP to address the statutory requirements.

The analysis for the final Transport Rule and the analysis for the 2010 proposal both identified Kansas as a state that interferes with maintenance of the 1997 ozone NAAQS in another state. In its 2010 Transport Rule proposal, EPA proposed to determine that Kansas significantly contributes to nonattainment or interferes with maintenance of the 1997 ozone NAAQS and thus proposed to include Kansas in the Transport Rule ozone-season NO_X program. The analysis conducted for the final Transport Rule, demonstrated that Kansas is linked only to a newly-identified ozone maintenance receptor in Allegan County, Michigan. As noted above, EPA decided to provide an additional opportunity to comment on its conclusions with respect to states that were linked, in the final Transport Rule analysis, only to receptors that were identified for the first time in that analysis. In that supplemental proposal, EPA specifically requested comment in the proposed notice to this supplemental action on whether there are errors in the Agency's application of the Transport Rule methodologies with respect to Kansas's significant contribution to nonattainment and interference of the 1997 ozone NAAQS. After a review of comments received, EPA has concluded that Kansas interferes with maintenance of the 1997 ozone NAAQS in Allegan County, Michigan.

This action does not take final action on the portion of the proposal relating to whether to use the Transport Rule ozone season program as the FIP for Kansas. In the 2010 Transport Rule proposal, EPA summarized the status of the CAA section 110(a)(2)(D)(i)(I) SIP for the state of Kansas with regard to the 1997 ozone NAAQS. As explained therein, EPA had previously approved a section 110(a)(2)(D)(i) SIP submission from the state of Kansas for the 1997 ozone and 1997 $PM_{2.5}$ NAAQS on March 9, 2007 (72 FR 10608). That SIP submission did not rely on the unlawful CAIR trading programs or rely in any way on the conclusion in CAIR that compliance with CAIR was sufficient to satisfy a state's 110(a)(2)(D)(i)(I) obligations with respect to the 1997 ozone and $PM_{2.5}$ NAAQS. Kansas is unique in this regard because no other state covered by the Transport Rule or this action has an approved SIP that did not rely on the CAIR requirements, which the DC Circuit held were not sufficient to satisfy the requirements of 110(a)(2(D)((I)(I) of the Act. For these reasons, EPA does not have an obligation under section 110(c)(1) of the Act to promulgate a FIP for Kansas at this time. Therefore, in a separate action, EPA proposed a SIP Call under CAA section 110(k)(5) for Kansas (76 FR 763, January 6, 2011), and proposed to find the Kansas SIP substantially inadequate to meet the requirements of 110(a)(2)(D)(i)(I) with respect to the 1997 ozone NAAQS. This proposal was based on the proposed conclusion that emissions from Kansas are significantly contributing to nonattainment or interfering with maintenance of the 1997 ozone NAAQS in another state. EPA intends to take final action on the proposed SIP Call concurrently with this action or shortly thereafter.

D. Allegan County, Michigan, Receptor

The final Transport Rule air quality modeling identified a new maintenance receptor in Allegan County, Michigan, to which upwind states interfere with maintenance of the NAAQS.

Some commenters noted that EPA took final action on September 24, 2010 to redesignate the Allegan County, Michigan nonattainment area to attainment for the 1997 8-hour ozone standard. 75 FR 58312; September 24, 2010. Moreover, commenters noted that EPA in the same action approved Michigan's ''maintenance plan'' for maintaining the 8-hour ozone NAAQS through 2021 in the same area. Based on this observation, these commenters asserted that EPA should not consider Allegan County to be a ''maintenance receptor'' for purposes of the Transport Rule. Accordingly, these commenters believed that EPA should not be requiring emission reductions from upwind states on the basis of the contributions to Allegan County, Michigan.

EPA agrees that the nonattainment area containing Allegan County, Michigan was redesignated by EPA on September 24, 2010, and that EPA approved the state of Michigan's maintenance plan for the area. The area, therefore, is currently considered to be a maintenance area and not a nonattainment area.

EPA, however, disagrees with commenters' conclusion that a maintenance area (*i.e.,* an area that has been redesignated and is thus subject to a maintenance plan) should not be considered a maintenance receptor in EPA's analysis for a number of reasons. First, EPA notes that ozone values at the Allegan location, historically and in the future, are strongly influenced by interstate transport. Second, the methodology for identifying ''maintenance'' receptors relevant to upwind state contributions in the Transport Rule is a unique test designed to satisfy the ''interfere with maintenance'' prong of 110(a)(2)(D)(i)(I); EPA believes this methodology responds to the U.S. Court of Appeals for the DC Circuit in the July 20, 2008 decision in *North Carolina* v. *EPA,* 531 F.3d 896, ruling on the deficiency of CAIR with regard to this 110(a)(2)(D)(i) obligation. Finally, as stated in the preamble to the final Transport Rule, EPA's test for identifying ''maintenance receptors'' for the Transport Rule appropriately differs from, and is not dependent on, recent monitoring data, including data used to re-designate an area as being in attainment.

1. Nature of the Ozone Problem for the Allegan County, Michigan Location

Allegan County is a mostly rural county located in southwestern Michigan along Lake Michigan. EPA source apportionment modeling for 2012 shows that for the ozone monitor in Allegan County, 96 percent of ozone is attributable to out-of-state emissions. As such, Allegan Country provides a particularly compelling example of the limited ability of any individual state to unilaterally control air quality outcomes within its borders. See Air Quality Modeling Final Rule TSD, EPA–HQ–OAR–2009–0491–4140 for details.

Table III.D–1 provides more information on the nature of ozone at this site. In many years in the available data set, there are a few days with markedly higher ozone values than are measured for the remainder of the year. Whether those values lead to exceedances of the 8-hour ozone NAAQS is dependent on whether that phenomenon extends to the 4th highest day of the season and on the degree to which this occurs in consecutive years. Accordingly, this site's ozone design value can experience significant variability from year to year.

TABLE III.D–1—RECENT OBSERVED OZONE CONCENTRATIONS AT THE ALLEGAN COUNTY OZONE MONITOR (AIRS ID 260050003)

Year	1st High	2nd High	3rd High	4th High	Design Value (DV) Period	DV (average of 4th high over 3-yr period)
2003	106	102	97	95	.....	.....
2004	107	84	81	79	.....	.....
2005	113	107	95	94	2003–2005	89
2006	99	91	91	91	2004–2006	88
2007	109	108	98	94	2005–2007	93
2008	100	77	74	73	2006–2008	86
2009	92	83	79	76	2007–2009	81
2010	77	76	75	73	2008–2010	74
2011	98	96	96	87	*2009–2011	*78

*2011 is based on preliminary data for year to date through 9/5/11; see: *http://www.michigan.gov/documents/deq/deq-aqd-mm-ozone-8hrhighestcurrent_256060_7.pdf.*

Table III.D–1 shows that the 1st high annual measured value over the last 9 years has ranged from 92–113 ppb, except in 2010 when the 1st high value was only 77 ppb. The 4th high values have ranged between 73 and 95 ppb. There were three consecutive years with low 4th high values below 80 ppb (2007–2009) and there was one period (2005–2007) with consecutive 4th high values greater than 90 ppb. The fact that the 4th high value dropped from 94 ppb in 2007 to 73 ppb 2008, and then increased again from 73 ppb in 2010 to 87 ppb in 2011 shows that the pattern of regional transport and meteorology are the primary factors in the year to year variability of the observed design value at this site. The magnitude of the year-to-year changes is too large to be caused solely by emission reductions or increases in Allegan County, or even in upwind states. Based on EPA's CAMx source apportionment modeling, if emission reductions were solely responsible for the improvement in ozone concentrations in Allegan County from 2007 to 2008, all of the NO_X emissions in the upwind states of Illinois, Indiana, and Missouri would have to have dropped by greater than 50 percent between those years. Since that is clearly not the case, the data show that meteorological conditions and regional transport patterns may still effect substantial changes in ozone in Allegan County, which supports its identification as a receptor whose maintenance of the NAAQS may be jeopardized without further emission reductions in upwind states.

2. Emission Analysis Conducted in Approving Michigan's Maintenance Plan for Allegan

EPA's rationale for approving the maintenance plan for Allegan County is described in the proposed approval notice (75 FR 42018; July 20, 2010). A number of tables in that proposed approval compared current emissions to future emissions for VOC and NO_X sources located within the Allegan County nonattainment area. The analysis concluded that projected emission levels, for sources within the nonattainment area, were decreasing throughout the maintenance period. The ozone redesignation and maintenance plan analysis completed by Michigan meets EPA guidance but uses a different test and data that are less current than what were applied in the Transport Rule. The maintenance plan test for the local SIP requires an analysis to show that emissions in the local area will not increase, thereby showing that the area will be able to maintain the ozone NAAQS. The redesignation is based on having current air quality data which shows that the area is attaining the NAAQS and the area meets all other Clean Air Act requirements for redesignation.

3. Maintenance Approach in the Transport Rule

In the *North Carolina* decision concerning CAIR, the Court directed EPA to give independent meaning to the ''interfere with maintenance'' prong of CAA section 110(a)(2)(D)(i)(I) and to separately identify upwind sources that interfere with downwind maintenance. In particular, the Court expressed concern that CAIR did not adequately protect areas that find themselves barely in attainment by the statutory deadline and suggested that EPA needed to take into account the historic variability of a downwind area's ozone levels in determining whether an upwind source would cause that downwind area to have trouble maintaining the NAAQS.

Accordingly, EPA in the Transport Rule explicitly gave independent meaning to the ''interfere with maintenance'' prong of section 110(a)(2)(D)(i)(I) by evaluating contributions to maintenance receptors as well as contributions to identified nonattainment receptors. The maintenance methodology used an approach that examined multiple design value periods (from 2003–2007) projected to 2012. This allowed an estimate of variability in future design values, based on past measured variability. A detailed discussion of EPA's new approach, rationale, and responses to comments on the approach, including the methodology for identifying maintenance receptors, is found in section V.C.2 of the preamble to the final Transport Rule (76 FR 48227).

In the application in the final Transport Rule of that approach, Allegan County was identified as a maintenance receptor but not as a nonattainment receptor. That is, for Allegan County, EPA projected that, under ''average'' conditions that would take place in the relevant area in the future, Allegan County would not exceed the ozone NAAQS in 2012. On the other hand, EPA projected, under conditions reflecting the maximum design values in the relevant area during 2003–2007, that Allegan County could exceed the ozone NAAQS. EPA's analysis took into account the fact that previously experienced meteorological conditions (*e.g.,* dominant wind direction, temperatures, and air mass patterns) promoting ozone formation may reoccur in the relevant area in the future. Consistently applying this approach throughout the relevant area, EPA found that Allegan County exceeded the threshold for inclusion as a maintenance receptor.

4. Relationship between EPA's ''Maintenance Receptor'' Analysis for the Transport Rule and EPA's Approval of Michigan's ''Maintenance Plan''

EPA's methodology for identifying nonattainment and maintenance receptors is based on modeled projections of measured air quality at specific monitors, not on the designation status of an area.[7] EPA believes this approach is appropriate for the reasons explained in section V.C.2 of the preamble to the final Transport Rule. 76 FR 48230. EPA does not believe it would be appropriate to rely on the designation status of an area to determine air quality or for determining whether one state is contributing significantly to nonattainment or interfering with maintenance of another state under CAA section 110(a)(2)(D)(i)(I). The CAA does not require EPA to do so. As EPA explained in the proposal to designate Allegan County as an attainment area, an area's transport requirements under section 110(a)(2)(D) are not linked to an area's attainment designation and continue to apply regardless of an area's designation status. 75 FR 42018, 42023. The U.S. Court of Appeals for the DC Circuit's decision in *Michigan* v. *EPA,* 213 F.3d 663 (2000), further supports the position that determinations of significant contribution or interference with maintenance under CAA section 110(a)(2)(D)(i)(I) is most appropriately based on current air quality and modeling, rather than an area's attainment designation. In fact, it would be impractical given the timing of when designations are made and nonattainment SIPs due to base such a determination on an area's attainment or maintenance designation, suggesting that Congress did not intend section 110(a)(2)(D)(i)(I) SIPs to be linked in any way to designation status. Further, even areas that have never been in nonattainment or have been re-designated to attainment (including those where the majority of pollution comes from out of state) continue to be at risk for falling into nonattainment as a result of emissions from upwind states, as the *North Carolina* court recognized, 531 F.3d at 910.

Generally, in judging whether to re-designate a given area, EPA evaluates local emissions as part of the ''maintenance plan.'' However, if EPA proposes to re-designate areas to attainment, this does not remove the need to address emissions in upwind states which could interfere with the maintenance plan. Without a cap on emissions in upwind states with a significant impact, upwind state emissions might in fact grow, increasing the possibility that the area being evaluated will not be able to maintain attainment. Furthermore, since upwind states are not required to have contingency measures under a downwind state's SIP, it is incumbent on EPA to ensure that states with significant impacts are appropriately controlled.

Additionally, EPA notes that the Transport Rule was based upon newer and more extensive information than was available at the time of our approval of Michigan's ''maintenance plan'' for Allegan County, and the more recent information suggests Allegan County may have difficulty maintaining attainment, notwithstanding its 2010 redesignation. EPA believes that the maintenance requirements in the Transport Rule serve to reinforce and supplement the state's maintenance plan, providing important support by greatly decreasing the probability that emissions from upwind states could lead to future nonattainment. As discussed above, EPA's projections for 2012 indicate that 96 percent of ozone at the Allegan County receptor is created by precursor emissions originating from states other than Michigan. Clearly, the ability to maintain the ozone NAAQS in Allegan Country is largely influenced by upwind state emissions.

5. Recent Air Quality Data

Commenters in Oklahoma noted that EPA should use actual monitoring data, ''which reflects CAIR reductions,'' to demonstrate that Allegan County would remain in attainment. They cited ambient measurements of 74 ppb for the 3-year average for 2008–2010. Recent preliminary air quality data for 2011 serve to reinforce EPA's view that the variability in meteorology is a significant issue for the Allegan receptor's ability to maintain the NAAQS. In 2011, there were four ambient values exceeding the 85 ppb level of the 1997 NAAQS, with a high value of 98 ppb. In other words, the 4th high value for 2011 exceeded the NAAQS. These values do not yet lead to a conclusion that the area is in nonattainment because the preliminary 2009–2011 design value—the average of the 4th high values for 2009, 2010, and 2011[8]—remains below 85 ppb. However, if the 4th high ambient values for 2012 and 2013 were the same as the preliminary values for 2011, the area would be in violation of the NAAQS. But even with relatively lower ozone concentrations across much of the country in the 2008–2010 period, the preliminary 2011 data show that Allegan County clearly continues to experience high ozone days, suggesting that this location may have maintenance problems that may eventually lead to violations of the 1997 ozone NAAQS. The data illustrate the highly variable nature of ozone at the Allegan location and reinforce the wisdom of taking variability into account in our ''maintenance'' analysis.

E. Ozone Season NO_X Emission Budgets for Five States

EPA is finalizing state ozone season NO_X emission budgets for covered units (generally large electric generating units)[9] in Iowa, Michigan, Missouri, Oklahoma, and Wisconsin under the FIPs for the 1997 ozone NAAQS. As noted above, EPA is not taking final action on the proposed Kansas FIP at this time.

EPA is finalizing these budgets, adjusted if necessary based on comments received, as part of the FIPs for these five states. These budgets and the associated variability limits are presented in Table III.E–1. Note that EPA has proposed, in a separate rulemaking (76 FR 63860), to revise the effective date of the assurance penalty provisions so that they start on January 1, 2014 instead of January 1, 2012. If EPA finalizes that revision, the assurance provisions and variability limits below would not apply for 2012 and 2013. The new unit set-asides and Indian country new unit set-aside, if applicable, for these five states are presented in Table III.E–2. For illustrative purposes only, in order to provide a complete picture of the Transport Rule ozone season program,

[7] This issue was discussed in the preamble to the NO_X SIP Call (see 63 FR 57375, October 27, 1998, footnote 25), and the U.S. Court of Appeals for the DC Circuit's decision in *Michigan* v. *EPA,* 213 F.3d 663 (2000), further supports the position that determinations of significant contribution or interference with maintenance under CAA section 110(a)(2)(D)(i)(I) should not be based on an area's attainment designation.

[8] Data for 2011 is incomplete at the time of finalization of this rulemaking.

[9] The applicability provisions for determining covered units in the named six states for the Transport Rule ozone season NO_X program are the same as those described in section VII.B, ''Applicability,'' of the preamble to the final Transport Rule.

[10] This table reflects ozone-season NO_X budgets and variability limits as currently effective based on finalization of the Transport Rule published on July 6, 2011 and finalization of this supplemental action. In a separate action, EPA has proposed revisions to certain state budgets and new unit set-asides that are not reflected in these tables, as they are not yet finalized. That action may be reviewed at 76 FR 63860, October 14, 2011.

Tables III.E–1 and III.E–2 also include information concerning the other states in that program. However, the proposed rule did not reconsider or request comment on any issues concerning the other states, and neither the proposed rule nor this final rule reopens any issues concerning these other states.

TABLE III.E–1—STATE BUDGETS [10] AND VARIABILITY LIMITS FOR 2012–2013, 2014 AND THEREAFTER

State	NO_X Ozone Season trading budget for 2012 and 2013 (tons) *	NO_X Ozone Season trading budget for 2014 and thereafter (tons) *	Variability limits for 2012 and 2013	Variability limits for 2014 and thereafter
Alabama	31,746	31,499	6,667	6,615
Arkansas	15,037	15,037	3,158	3,158
Florida	27,825	27,825	5,843	5,843
Georgia	27,944	18,279	5,868	3,839
Illinois	21,208	21,208	4,454	4,454
Indiana	46,876	46,175	9,844	9,697
Iowa	16,532	16,207	3,472	3,403
Kentucky	36,167	32,674	7,595	6,862
Louisiana	13,432	13,432	2,821	2,821
Maryland	7,179	7,179	1,508	1,508
Michigan	28,041	27,016	5,889	5,673
Mississippi	10,160	10,160	2,134	2,134
Missouri	22,762	21,073	4,780	4,425
New Jersey	3,382	3,382	710	710
New York	8,331	8,331	1,750	1,750
North Carolina	22,168	18,455	4,655	3,876
Ohio	40,063	37,792	8,413	7,936
Oklahoma **	36,567 21,835	21,835	7,679 4,585	4,585
Pennsylvania	52,201	51,912	10,962	10,902
South Carolina	13,909	13,909	2,921	2,921
Tennessee	14,908	8,016	3,131	1,683
Texas	63,043	63,043	13,239	13,239
Virginia	14,452	14,452	3,035	3,035
West Virginia	25,283	23,291	5,309	4,891
Wisconsin	14,784	14,296	3,105	3,002

* Variability limits are discussed in the preamble to the final Transport Rule, section VI.E.

** Data in this table is presented for Oklahoma separately for the years 2012 and 2013, as its state budget and variability limits are not the same in each of those years.

In section III.B.iv, EPA explained that this final rule adjusts the Oklahoma state budget only for the 2012 ozone season, reflecting revised emission projections that do not include LNB installation or the redispatching of oil/gas steam units by the 2012 ozone season. For 2013 onwards, the Oklahoma ozone season budget remains at the level EPA proposed.

In the October 6, 2011 proposed Revisions to the Transport Rule (also known as the Cross-State Air Pollution Rule), EPA proposed, and invited comment on, adjustments to the annual NO_X emission budgets for both Michigan and Wisconsin. For both states, the budget was proposed to be increased based on revised assumptions regarding Selective Catalytic Reduction (SCR) technology previously assumed to be installed and operating at specific units in 2012. In the case of Michigan, the budget was proposed to be increased to account for Monroe Unit 2 not having a SCR in 2012 or 2014. For Wisconsin, a similar adjustment was proposed to account for JP Madgett Unit 1 not having a SCR in 2012 or 2014. EPA recognized that these revised input assumptions would also affect the calculation of the states' ozone-season budgets, and EPA is now applying that information to the determination of these states' ozone season NO_X budgets in this final rule. Applying the updated information regarding Monroe Unit 2 in Michigan and JP Madgett Unit 1 in Wisconsin results in budgets for Michigan and Wisconsin that are 2,289 tons and 1,080 tons, respectively, larger than the proposed budgets for these states. The final budgets are reflected in Table III.E–1.

As noted above, EPA is finalizing for the five states the ozone season new unit set-asides for allowance allocations to new units, determined in the same manner as for the other states covered in the Transport Rule ozone season NO_X program. This approach is described in section VII.D.2, ''Allocations to New Units,'' of the preamble to the final Transport Rule. Table III.E–2 shows the new unit set-aside for Iowa, Michigan, Missouri, Oklahoma, and Wisconsin as a percent of state ozone season NO_X emissions. Table III.E–3 shows the new unit set-aside and Indian country new unit set-aside, as appropriate, for the five states and, for the reasons discussed above, the other states in the Transport Rule ozone season program.

In addition, as described in section VII.D.2, ''Allocations to New Units,'' of the preamble to the final Transport Rule, EPA is providing a mechanism to make allowances available in the future for new units built in Indian country. Table III.E–3 shows the Indian country set-asides EPA is finalizing to set aside Transport Rule ozone-season allowances from the budgets of the states addressed in this final rule that have Indian country within their borders (*i.e.,* Iowa, Michigan, Missouri, and Wisconsin). As explained in the final Transport Rule,

[10] This table reflects ozone-season NO_X budgets and variability limits as currently effective based on finalization of the Transport Rule published on July 6, 2011 and finalization of this supplemental action. In a separate action, EPA has proposed revisions to certain state budgets and new unit set-asides that are not reflected in these tables, as they are not yet finalized. That action may be reviewed at 76 FR 63860, October 14, 2011.

EPA will administer these Indian country new unit set-asides regardless of whether a state replaces its Transport Rule FIP with an approved SIP. EPA received one comment from a state regarding the size of its Indian Country new unit set-aside. However, there was no information submitted showing that EPA's calculations or methodologies were in error. Therefore, EPA is finalizing the new unit set-asides and Indian country new unit set-asides, as proposed, with adjustments to reflect any revisions to the appropriate budgets, for the five states in this final action.

TABLE III.E–2—STATE NEW UNIT SET-ASIDES AS A PERCENT OF STATE NO_X OZONE SEASON TRADING BUDGETS

	NO_X ozone season new unit set-aside (percent)
Iowa	2
Michigan	2
Missouri	3
Oklahoma	2
Wisconsin	6

TABLE III.E–3—NEW UNIT SET-ASIDES AND INDIAN COUNTRY NEW UNIT SET-ASIDES FOR 2012–2013; 2014 AND THEREAFTER [11]

State	New unit set-aside for 2012 and 2013 (tons)	New unit set-aside for 2014 and thereafter (tons)	Indian country new unit set-aside for 2012 and 2013 (tons)	Indian country new unit set-aside for 2014 and thereafter (tons)
Alabama	635	630		
Arkansas	301	301		
Florida	529	529	28	28
Georgia	559	366		
Illinois	1,697	1,697		
Indiana	1,406	1,385		
Iowa	314	308	17	16
Kentucky	1,447	1,307		
Louisiana	390	390	13	13
Maryland	144	144		
Michigan	533	513	28	27
Mississippi	193	193	10	10
Missouri	683	632		
New Jersey	68	68		
New York	242	242	8	8
North Carolina	1,308	1,089	22	18
Ohio	801	756		
Oklahoma	731 437	437		
Pennsylvania	1,044	1,038		
South Carolina	264	264	14	14
Tennessee	298	160		
Texas	1,828	1,828	63	63
Virginia	723	723		
West Virginia	1,264	1,165		
Wisconsin	872	844	15	14

Finally, EPA is finalizing the unit-level allocations of Transport Rule NO_X ozone season allowances under the FIP to existing covered units in Iowa, Michigan, Missouri, Oklahoma, and Wisconsin. These allocations are presented in the TSD entitled ''Final Unit-Level Ozone Season NO_X Allowance Allocations to Existing Units in Five States: Supplemental Final Rule TSD,'' which is available in the public docket for this rule and on the Web at *http://www.epa.gov/crossstaterule*. The methodology and procedures used for allocations to existing units covered by the Transport Rule ozone season NO_X program are specified in section VII.D, ''Allocation of Emission Allowances,'' of the preamble to the final Transport Rule and in the TSD entitled ''Allowance Allocation Final Rule TSD,'' which is available in the public docket for this rule. The TSD entitled ''Final Unit-Level Ozone Season NO_X Allowance Allocations to Existing Units in Five States: Supplemental Final Rule TSD'' also describes how to access publicly available downloadable Excel spreadsheets with the unit-level allowance allocations and the supporting data EPA used in applying the final Transport Rule existing unit allocation methodology to eligible units in each of the five states in this final rule on the Web at *http://www.epa.gov/crossstaterule*.

F. Implementation of the Transport Rule NO_X Ozone Season Trading Program

As discussed above, EPA concludes in this final rule that the Transport Rule NO_X Ozone Season Trading Program set forth in the final Transport Rule should be used as the FIP for Iowa, Michigan, Missouri, Oklahoma, and Wisconsin with regard to the 1997 ozone NAAQS. In the SNPR, EPA proposed that the implementation of the Transport Rule ozone season program be identical for these five states to implementation for the other states subject to this program. Under this final rule, the implementation of this program for these five states is the same as for the

[11] This table reflects ozone-season NO_X budgets and variability limits as currently effective based on finalization of the Transport Rule published on July 6, 2011 and finalization of this supplemental action. In a separate action, EPA has proposed revisions to certain state budgets and new unit set-asides that are not reflected in these tables, as they are not yet finalized. That action may be reviewed at 76 FR 63860, October 14, 2011.

other states, except for the deadlines for submission of allocations for existing units for 2013.

Under the Transport Rule, states have the option of submitting three types of SIP revisions that, if approved, change certain provisions of the Transport Rule NO_X Ozone Season Trading Program. First, a state may submit a SIP revision setting forth allocations to existing units for 2013. Second, a state may submit an abbreviated SIP that replaces the allowance allocation provisions in the FIP to existing and new units starting in 2014 or any year thereafter. Third, a state may submit a full SIP that replaces the FIP entirely (except for any provisions concerning units in any Indian country within the borders of the state) but substantively changes only the allowance allocation provisions starting in 2014 or any year thereafter.

With regard to the first type of SIP revision, involving only 2013 allocations to existing units, the final Transport Rule set a series of deadlines concerning submission, approval, and implementation of state-determined 2013 existing-unit allocations. Specifically, states under the final Transport Rule were required to inform EPA of their intent to submit 2013 allocations for existing units by November 7, 2011 and must submit these allocations by April 1, 2012, and the Administrator will record the allocations, if approved, by October 1, 2012. Because this series of sequential deadlines began about six months before the issuance and the publication of this final rule, EPA is revising the final Transport Rule (including the Transport Rule NO_X Ozone Season Trading Program) to establish an analogous series—only for Iowa, Michigan, Missouri, Oklahoma, and Wisconsin—of deadlines for 2013 allocations of Transport Rule NO_X Ozone Season allowances using dates that are about six months later than the dates in the generally applicable series of 2013 allocation-related deadlines. For example, the five states must inform EPA of their intent to submit 2013 allocations for existing units by the date 70 days after publication of this final rule in the **Federal Register** and must submit these allocations by October 1, 2012, and the Administrator will record the allocations, if approved, by April 15, 2013.[12]

With regard to the other two types of SIP revisions (abbreviated SIPs and full SIPs), all of the deadlines for SIP submission and for submission of allocations (or results of auctions, if any) for the other states in the Transport Rule ozone season program are about 11 months or more after the issuance or the publication of the final Transport Rule, and no commenters suggested changing these deadlines for Iowa, Michigan, Missouri, Oklahoma, and Wisconsin. Consequently, EPA is finalizing these deadlines related to abbreviated SIPs and full SIPs. The submission deadlines and process for abbreviated SIPs and full SIPs for all states (including the five states covered by this final rule) in the Transport Rule ozone season program are found in section X, ''Transport Rule State Implementation Plans,'' of the preamble to the final Transport Rule.

Finally, under the final Transport Rule, the first Transport Rule ozone season trading program runs from May 1, 2012 through September 30, 2012. For the reasons discussed above, the FIPs for Iowa, Michigan, Missouri, Oklahoma, and Wisconsin apply the Transport Rule ozone-season NO_X requirements to sources in those states in the same manner the requirements are applied to sources in other states covered by Transport Rule ozone-season provisions.

IV. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is a ''significant regulatory action.'' Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review under Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011) and any changes made in response to OMB recommendations have been documented in the docket for this action. This action has also been determined to be economically significant. EPA's regulatory impacts analysis (RIA) of the July 2011 final Transport Rule included modeling of ozone-season NO_X reductions for the states covered in this final rulemaking. While the results of that analysis cannot be disaggregated to isolate the impacts of this rulemaking alone, that analysis does include a comprehensive and fully detailed accounting of the costs and benefits of the Transport Rule programs, inclusive of the impacts of this rulemaking.[13]

B. Paperwork Reduction Act

EPA is required to document the information collection burden imposed by the Transport Rule program on industry, States, and EPA in an information collection request (ICR). The ICR describes the information collection requirements associated with the final Transport Rule program inclusive of this proposal and estimates the incremental costs of compliance with all such requirements, such as the requirement for industry to monitor, record, and report emissions data to EPA.

The ICR for the Transport Rule Program inclusive of this supplemental rule was submitted for approval to OMB under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.,* and was approved under OMB control number 2060–0667. EPA believes that there are no information collection requirements or burden beyond those reported in the Transport Rule program inclusive of this supplemental rule.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of this final rule on small entities, small entity is defined as:

(1) A small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201. For the electric power generation industry, the small business size standard is an ultimate parent entity defined as having a total electric output of 4 million megawatt-hours (MW-hour) or less in the previous fiscal year.

(2) A small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and

(3) A small organization that is any not-for-profit enterprise which is

[12] Similarly, the deadline for recordation by the Administrator of 2012 existing-unit allocations and, in the absence of a notice by a state of intent to submit a SIP revision with 2013 allocations, of 2013 existing-unit allocations is moved for the five states to the date 90 days after publication of this final rule in the **Federal Register**. The analogous deadline for the other states in the Transport Rule ozone season program was November 7, 2011, which was set as the date 90 days after publication of the final Transport Rule and precedes the issuance and publication of this final rule.

[13] For more information, please see the final Transport Rule Regulatory Impact Analysis in the docket for this rulemaking (EPA–HQ–OAR–2009–0491–4409).

independently owned and operated and is not dominant in its field.

TABLE IV.C–1—POTENTIALLY REGULATED CATEGORIES AND ENTITIES [a]

Category	NAICS Code [b]	Examples of potentially regulated entities
Industry	221112	Fossil-fuel-fired electric utility steam generating units.
Federal Government	[c] 221112	Fossil-fuel-fired electric utility steam generating units owned by the federal government.
State/Local Government	[c] 221112	Fossil-fuel-fired electric utility steam generating units owned by municipalities.
Tribal Government	921150	Fossil-fuel-fired electric utility steam generating units in Indian Country.

[a] Include NAICS categories for source categories that own and operate electric generating units only.
[b] North American Industry Classification System.
[c] Federal, state, or local government-owned and operated establishments are classified according to the activity in which they are engaged.

After considering the economic impacts of the Transport Rule program inclusive of this supplemental rule on small entities, as described in section XII.C of the preamble to the final Transport Rule, EPA certifies that this action will not have a significant economic impact on a substantial number of small entities (No SISNOSE). This certification is based on the economic impact of the final Transport Rule inclusive of this supplemental rule on all affected small entities across all industries affected. EPA assessed the potential impact of the final Transport Rule on small entities and found that there are about 660 potentially affected small units (*i.e.,* greater than 25 MW and generating less than 4MM MWh) out of 3,625 existing units in the TR region. The majority of these EGUs are owned by entities that do not meet the small entity definition. The remaining 271 of the 660 EGUs are owned by 108 potentially affected small entities and are likely to be affected by this rule. EPA estimates that 24 of the 108 identified small entities will have annualized costs greater than 1 percent of their revenues, and the other 84 are projected to incur costs less than 1 percent of revenues. Eleven small entities out of 108—only about 10 percent—are estimated to have annualized costs greater than 3 percent of their revenues, which factors into EPA's finding of no SISNOSE. EPA believes that the provisions of the Regulatory Flexibility Act are covered by and reported in section XII.C of the preamble to the final Transport Rule.

Although this final rule will not have a significant economic impact on a substantial number of small entities, EPA nonetheless has tried to reduce the impact of this rule on small entities. In EPA's modeling, most of the cost impacts for these small entities and their associated units are driven by lower electricity generation relative to the base case. Another main driver of small entity impacts are higher fuel costs, which the affected units would incur irrespective of whether they had to comply with this rule. In addition, EPA's decision to exclude units smaller than 25 MWe has already significantly reduced the burden on hundreds of small entities. Hence, EPA has concluded that there is no SISNOSE for this rule.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538, requires federal agencies, unless otherwise prohibited by law, to assess the effects of their regulatory actions on state, local, and tribal governments and the private sector. The Transport Rule program inclusive of this supplemental rule contains a Federal mandate that may result in expenditures of $100 million or more for state, local, and tribal governments, in the aggregate, or the private sector in any one year. Accordingly, EPA has prepared under section 202 of the UMRA a written statement that is summarized in section XII.D of the preamble to the final Transport Rule.

Consistent with the intergovernmental consultation provisions of section 204 of the UMRA, EPA held consultations with the governmental entities affected by the final Transport Rule and this supplemental rule. As detailed in section XII.D of the preamble to the final Transport Rule, EPA participated in informational calls with the Environmental Council of the States (ECOS) and the National Governors Association to provide information about the January 7, 2011 NODA [14] directly to state and local officials and conducted consultations with federally recognized tribes prior to finalizing the final Transport Rule and issuing the supplemental notice of proposed rulemaking for the action being finalized here for inclusion of six additional states (of which only three being finalized today—Iowa, Michigan, and Wisconsin—have Indian country within their boundaries).

EPA believes that no unfunded mandates have been created by the Transport Rule program inclusive of this action. Neither the final Transport Rule nor the provisions in this SNPR have regulatory requirements that might significantly or uniquely affect small governments.

E. Executive Order 13132: Federalism

As described in section XII.E of the preamble to the final Transport Rule, EPA has concluded that the Transport Rule program inclusive of this supplemental rule does not have federalism implications. Thus, Executive Order 13132 does not apply to the final Transport Rule or to this SNPR.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Under Executive Order 13175 (65 FR 67249, November 9, 2000), EPA may not issue a regulation that has tribal implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by tribal governments, or EPA consults with tribal officials early in the process of developing the proposed regulation and develops a tribal summary impact statement. EPA has concluded that this action may have tribal implications. As described in section XII.F of the preamble to the final Transport Rule, EPA believes that there has been proper consultation and coordination with Indian tribal governments for the Transport Rule program inclusive of this supplemental rule.

[14] 76 FR 1109 (January 7, 2011).

As required by section 7(a) of the Executive Order, EPA's Tribal Consultation Official has certified that the requirements of the Executive Order have been met in a meaningful and timely manner. A copy of the certification is included in the docket for the final Transport Rule.

G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

Executive Order 13045 (62 FR 19,885, April 23, 1997) applies to any rule that: (1) Is determined to be ''economically significant'' as defined under EO 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of this planned rule on children, and explain why this planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

As described in section XII.G of the preamble to the final Transport Rule, the Transport Rule program inclusive of this supplemental rule is not subject to Executive Order 13045 because it does not involve decisions that increase environmental health or safety risks that may disproportionately affect children. The EPA believes that the emissions reductions from the strategies in the Transport Rule program inclusive of this action will further improve air quality and will further improve children's health.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

Executive Order 13211 (66 FR 28355, May 22, 2001) provides that agencies shall prepare and submit to the Administrator of the Office of Regulatory Affairs, OMB, a Statement of Energy Effects for certain actions identified as ''significant energy actions.'' Section 4(b) of Executive Order 13211 defines ''significant energy action'' as ''any action by an agency (normally published in the **Federal Register**) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking: (1)(i) That is a significant regulatory action under Executive Order 12866 or any successor order, and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (2) that is designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action.'' This rule is a significant regulatory action under Executive Order 12866, and this rule is likely to have a significant adverse effect on the supply, distribution, or use of energy. EPA prepared a Statement of Energy Effects for the Transport Rule program inclusive of this supplemental rule which appears in section XII.H of the preamble to the final Transport Rule.

EPA believes that there is no impact to the energy supply beyond that which is reported for the Transport Rule program inclusive of this supplemental rule in the final Transport Rule.

I. National Technology Transfer Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Public Law 104–113, 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards. As described in section XII.I of the preamble to the final Transport Rule, the Transport Rule program inclusive of this supplemental rule will require all sources to meet the applicable monitoring requirements of 40 CFR part 75. Part 75 already incorporates a number of voluntary consensus standards.

J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order (EO) 12898 (59 FR 7629 (Feb. 16, 1994)) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority, low-income, and Tribal populations in the United States. During development of this Transport Rule program inclusive of this supplemental rule, EPA considered its impacts on low-income, minority, and tribal communities in several ways and provided multiple opportunities for these communities to meaningfully participate in the rulemaking process. As described in section XII.J of the preamble to the final transport Rule, EPA believes that the final remedy in the Transport Rule program inclusive of this supplemental rule addresses potential environmental justice concerns about localized hot spots and reduces ambient concentrations of pollution where they are most needed by sensitive and vulnerable populations.

EPA believes that the vast majority of communities and individuals in areas covered by the Transport Rule program inclusive of this action, including numerous low-income, minority, and tribal individuals and communities in both rural areas and inner cities in the eastern and central U.S., will see significant improvements in air quality and resulting improvements in health. EPA's assessment of the effects of the final Transport Rule program inclusive of this supplemental rule on these communities is detailed in section XII.J of the preamble to the final Transport Rule. Based on this assessment, EPA concludes that we do not expect disproportionately high and adverse human health or environmental effects on minority, low-income, or tribal populations in the United States as a result of implementing the Transport Rule program inclusive of this action.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A Major rule cannot take effect until 60 days after it is published in the **Federal Register.** This action is a ''major rule'' as defined by 5 U.S.C. 804(2). This rule will be effective February 27, 2012.

L. Judicial Review

Petitions for judicial review of this action must be filed in the United States Court of Appeals for the District of Columbia Circuit by February 27, 2012. Section 307(b)(1) of the CAA indicates which Federal Courts of Appeal have venue for petitions of review of final

actions by EPA. This section provides, in part, that petitions for review must be filed in the Court of Appeals for the District of Columbia Circuit if (i) the agency action consists of ''nationally applicable regulations promulgated, or final action taken, by the Administrator,'' or (ii) such action is locally or regionally applicable, if ''such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination.''

Any final action related to the Transport Rule is ''nationally applicable'' within the meaning of section 307(b)(1). Through this rule, EPA interprets section 110 of the CAA, a provision which has nationwide applicability. In addition, the Transport Rule applies to 27 States. The Transport Rule is also based on a common core of factual findings and analyses concerning the transport of pollutants between the different states subject to it. For these reasons, the Administrator also is determining that any final action regarding the Transport Rule is of nationwide scope and effect for purposes of section 307(b)(1). Thus, pursuant to section 307(b) any petitions for review of final actions regarding the Transport Rule must be filed in the Court of Appeals for the District of Columbia Circuit within 60 days from the date final action is published in the **Federal Register.**

Filing a petition for reconsideration of this action does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed and shall not postpone the effectiveness of such rule or action. In addition, pursuant to CAA section 307(b)(2) this action may not be challenged later in proceedings to enforce its requirements.

List of Subjects

40 CFR Part 52

Administrative practice and procedure, Air pollution control, Intergovernmental relations, Nitrogen oxides, Ozone, Particulate matter, Regional haze, Reporting and recordkeeping requirements, Sulfur dioxide.

40 CFR Part 97

Administrative practice and procedure, Air pollution control, Electric utilities, Nitrogen oxides, Reporting and recordkeeping requirements, Sulfur dioxide.

Dated: December 15, 2011.

Lisa P. Jackson,

Administrator.

For the reasons set forth in the preamble, parts 52 and 97 of chapter I of title 40 of the Code of Federal Regulations are amended as follows:

PART 52—[AMENDED]

■ 1. The authority citation for Part 52 continues to read as follows:

Authority: 42 U.S.C. 7401, *et seq.*

Subpart A—General Provisions

§ 52.38 [Amended]

■ 2. Section 52.38 is amended by:

■ a. In paragraph (b)(2), add, after the word ''Indiana'', the word ''Iowa'', add, after the word ''Maryland'', the word ''Michigan'', add after the word ''Mississippi'', the word ''Missouri'', add after the word ''Ohio'', the word ''Oklahoma'', and remove the words ''and West Virginia'' and add, in their place, the words ''West Virginia, and Wisconsin'';

■ b. In paragraph (b)(3)(v)(A), add, after the words ''October 17, 2011'', the words ''or, for Iowa, Michigan, Missouri, Oklahoma, and Wisconsin, March 6, 2012'' and add, after the words ''April 1, 2012'', the words ''or, for Iowa, Michigan, Missouri, Oklahoma, and Wisconsin, October 1, 2012''; and

■ c. In paragraph (b)(3)(v)(B), add, after the words ''April 1, 2012'', the words ''or, for Iowa, Michigan, Missouri, Oklahoma, and Wisconsin, October 1, 2012''.

Subpart Q—Iowa

■ 3. Section 52.840 is amended by adding a new paragraph (b) to read as follows:

§ 52.840 Interstate pollutant transport provisions; What are the FIP requirements for decreases in emissions of nitrogen oxides?

* * * * *

(b)(1) The owner and operator of each source and each unit located in the State of Iowa and Indian country within the borders of the State and for which requirements are set forth under the TR NO_X Ozone Season Trading Program in subpart BBBBB of part 97 of this chapter must comply with such requirements. The obligation to comply with such requirements with regard to sources and units in the State will be eliminated by the promulgation of an approval by the Administrator of a revision to Iowa's State Implementation Plan (SIP) as correcting the SIP's deficiency that is the basis for the TR Federal Implementation Plan under § 52.38(b), except to the extent the Administrator's approval is partial or conditional. The obligation to comply with such requirements with regard to sources and units located in Indian country within the borders of the State will not be eliminated by the promulgation of an approval by the Administrator of a revision to Iowa's SIP.

(2) Notwithstanding the provisions of paragraph (b)(1) of this section, if, at the time of the approval of Iowa's SIP revision described in paragraph (b)(1) of this section, the Administrator has already started recording any allocations of TR NO_X Ozone Season allowances under subpart BBBBB of part 97 of this chapter to units in the State for a control period in any year, the provisions of subpart BBBBB of part 97 of this chapter authorizing the Administrator to complete the allocation and recordation of TR NO_X Ozone Season allowances to units in the State for each such control period shall continue to apply, unless provided otherwise by such approval of the State's SIP revision.

Subpart X—Michigan

■ 4. Section 52.1186 is amended by adding a new paragraph (e) to read as follows:

§ 52.1186 Interstate pollutant transport provisions; What are the FIP requirements for decreases in emissions of nitrogen oxides?

* * * * *

(e)(1) The owner and operator of each source and each unit located in the State of Michigan and Indian country within the borders of the State and for which requirements are set forth under the TR NO_X Ozone Season Trading Program in subpart BBBBB of part 97 of this chapter must comply with such requirements. The obligation to comply with such requirements with regard to sources and units in the State will be eliminated by the promulgation of an approval by the Administrator of a revision to Michigan's State Implementation Plan (SIP) as correcting the SIP's deficiency that is the basis for the TR Federal Implementation Plan under § 52.38(b), except to the extent the Administrator's approval is partial or conditional. The obligation to comply with such requirements with regard to sources and units located in Indian country within the borders of the State will not be eliminated by the promulgation of an approval by the Administrator of a revision to Michigan's SIP.

(2) Notwithstanding the provisions of paragraph (e)(1) of this section, if, at the time of the approval of Michigan's SIP revision described in paragraph (e)(1) of this section, the Administrator has

already started recording any allocations of TR NO_X Ozone Season allowances under subpart BBBBB of part 97 of this chapter to units in the State for a control period in any year, the provisions of subpart BBBBB of part 97 of this chapter authorizing the Administrator to complete the allocation and recordation of TR NO_X Ozone Season allowances to units in the State for each such control period shall continue to apply, unless provided otherwise by such approval of the State's SIP revision.

Subpart AA—Missouri

■ 5. Section 52.1326 is amended by adding a new paragraph (b) to read as follows:

§ 52.1326 Interstate pollutant transport provisions; What are the FIP requirements for decreases in emissions of nitrogen oxides?

* * * * *

(b)(1) The owner and operator of each source and each unit located in the State of Missouri and for which requirements are set forth under the TR NO_X Ozone Season Trading Program in subpart BBBBB of part 97 of this chapter must comply with such requirements. The obligation to comply with such requirements will be eliminated by the promulgation of an approval by the Administrator of a revision to Missouri's State Implementation Plan (SIP) as correcting the SIP's deficiency that is the basis for the TR Federal Implementation Plan under § 52.38(b), except to the extent the Administrator's approval is partial or conditional.

(2) Notwithstanding the provisions of paragraph (b)(1) of this section, if, at the time of the approval of Missouri's SIP revision described in paragraph (b)(1) of this section, the Administrator has already started recording any allocations of TR NO_X Ozone Season allowances under subpart BBBBB of part 97 of this chapter to units in the State for a control period in any year, the provisions of subpart BBBBB of part 97 of this chapter authorizing the Administrator to complete the allocation and recordation of TR NO_X Ozone Season allowances to units in the State for each such control period shall continue to apply, unless provided otherwise by such approval of the State's SIP revision.

Subpart LL—Oklahoma

■ 6. Section 52.1930 is added to read as follows:

§ 52.1930 Interstate pollutant transport provisions; What are the FIP requirements for decreases in emissions of nitrogen oxides?

(a) The owner and operator of each source and each unit located in the State of Oklahoma and Indian country within the borders of the State and for which requirements are set forth under the TR NO_X Ozone Season Trading Program in subpart BBBBB of part 97 of this chapter must comply with such requirements. The obligation to comply with such requirements with regard to sources and units in the State will be eliminated by the promulgation of an approval by the Administrator of a revision to Oklahoma's State Implementation Plan (SIP) as correcting the SIP's deficiency that is the basis for the TR Federal Implementation Plan under § 52.38(b), except to the extent the Administrator's approval is partial or conditional. The obligation to comply with such requirements with regard to sources and units located in Indian country within the borders of the State will not be eliminated by the promulgation of an approval by the Administrator of a revision to Oklahoma's SIP.

(b) Notwithstanding the provisions of paragraph (a) of this section, if, at the time of the approval of Oklahoma's SIP revision described in paragraph (a) of this section, the Administrator has already started recording any allocations of TR NO_X Ozone Season allowances under subpart BBBBB of part 97 of this chapter to units in the State for a control period in any year, the provisions of subpart BBBBB of part 97 of this chapter authorizing the Administrator to complete the allocation and recordation of TR NO_X Ozone Season allowances to units in the State for each such control period shall continue to apply, unless provided otherwise by such approval of the State's SIP revision.

Subpart YY—Wisconsin

■ 7. Section 52.2587 is amended by adding a new paragraph (e) to read as follows:

§ 52.2587 Interstate pollutant transport provisions; What are the FIP requirements for decreases in emissions of nitrogen oxides?

* * * * *

(e)(1) The owner and operator of each source and each unit located in the State of Wisconsin and Indian country within the borders of the State and for which requirements are set forth under the TR NO_X Ozone Season Trading Program in subpart BBBBB of part 97 of this chapter must comply with such requirements. The obligation to comply with such requirements with regard to sources and units in the State will be eliminated by the promulgation of an approval by the Administrator of a revision to Wisconsin's State Implementation Plan (SIP) as correcting the SIP's deficiency that is the basis for the TR Federal Implementation Plan under § 52.38(b), except to the extent the Administrator's approval is partial or conditional. The obligation to comply with such requirements with regard to sources and units located in Indian country within the borders of the State will not be eliminated by the promulgation of an approval by the Administrator of a revision to Wisconsin's SIP.

(2) Notwithstanding the provisions of paragraph (e)(1) of this section, if, at the time of the approval of Wisconsin's SIP revision described in paragraph (e)(1) of this section, the Administrator has already started recording any allocations of TR NO_X Ozone Season allowances under subpart BBBBB of part 97 of this chapter to units in the State for a control period in any year, the provisions of subpart BBBBB of part 97 of this chapter authorizing the Administrator to complete the allocation and recordation of TR NO_X Ozone Season allowances to units in the State for each such control period shall continue to apply, unless provided otherwise by such approval of the State's SIP revision.

PART 97—[AMENDED]

■ 8. The authority citation for Part 97 continues to read as follows:

Authority: 42 U.S.C. 7401, 7403, 7410, 7426, 7601, and 7651, *et seq.*

■ 9. Section 97.510 is revised to read as follows:

§ 97.510 State NO_X Ozone Season trading budgets, new unit set-asides, Indian country new unit set-aside, and variability limits.

(a) The State NO_X Ozone Season trading budgets, new unit set-asides, and Indian country new unit set-asides for allocations of TR NO_X Ozone Season allowances for the control periods in 2012 and thereafter are as follows:

State	NO_X Ozone Season trading budget (tons) * for 2012 and 2013	New unit set-aside (tons) for 2012 and 2013	Indian country new unit set-aside (tons) for 2012 and 2013
Alabama	31,746	635	.....
Arkansas	15,037	301	.....
Florida	27,825	529	28
Georgia	27,944	559	.....
Illinois	21,208	1,697	.....
Indiana	46,876	1,406	.....
Iowa	16,532	314	17
Kentucky	36,167	1,447	.....
Louisiana	13,432	390	13
Maryland	7,179	144	.....
Michigan	28,041	533	28
Mississippi	10,160	193	10
Missouri	22,762	683	.....
New Jersey	3,382	68	.....
New York	8,331	242	8
North Carolina	22,168	1,308	22
Ohio	40,063	801	.....
Oklahoma	36,567	731	.....
	21,835	437	.....
Pennsylvania	52,201	1,044	.....
South Carolina	13,909	264	14
Tennessee	14,908	298	.....
Texas	63,043	1,828	63
Virginia	14,452	723	.....
West Virginia	25,283	1,264	.....
Wisconsin	14,784	872	15

State	NO_X Ozone Season trading budget (tons) * for 2014 and thereafter	New unit set-aside (tons) for 2014 and thereafter	Indian country new unit set-aside (tons) for 2014 and thereafter
Alabama	31,499	630	.....
Arkansas	15,037	301	.....
Florida	27,825	529	28
Georgia	18,279	366	.....
Illinois	21,208	1,697	.....
Indiana	46,175	1,385	.....
Iowa	16,207	308	16
Kentucky	32,674	1,307	.....
Louisiana	13,432	390	13
Maryland	7,179	144	.....
Michigan	27,016	513	27
Mississippi	10,160	193	10
Missouri	21,073	632	.....
New Jersey	3,382	68	.....
New York	8,331	242	8
North Carolina	18,455	1,089	18
Ohio	37,792	756	.....
Oklahoma	21,835	437	.....
Pennsylvania	51,912	1,038	.....
South Carolina	13,909	264	14
Tennessee	8,016	160	.....
Texas	63,043	1,828	63
Virginia	14,452	723	.....
West Virginia	23,291	1,165	.....
Wisconsin	14,296	844	14

* Each trading budget includes the new unit set-aside and, where applicable, the Indian country new unit set-aside and does not include the variability limit.

(b) The States' variability limits for the State NO_X Ozone Season trading budgets for the control periods in 2012 and thereafter are as follows:

State	Variability limits for 2012 and 2013	Variability limits for 2014 and thereafter
Alabama	6,667	6,615
Arkansas	3,158	3,158
Florida	5,843	5,843
Georgia	5,868	3,839
Illinois	4,454	4,454
Indiana	9,844	9,697
Iowa	3,472	3,403
Kentucky	7,595	6,862
Louisiana	2,821	2,821
Maryland	1,508	1,508
Michigan	5,889	5,673
Mississippi	2,134	2,134
Missouri	4,780	4,425
New Jersey	710	710
New York	1,750	1,750
North Carolina	4,655	3,876
Ohio	8,413	7,936
Oklahoma	7,679	4,585
	4,585	
Pennsylvania	10,962	10,902
South Carolina	2,921	2,921
Tennessee	3,131	1,683
Texas	13,239	13,239
Virginia	3,035	3,035
West Virginia	5,309	4,891
Wisconsin	3,105	3,002

§ 97.521 [Amended]

■ 10. Section 97.521 is amended by:

■ a. In paragraph (a) add, after the words ''November 7, 2011'', the words ''or, with regard to units in Iowa, Michigan, Missouri, Oklahoma, and Wisconsin, March 26, 2012'';

■ b. In paragraph (b) introductory text, add, after the words ''November 7, 2011'', the words ''or, with regard to units in Iowa, Michigan, Missouri, Oklahoma, and Wisconsin, March 26, 2012'', add, after the words ''October 17, 2011'', the words ''or, with regard to TR NO_X Ozone Season units in Iowa, Michigan, Missouri, Oklahoma, and Wisconsin, March 6, 2012'', and add, after the words ''April 1, 2012'', the words ''or, with regard to units in Iowa, Michigan, Missouri, Oklahoma, and Wisconsin, October 1, 2012'';

■ c. In paragraph (b)(1), add, after the words ''April 1, 2012'', the words ''or, with regard to TR NO_X Ozone Season units in Iowa, Michigan, Missouri, Oklahoma, and Wisconsin, by October 1, 2012'', and add, after the words ''April 15, 2012'', the words ''or, with regard to units in Iowa, Michigan, Missouri, Oklahoma, and Wisconsin, October 15, 2012'';

■ d. In paragraph (b)(2), add, after the words ''April 1, 2012'', the words ''or, with regard to units in Iowa, Michigan, Missouri, Oklahoma, and Wisconsin, October 1, 2012'', and add, after the words ''by October 1, 2012'' whenever they appear, the words ''or, with regard to units in Iowa, Michigan, Missouri, Oklahoma, and Wisconsin, April 1, 2013''; and

■ e. In paragraph (b)(3), add, after the words ''April 1, 2012'', the words ''or, with regard to units in Iowa, Michigan, Missouri, Oklahoma, and Wisconsin, October 1, 2012'', and add, after the words ''by October 1, 2012'' whenever they appear, the words ''or, with regard to units in Iowa, Michigan, Missouri, Oklahoma, and Wisconsin, April 1, 2013''.

[FR Doc. 2011–32821 Filed 12–23–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 62

[EPA–R04–OAR–2011–0006(a); FRL–9611–8]

Approval and Promulgation of State Plans for Designated Facilities and Pollutants; State of Florida; Control of Hospital/Medical/Infectious Waste Incinerator (HMIWI) Emissions From Existing Facilities

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is approving the Clean Air Act (CAA) section 111(d)/129 state plan (the Plan) submitted by the Florida Department of Environmental Protection (FDEP) for the State of Florida on December 21, 2010, for implementing and enforcing the Emissions Guidelines (EGs) applicable to existing Hospital/Medical/Infectious Waste Incinerators (HMIWIs). These EGs apply to devices that combust any amount of hospital waste and/or medical/infectious waste.

DATES: This direct final rule is effective February 27, 2012 without further notice, unless EPA receives adverse comment by January 26, 2012. If EPA receives such comments, it will publish a timely withdrawal of the direct final rule in the **Federal Register** and inform the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID Number EPA–R04–OAR–2011–0006 by one of the following methods:

1. *www.regulations.gov:* Follow the on-line instructions for submitting comments.
2. *Email: garver.daniel@epa.gov.*
3. *Fax:* (404) 562–9095.
4. *Mail:* EPA–R04–OAR–2011–0006, Daniel Garver, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW., Atlanta, Georgia 30303.
5. *Hand Delivery or Courier:* Mr. Daniel Garver, Air Toxics Assessment and Implementation Section, Air Toxics and Monitoring Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW., Atlanta, Georgia 30303–8960. Such

deliveries are only accepted during the Regional Office's normal hours of operation. The Regional Office's official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding federal holidays.

Instructions: Direct your comments to Docket ID Number EPA–R04–OAR–2011–0006. EPA's policy is that all comments received will be included in the public docket without change, and may be made available online at *www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or email. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through *www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

Docket: All documents in the electronic docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at the Air Toxics Assessment and Implementation Section, Air Toxics and Monitoring Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW., Atlanta, Georgia 30303–8960. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Daniel Garver, Air Toxics Assessment and Implementation Section, Air Toxics and Monitoring Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW., Atlanta, Georgia 30303–8960. The telephone number is (404) 562–9839. Mr. Garver can also be reached via electronic mail at *garver.daniel@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background
II. Review of Florida's Municipal Waste Combustor (MWC) Plan Revision
III. Final Action
IV. Statutory and Executive Order Reviews

I. Background

Section 129(a)(5) of the CAA requires EPA to conduct a 5-year review of the solid waste incinerator new source performance standards (NSPS) and EGs and revise both, as appropriate. On October 6, 2009, EPA took final action in the **Federal Register** to revise HMIWI rules under sections 111 and 129 of the CAA. *See* 74 FR 51368. This revision was made pursuant to the U.S. Court of Appeals for the District of Columbia Circuit decision which remanded EPA's previous HMIWI regulations, and required that EPA provide further explanation to justify EPA's determination on the minimum regulatory ''floors'' for new and existing HMIWI. The October 6, 2009 revision also satisfies the CAA Section 129(a)(5) requirement to conduct a review of the standards every 5 years. Section 129(b)(2) of the CAA requires states to submit to EPA for approval state plans and revisions that implement and enforce the amended EGs, in this case, 40 CFR part 60, subpart Ce. State plans and revisions must be at least as protective as the EGs, and become federally enforceable as a section 111(d)/129 plan revision upon approval by EPA. The procedures for adoption and submittal of state plans and revisions are codified in 40 CFR part 60, subpart B.

II. Review of Florida's MWC Plan Revision

The required Florida 111(d)/129 Plan revision was submitted by FDEP to EPA on December 21, 2010. EPA has reviewed the plan revision for existing HMIWI units in the context of the requirements of 40 CFR part 60, and subparts B and Ce, as amended. State plans must include the following nine essential elements: (1) Identification of legal authority, (2) identification of mechanism for implementation, (3) inventory of affected facilities, (4) emissions inventory, (5) emissions limits, (6) compliance schedules, (7) testing, monitoring, recordkeeping, and reporting, (8) public hearing records, and (9) annual state progress reports on facility compliance.

A. Identification of Legal Authority

Federal regulations found at 40 CFR 60.26 require the plan to demonstrate that the State has legal authority to adopt and implement the emission standards and compliance schedules. FDEP has demonstrated that it has the legal authority to adopt and implement the emission standards and compliance governing MWC emissions. FDEP's legal authority is derived from state law found at Florida Statutes (F.S.) Sec. 403.031 (Definitions), F.S. Sec. 403.061 (Department powers and duties), F.S. Sec. 403.0872 (Title V air operating permits), and F.S. Sec. 403.8055 (Authority to adopt federal standards by reference). F.S. Subsections 403.061(6), (7), (8), and (13) give the authority for obtaining information and for requiring recordkeeping, and use of monitors. F.S. Subsection 403.061(35) gives the department authority to exercise the duties, powers, and responsibilities required of the State under the CAA. The sections of the Florida Statutes that give authority for compliance and enforcement authority are F.S. Sec. 403.121 (Judicial and administrative remedies), F.S. Sec. 403.131 (Injunctive relief), F.S. Sec. 403.141 (Civil remedies), and F.S. Sec. 403.161 (Civil and criminal penalties). Finally, F.S. Sec. 119.07 is the authority for making the information available to the public. Furthermore, FDEP has submitted and EPA has approved a previous Florida 111(d)/129 Plan for HMIWIs that demonstrate the required legal authority (40 CFR 62.2370). Therefore, the Plan meets the requirements of 40 CFR 60.26.

B. Identification of Enforceable State Mechanisms for Implementing the Plan

The subpart B provision at 40 CFR 60.24(a) requires that state plans include emissions standards, defined 40 CFR 60.21(f) as ''a legally enforceable regulation setting forth an allowable rate of emissions into the atmosphere, or prescribing equipment specifications for control of air pollution emissions.'' Florida Administrative Code (F.A.C.)

Chapter 62–204.800, ''Federal Regulations Adopted by Reference'' has been amended to incorporate revisions to subpart Cb. These amendments to F.A.C. Rule 62–204.800(8) and (9), for Standards of Performance for New Stationary Sources and Emission Guidelines and Compliance Times, respectively, were proposed on October 8, 2010, and became effective on December 30, 2010. These rules meet the requirement of 40 CFR 60.24(a) to have a legally enforceable emission standard.

C. Inventory of Affected MWC Units

Federal regulations found at 40 CFR 60.25(a) require each state plan to include a complete source inventory of all HMIWI units. FDEP has identified ten (10) affected facilities. An affected facility is not exempt from applicable sections 111(d)/129 requirements because it is not listed in the inventory compiled by FDEP. The affected facilities identified by FDEP are shown in the table below:

Facility name	County
Boca Raton Community Hospital.	Palm Beach.
Bethesda Memorial Hospital	Palm Beach.
Malcom Randall VA Medical Center.	Alachua.
Memorial Regional Hospital	Broward.
Lakeland Regional Medical Center.	Polk.
Stericycle, Inc	Orange.
Holy Cross Hospital	Broward.
Curtis Bay Energy Southeast	Pinellas.
St. Joseph's Hospital	Hillsborough.
VA Medical Center	Miami/Dade.

D. Inventory of Emissions From Affected MWC Units

Federal regulations found at 40 CFR 60.25(a) require that each state plan include an emissions inventory that estimates emissions of the pollutant regulated by the EGs. Emissions from HMIWI units contain organics (dioxins/furans), metals (cadmium, lead, mercury, particulate matter, opacity), and acid gases (hydrogen chloride, sulfur dioxide, and nitrogen oxides). FDEP submitted an emissions inventory of HMIWI units as part of its state plan. This emissions inventory contains HMIWI unit emissions rates for each regulated pollutant for each designated facility based on the most recent stack test data. This meets the emission inventory requirements of 40 CFR 60.25(a).

E. Emissions Limitations for HMIWI Units

Federal regulations found at 40 CFR 60.24(c) specify that the state plan or revision must include emission standards that are no less stringent than the EGs, except as specified in 40 CFR 60.24(f), which allows for less stringent emission limitations on a case-by-case basis if certain conditions are met. This exception clause is superseded by section 129(b)(2) of the CAA, which requires that state plans be ''at least as protective'' as the EGs. F.A.C. Rule 62–204.800(9)(g)3.a. and b. specifically adopts by reference the EGs contained in 40 CFR part 60 subpart Ce. Since the emissions standards are adopted by reference, the emission standards in the state plan are ''at least as protective'' as those in subpart Ce, as amended.

F. Compliance Schedules

Federal regulations found at 40 CFR 60.24(c) and (e), require that each state plan must include an expeditious compliance schedule that owners and operators of affected MWC units must meet in order to comply with the requirements of the plan. F.A.C. Rule 62–204.800(9)(g)9., contains compliance times for HMIWI units. The Plan requires that all existing HMWI units comply with the requirements of the plan by June 1, 2012, unless the unit complies with the alternate schedule found at 40 CFR 60.39e(c). The Plan revision meets applicable Federal requirements for compliance schedules.

G. Testing, Monitoring, Recordkeeping, and Reporting Requirements

The provisions of subpart B, 40 CFR 60.24(b) and 60.25(b), stipulate facility testing, monitoring, recordkeeping and reporting requirements for state plans. F.A.C. Rules 62–204.800(9)(g)7.a. and b., and 62–204.800(9)(g)8.a. and b., adopt by reference the performance testing and monitoring, and reporting and recordkeeping requirements found at 40 CFR 60.37e and 60.38e, respectively. The Plan revision meets applicable Federal requirements for testing, monitoring, recordkeeping, and reporting requirements.

H. A Record of Public Hearing on the State Plan Revision

FDEP published a notice of opportunity to submit public comments or request a public hearing on the state plan revision on October 22, 2010. No comments were received, and a public hearing was not requested. Applicable portions of F.A.C. Chapter 62–204.800 amendments became effective on December 30, 2010. FDEP provided evidence of complying with public notice and other hearing requirements. FDEP also certified that ''the public notice and hearing requirements of all applicable state and federal regulations have been satisfied.'' FDEP has met the requirement of 40 CFR 60.23 for a public hearing.

I. Annual State Progress Reports to EPA

FDEP must submit to EPA on an annual basis a report which details the progress in the enforcement of the plan in accordance with 40 CFR 60.25(e) and (f). Accordingly, FDEP will submit annual reports on progress in plan enforcement to EPA on an annual (calendar) basis, commencing with the first full report period after plan revision approval.

III. Final Action

Based upon the rationale discussed above, EPA is approving the Plan revision and related F.A.C. Rule 62–204.800(9) amendments, as adopted by Florida on October 8, 2010. This approval excludes certain authorities retained by EPA, as stated in 40 CFR 60.50c(i). As required by 40 CFR 60.28(c), any revisions to the Plan or supporting regulations will not be considered part of the applicable plan until submitted by FDEP in accordance with 40 CFR 60.28(a) or (b), as applicable, and until approved by EPA in accordance with 40 CFR part 60, subpart B, requirements.

EPA is publishing this rule without prior proposal because the Agency views this as a noncontroversial amendment and anticipates no adverse comments. This action simply reflects already existing Federal requirement for state air pollution control agencies and existing HMIWI units that are subject to the provisions of 40 CFR part 60, subpart Ce and related subpart Ec. However, in the ''Proposed Rules'' section of this **Federal Register** publication, EPA is publishing a separate document that will serve as the proposal to approve the section 111(d)/129 Plan revision should relevant adverse or critical comments be filed. This rule will be effective January 26, 2012 without further notice unless EPA receives adverse comments by January 26, 2012. If EPA receives adverse comments, EPA will publish a timely withdrawal in the **Federal Register** informing the public that the rule did not take effect. EPA will address all public comments in a subsequent final rule based on the proposed rule. The EPA will not institute a second comment period on this action. Any parties interested in commenting must do so at this time. If no such comments are received, the public is advised that this rule will be effective on February 27, 2012 and no further action will be taken on the proposed rule.

IV. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a 111(d)/129 plan submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing 111(d)/129 plan submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the 111(d)/129 Plan is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register.** A major rule cannot take effect until 60 days after it is published in the **Federal Register.** This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by February 27, 2012. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. Parties with objections to this direct final rule are encouraged to file a comment in response to the parallel notice of proposed rulemaking for this action published in the proposed rules section of today's **Federal Register,** rather than file an immediate petition for judicial review of this direct final rule, so that EPA can withdraw this direct final rule and address the comment in the proposed rulemaking. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2)).

List of Subjects in 40 CFR Part 62

Environmental protection, Administrative practice and procedure, Air pollution control, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: November 21, 2011.

A. Stanley Meiburg,

Acting Regional Administrator, Region 4.

For the reasons set forth in the preamble, part 62 of chapter I of title 40 of the Code of Federal Regulations is amended as follows:

PART 62—[AMENDED]

■ 1. The authority citation for part 62 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart K—Florida

■ 2. Section 62.2370 is revised to read as follows:

§ 62.2370 Identification of sources.

(a) The plan applies to existing hospital/medical/infectious waste incinerators for which construction was commenced on or before December 1, 2008, or for which modification was commenced on or before April 6, 2010.

(b) On December 21, 2010, Florida submitted a revised state plan and related Florida Administrative Code amendments as required by 40 CFR part 60, subpart Ce, amended on October 6, 2009.

[FR Doc. 2011–33151 Filed 12–23–11; 8:45 am]

BILLING CODE P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 11

[EB Docket No. 04–296; FCC 11–136]

Review of the Emergency Alert System

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Commission amends its rules governing the Emergency Alert System (EAS) rules to extend the deadline for EAS Participants to be able to receive Common Alerting Protocol (CAP)-formatted EAS alerts to no later than June 30, 2012. This is intended to provide EAS Participants with time to comply with any new CAP-based revisions to the Commission's rules.

DATES: Effective December 27, 2011.

FOR FURTHER INFORMATION CONTACT: Lisa Fowlkes, Deputy Bureau Chief, Public Safety and Homeland Security Bureau, at (202) 418–7452, or by email at *Lisa.Fowlkes@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Fourth Report and Order* in EB Docket No. 04–296, FCC 11–136, adopted on September 15, 2011, and released on September 16, 2011. The full text of this document is available for inspection and copying during normal business hours in the FCC Reference Center (Room CY–A257), 445 12th Street SW., Washington, DC 20554. The complete text of this document also may be purchased from the Commission's copy contractor, Best Copy and Printing, Inc., 445 12th Street SW., Room, CY–B402, Washington, DC 20554. The full text may also be downloaded at: *www.fcc.gov.*

1. This *Fourth Report and Order* is one of two orders in which the Commission will take additional steps to integrate CAP into its part 11 rules governing the EAS. In this *Fourth Report and Order,* the Commission amends § 11.56 of its EAS rules to require EAS Participants to be able to receive CAP-formatted EAS alerts as required by part 11 no later than June 30, 2012. The Commission anticipates that it will adopt the CAP-based revisions to its part 11 EAS rules in a subsequent order stemming from its *Third Further Notice of Proposed Rulemaking* (*Third FNPRM*), 76 FR 35810–01, June 20, 2011, in this docket sufficiently in advance of June 30, 2012, to allow EAS Participants ample time to comply with the new part 11 rules. In this subsequent order, the Commission will also address the many remaining non-CAP related issues raised in its *Third FNPRM.* This amendment of § 11.56 of the Commission's rules moots the Petition for an Expedited Further Extension of the 180-Day ''Cap'' Compliance Deadline, EB Docket 04–296 (filed July 29, 2011) (Joint Petition) filed jointly by 46 state broadcasters associations, NAB, NCTA, the Society of Broadcast Engineers, ACA, the Association for Maximum Service Television, National Public Radio, the Association of Public Television Stations, and the Public Broadcasting Service for extension of the 180-day CAP compliance deadline.

2. In the *Third FNPRM,* the Commission noted that some equipment vendors may be marketing equipment—intermediary devices—that connects in some fashion with previously certified EAS equipment to allow that equipment to receive CAP-formatted alerts in the legacy EAS format. The Commission sought comment on a number of issues regarding these devices, including whether they must be certified under current EAS rules and whether they satisfy the Commission's 2007 CAP-related requirements. Although the Commission intends to address these issues in a subsequent order, it notes that, based on the record, it appears that some EAS Participants may have purchased such equipment. In this *Fourth Report and Order,* the Commission reminds EAS Participants that equipment that meets the definition of an encoder or a decoder under Commission rules must be certified under § 11.34 of the Commission's current rules. In addition, equipment used to receive CAP-formatted EAS alerts must, at a minimum, comply with the CAP requirements the Commission adopted in the *Second Report and Order* in this docket. While the Commission does not decide today whether intermediary devices comply with these requirements, it is unclear whether any equipment that does not meet these current baseline requirements will be able to satisfy any CAP-related rules we may adopt in the future. Consequently, the Commission urges EAS Participants that have purchased or are considering purchase of any type of EAS equipment to verify with manufacturers and/or vendors that the equipment complies with current FCC rules.

I. Procedural Matters

A. Paperwork Reduction Act Analysis

3. This document contains no modified information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104–13.

B. Congressional Review Act

4. The Commission will send a copy of this *Fourth Report and Order* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act (''CRA''), *see* 5 U.S.C. 801(a)(1)(A).

II. Final Regulatory Flexibility Analysis

5. The Regulatory Flexibility Act (RFA) requires that agencies prepare a regulatory flexibility analysis for notice-and-comment rulemaking proceedings, unless the agency certifies that ''the rule will not have a significant economic impact on a substantial number of small entities.'' In this *Fourth Report and Order,* we have revised the rules to extend the date by which EAS Participants must be able to receive CAP-formatted EAS alert to June 30, 2012. We hereby certify that this rule revision will not have a significant economic impact on a substantial number of small entities, because the action merely maintains the status quo regarding CAP compliance. The Commission will send a copy of this *Fourth Report and Order,* including this certification, to the Chief Counsel for Advocacy of the Small Business Administration. In addition, the *Fourth Report and Order* (or a summary thereof) and certification will be published in the **Federal Register**.

III. Ordering Clauses

6. Accordingly, *it is ordered* that, pursuant to sections 1, 2, 4(i), 4(o), 301, 303(r), 303(v), 307, 309, 335, 403, 624(g), 706, and 715 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 152, 154(i) and (o), 301, 303(r), 303(v), 307, 309, 335, 403, 544(g), 606, and 615, this Fourth Report and Order *is adopted;*

7. *It is further ordered* that part 11 of the Commission's rules, 47 CFR part 11, is amended. The Order shall become effective December 27, 2011;

8. *It is further ordered* that the Joint Petition for Further Extension of the CAP Compliance Deadline is dismissed as moot;

9. *It is further ordered* that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of this Fourth Report and Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects in 47 CFR Part 11

Radio, Television.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 11 as follows:

PART 11—EMERGENCY ALERT SYSTEM (EAS)

■ 1. The authority citation for part 11 continues to read as follows:

Authority: 47 U.S.C. 151, 154(i) and (o), 303(r), 544(g) and 606.

■ 2. Revise § 11.56 to read as follows:

§ 11.56 EAS Participants receive CAP-formatted alerts.

All EAS Participants must be able to receive CAP-formatted EAS alerts as required by this part no later than June 30, 2012.

[FR Doc. 2011–33154 Filed 12–23–11; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 219

[Docket No. FRA–2001–11213, Notice No. 15]

RIN 2130–AA81

Alcohol and Drug Testing: Determination of Minimum Random Testing Rates for 2012

AGENCY: Federal Railroad Administration (FRA), DOT.

ACTION: Notice of determination.

According to data from FRA's Management Information System, the rail industry's random drug testing

positive rate has remained below 1.0 percent for the last two years. The Federal Railroad Administrator (Administrator) has therefore determined that the minimum annual random drug testing rate for the period January 1, 2012, through December 31, 2012, will remain at 25 percent of covered railroad employees. In addition, because the industry-wide random alcohol testing violation rate has remained below 0.5 percent for the last two years, the Administrator has determined that the minimum random alcohol testing rate will remain at 10 percent of covered railroad employees for the period January 1, 2012, through December 31, 2012. Railroads remain free, as always, to conduct random testing at higher rates.

DATES: This notice of determination is effective December 27, 2011.

FOR FURTHER INFORMATION CONTACT: Lamar Allen, Alcohol and Drug Program Manager, Office of Safety Enforcement, Mail Stop 25, Federal Railroad Administration, 1200 New Jersey Avenue SE., Washington, DC 20590, (telephone (202) 493–6313); or Kathy Schnakenberg, FRA Alcohol/Drug Program Specialist, (telephone (719) 633–8955).

Issued in Washington, DC, on December 20, 2011.

Joseph C. Szabo,

Administrator.

[FR Doc. 2011–33046 Filed 12–23–11; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 111213751–1748–01]

RIN 0648–XA758

Fisheries of the Exclusive Economic Zone Off Alaska; Bering Sea and Aleutian Islands; Proposed 2012 and 2013 Harvest Specifications for Groundfish

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS proposes 2012 and 2013 harvest specifications, apportionments, and prohibited species catch (PSC) allowances for the groundfish fisheries of the Bering Sea and Aleutian Islands (BSAI) management area. This action is necessary to establish harvest limits for groundfish during the 2012 and 2013 fishing years, and to accomplish the goals and objectives of the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area. The intended effect of this action is to conserve and manage the groundfish resources in the BSAI in accordance with the Magnuson-Stevens Fishery Conservation and Management Act.

DATES: Comments must be received by January 26, 2012.

ADDRESSES: Send comments to Glenn Merrill, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region, NMFS, Attn: Ellen Sebastian. You may submit comments, identified by FDMS Docket Number NOAA–NMFS–2011–0230, by any one of the following methods:

- *Electronic Submissions:* Submit all electronic public comments via the Federal eRulemaking Portal at *http://www.regulations.gov.* To submit comments via the e-Rulemaking Portal, first click the ''submit a comment'' icon, then enter NOAA–NMFS–2011–0230 in the keyword search. Locate the document you wish to comment on from the resulting list and click on the ''Submit a Comment'' icon on the right of that line.
- *Mail:* Submit written comments to P.O. Box 21668, Juneau, AK 99802.
- *Fax:* (907) 586–7557.
- *Hand delivery to the Federal Building:* 709 West 9th Street, Room 420A, Juneau, AK.

Comments must be submitted by one of the above methods to ensure that the comments are received, documented, and considered by NMFS. Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered.

All comments received are a part of the public record. Comments will generally be posted for public viewing on *www.regulations.gov* without change. All Personal Identifying Information (for example, name, address) voluntarily submitted by the commenter will be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

NMFS will accept anonymous comments (enter N/A in the required fields, if you wish to remain anonymous). You may submit attachments to electronic comments in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

Electronic copies of the Alaska Groundfish Harvest Specifications Final Environmental Impact Statement (EIS), the Initial Regulatory Flexibility Analysis (IRFA), and the Supplemental IRFA prepared for this action may be obtained from *http://www.regulations.gov* or from the Alaska Region Web site at *http://alaskafisheries.noaa.gov.* Copies of the final 2010 Stock Assessment and Fishery Evaluation (SAFE) report for the groundfish resources of the BSAI, dated November 2010, are available from the North Pacific Fishery Management Council (Council) at 605 West 4th Avenue, Suite 306, Anchorage, AK 99501–2252, phone (907) 271–2809, or from the Council's Web site at *http://alaskafisheries.noaa.gov/npfmc.* The 2011 SAFE report for the BSAI became available from the same sources in November 2011.

FOR FURTHER INFORMATION CONTACT: Steve Whitney, (907) 586–7269.

SUPPLEMENTARY INFORMATION: Federal regulations at 50 CFR part 679 implement the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (FMP) and govern the groundfish fisheries in the BSAI. The Council prepared the FMP and NMFS approved it under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). General regulations governing U.S. fisheries also appear at 50 CFR part 600.

The FMP and its implementing regulations require NMFS, after consultation with the Council, to specify annually the total allowable catch (TAC) for each target species category, the sum of which must be within the optimum yield range of 1.4 million to 2.0 million metric tons (mt) (see § 679.20(a)(1)(i)). This proposed rule specifies 2.0 million mt for both 2012 and 2013. Section 679.20(c)(1) further requires NMFS to publish proposed harvest specifications in the **Federal Register** and solicit public comments on proposed annual TACs and apportionments thereof, PSC allowances, prohibited species quota (PSQ) reserves established by § 679.21, seasonal allowances of pollock, Pacific cod, and Atka mackerel TAC, American Fisheries Act allocations, Amendment 80 allocations, and Community Development Quota (CDQ) reserve amounts established by § 679.20(b)(1)(ii). The proposed harvest specifications set forth in Tables 1 through 12 of this action satisfy these requirements.

Under § 679.20(c)(3), NMFS will publish the final harvest specifications

for 2012 and 2013 after (1) considering comments received within the comment period (see **DATES**), (2) consulting with the Council at its December 5 through 13, 2011 meeting, and (3) considering new information presented in the final 2011 SAFE reports prepared for the 2012 and 2013 groundfish fisheries.

Other Actions Potentially Affecting the 2012 and 2013 Harvest Specifications

The Council is currently considering implementing management measures in the event that Pacific cod is split from a BSAI-wide fishery into separate OFLs, ABCs and TACs for the Bering Sea subarea and the Aleutian Island districts. This split is dependent upon the development of an age-structured model for the Aleutian Islands Pacific cod stock assessment that will be reviewed by the Plan Team and SSC in 2012 or 2013. This could impact the over fishing levels (OFL), acceptable biological catches (ABC), and total allowable catches (TAC) for Pacific cod on Table 1 for 2013.

In 2011, Kamchatka flounder had OFLs, ABCs, and TACs in the harvest specifications (76 FR 11139, March 1, 2011). In the proposed 2011 and 2012 harvest specifications (75 FR 76372, December 8, 2010) NMFS requested public comment on the proposal to allocate 10.7 percent of the Kamchatka flounder TAC to the CDQ program. Comments were received from each of the six CDQ groups requesting that NMFS not allocate Kamchatka flounder to the CDQ program. Based upon these comments, NMFS determined to not allocate Kamchatka flounder to the six CDQ groups in 2011. However, in 2011, a vessel fishing on behalf of one of the CDQ groups conducted directed fishing as defined at § 679.2 for Kamchatka flounder. That activity indicates that Kamchatka flounder may constitute a directed fishery of the Bering Sea and Aleutian Islands under section 305(i)(1)(B)(i) of the Magnuson-Stevens Act, which may make it necessary to make an allocation for Kamchatka flounder. Therefore, NMFS requests comment about whether the CDQ groups intend to conduct directed fishing for Kamchatka flounder in 2012 or 2013. For the final 2012 and 2013 groundfish harvest specifications for the BSAI NMFS will consider any comments received in determining whether to allocate Kamchatka flounder to the CDQ program. Specifically, if NMFS receives information that none of the CDQ groups intend to conduct directed fishing for Kamchatka flounder, then NMFS would not allocate 10.7 percent of the Kamchatka flounder TAC to the CDQ program. However, if any one of the six CDQ groups intends to conduct directed fishing for Kamchatka flounder, or if NMFS does not receive information that demonstrates unanimity among the CDQ groups about the economic value of Kamchatka flounder to the CDQ groups, NMFS would allocate 10.7 percent of the TAC to the CDQ program in 2012 and 2013.

If an allocation of Kamchatka flounder is made to the CDQ program in the final 2012 and 2013 groundfish harvest specifications for the BSAI, this CDQ reserve will be allocated among the CDQ groups using the same percentage allocations currently used to allocate the arrowtooth flounder complex among the CDQ groups. These percentage allocations are shown in Table 1 of a notice published in the **Federal Register** on August 31, 2006 (71 FR 51804). The current percentage allocations of arrowtooth flounder among the CDQ groups would be used to allocate Kamchatka flounder among the CDQ groups because the new TAC category was created by splitting Kamchatka flounder from the arrowtooth flounder complex.

Proposed ABC and TAC Harvest Specifications

The amounts proposed for the 2012 and 2013 harvest specifications are based on the 2010 SAFE report and are subject to change in the final harvest specifications to be published by NMFS following the Council's December 2011 meeting. At that meeting the Council will consider information contained in the final 2011 SAFE report, recommendations from the November 2011 BSAI Groundfish Plan Team (Plan Team) meeting, the December 2011 Scientific and Statistical Committee (SSC), the Advisory Panel (AP) meetings, and public testimony in making its recommendations for the final 2012 and 2013 harvest specifications.

At the October 2011 Council meeting, the SSC, AP, and Council reviewed the most recent biological and harvest information about the condition of the BSAI groundfish stocks. The Council's Plan Team compiled and presented this information, which was initially compiled by the Plan Team and presented in the final 2010 SAFE report for the BSAI groundfish fisheries, dated November 2010 (see **ADDRESSES**). In November 2011, the Plan Team updated the 2010 SAFE report to include new information collected during 2011, such as revised stock assessments and catch data. The Plan Team compiled this information and produced the 2011 SAFE report. The Council will review the 2011 SAFE report during the December 2011 Council meeting. At that meeting the Council will consider information contained in the 2011 SAFE report, recommendations made by the Plan Team during its November 2011 meeting, the December 2011 SSC and AP meetings, public testimony, and relevant written public comments in making its recommendations for the final 2012 and 2013 harvest specifications.

In previous years some of the largest changes from the proposed to the final harvest specifications have been based on the most recent NMFS surveys, which provide updated estimates of stock biomass and spatial distribution, and changes to the models used in the stock assessments. These changes are recommended by the November 2011 Plan Team and are included in the final 2011 SAFE report. The final 2011 SAFE report includes the most recent information, such as 2011 catch. The final harvest specification amounts for these stocks are not expected to vary greatly from the proposed specification amounts published here.

If the final 2011 SAFE report indicates that the stock biomass trend is increasing for a species, then the final 2012 and 2013 harvest specifications may reflect that increase from the proposed harvest specifications. Conversely, if the final 2011 SAFE report indicates that the stock biomass trend is decreasing for a species, then the final 2012 and 2013 harvest specifications may reflect a decrease from the proposed harvest specifications. In addition to changes driven by biomass trends, there may be changes in TACs due to the sum of ABCs exceeding 2 million mt. Since the FMP requires TACs to be set to an optimum yield between 1.4 and 2 million mt, the Council may be required to recommend TACs that are lower than the ABCs recommended by the Plan Team if setting TACs equal to ABC would cause the TAC to exceed an optimum yield of 2 million mt. Generally, ABCs greatly exceed 2 million mt in years with a large pollock biomass. Based upon the 2011 SAFE report, it is anticipated that both 2012 and 2013 will have large pollock biomasses, and the sum of the ABCs will exceed 2 million mt.

The proposed ABCs and TACs are based on the best available biological and socioeconomic data, including projected biomass trends, information on assumed distribution of stock biomass, and revised methods used to calculate stock biomass. The FMP specifies a series of six tiers to define OFLs and ABCs based on the level of reliable information available to fishery

scientists. Tier one represents the highest level of information quality available while tier six represents the lowest.

In November 2011, the Plan Team recommended a predation-based estimate to octopus mortality as an alternative Tier 6 estimate. If the SSC and Council approve this approach, the OFL and ABC for octopus will likely be larger in 2012 than in 2011.

In October 2011, the SSC adopted the proposed 2012 and 2013 OFLs and ABCs recommended by the Plan Team for all groundfish species. The Council adopted the SSC's OFL and ABC recommendations and the AP's TAC recommendations. These amounts are unchanged from the final 2012 harvest specifications published in the **Federal Register** on March 1, 2011 (76 FR 11139). For 2012 and 2013, the Council recommended and NMFS proposes the OFLs, ABCs, and TACs listed in Table 1. The proposed ABCs reflect harvest amounts that are less than the specified overfishing amounts. The sum of the proposed 2012 and 2013 ABCs for all assessed groundfish is 2,911,610 mt, which is higher than the final 2011 ABC total of 2,534,729 mt (76 FR 11139, March 1, 2011).

Specification and Apportionment of TAC Amounts

The Council recommended proposed TACs for 2012 and 2013 that are equal to proposed ABCs for sablefish, Kamchatka flounder, Pacific ocean perch, shortraker rockfish, and rougheye rockfish. The Council recommended proposed TACs for 2012 and 2013 that are less than the proposed ABCs for pollock, Pacific cod, Atka mackerel, yellowfin sole, rock sole, Greenland turbot, arrowtooth flounder, flathead sole, ''other flatfish,'' Alaska plaice, northern rockfish, ''other rockfish,'' squids, sharks, skates, sculpins, and octopuses.

Section 679.20(a)(5)(iii)(B)(*1*) requires the Aleutian Islands (AI) pollock TAC to be set at 19,000 mt when the AI pollock ABC equals or exceeds 19,000 mt. The Bogoslof pollock TAC is set to accommodate incidental catch amounts. With the exceptions of sablefish, Kamchatka flounder, Pacific ocean perch, shortraker rockfish, and rougheye rockfish; TACs are set below ABCs. TACs are set so that the sum of the overall TAC does not exceed the BSAI optimum yield.

The proposed groundfish OFLs, ABCs, and TACs are subject to change pending the completion of the 2011 SAFE report and the Council's recommendations for final 2012 and 2013 harvest specifications during its December 2011 meeting. These proposed amounts are consistent with the biological condition of groundfish stocks as described in the 2010 SAFE report, and adjusted for other biological and socioeconomic considerations. Pursuant to section 3.2.3.4.1 of the Fishery Management Plan, the Council could recommend adjusting the TACs if warranted on the basis of bycatch considerations, management uncertainty, or socioeconomic considerations, or if required in order to cause the sum of the TACs to fall within the OY range. Table 1 lists the proposed 2012 and 2013 OFL, ABC, TAC, initial TAC (ITAC), and CDQ amounts for groundfish for the BSAI. The proposed apportionment of TAC amounts among fisheries and seasons is discussed below.

BILLING CODE 3510–22–P

TABLE 1– PROPOSED 2012 AND 2013 OVERFISHING LEVEL (OFL), ACCEPTABLE BIOLOGICAL CATCH (ABC), TOTAL ALLOWABLE CATCH (TAC), INITIAL TAC (ITAC), AND CDQ RESERVE ALLOCATION OF GROUNDFISH IN THE BSAI[1]

[Amounts are in metric tons]

Species	Area	Proposed 2012 and 2013				
		OFL	ABC	TAC	ITAC[2]	CDQ[3,4,5]
Pollock	BS	3,170,000	1,600,000	1,253,658	1,128,292	125,366
	AI	50,400	41,600	19,000	17,100	1,900
	Bogoslof	22,000	156	150	150	n/a
Pacific cod[4]	BSAI	329,000	281,000	229,608	205,040	24,568
Sablefish[5]	BS	3,080	2,610	2,610	1,109	98
	AI	2,060	1,740	1,740	370	33
Atka mackerel	BSAI	92,200	77,900	48,593	43,394	5,199
	EAI/BS	n/a	36,800	36,800	32,862	3,938
	CAI	n/a	21,900	10,293	9,192	1,101
	WAI	n/a	19,200	1,500	1,340	161
Yellowfin sole	BSAI	266,000	242,000	197,660	176,510	21,150
Rock sole[6]	BSAI	243,000	219,000	85,000	75,905	9,095
Greenland turbot	BSAI	6,760	5,750	4,950	4,208	n/a
	BS	n/a	4,300	3,500	2,975	375
	AI	n/a	1,450	1,450	1,233	n/a
Arrowtooth flounder	BSAI	191,000	157,000	25,900	22,015	2,771
Kamchatka flounder	BSAI	23,600	17,700	17,700	15,045	n/a
Flathead sole[7]	BSAI	82,100	68,300	41,548	37,102	4,446
Other flatfish[8]	BSAI	19,500	14,500	3,000	2,550	n/a
Alaska plaice	BSAI	83,800	69,100	16,000	13,600	n/a
Pacific ocean perch	BSAI	34,300	24,700	24,700	21,812	n/a
	BS	n/a	5,710	5,710	4,854	n/a
	EAI	n/a	5,660	5,660	5,054	606
	CAI	n/a	4,960	4,960	4,429	531
	WAI	n/a	8,370	8,370	7,474	896
Northern rockfish	BSAI	10,400	8,330	4,000	3,400	n/a
Shortraker rockfish	BSAI	524	393	393	334	n/a
Rougheye rockfish[9]	BSAI	563	465	465	395	n/a
	EBS/EAI	n/a	240	240	204	n/a
	CAI/WAI	n/a	225	225	191	n/a
Other rockfish[10]	BSAI	1,700	1,280	1,000	850	n/a
	BS	n/a	710	500	425	n/a
	AI	n/a	570	500	425	n/a
Squids	BSAI	2,620	1,970	425	361	n/a
Sharks	BSAI	1,360	1,020	50	43	n/a
Skates	BSAI	37,200	31,000	16,500	14,025	n/a
Sculpins	BSAI	58,300	43,700	5,200	4,420	n/a
Octopuses	BSAI	528	396	150	128	n/a
TOTAL		4,731,995	2,911,610	2,000,000	1,788,157	197,032

[1] These amounts apply to the entire BSAI management area unless otherwise specified. With the exception of pollock, and for the purpose of these harvest specifications, the Bering Sea (BS) subarea includes the Bogoslof District.

[2] Except for pollock, the portion of the sablefish TAC allocated to hook-and-line and pot gear, and Amendment 80 species (Atka mackerel, Aleutian Islands Pacific ocean perch, yellowfin sole, rock sole, flathead sole, and Pacific cod), 15 percent of each TAC is put into a reserve. The ITAC for these species is the remainder of the TAC after the subtraction of these reserves.

[3] Under § 679.20(a)(5)(i)(A)(1), the annual Bering Sea subarea pollock TAC, after subtracting first for the CDQ directed fishing allowance (10 percent) and second for the incidental catch allowance 3 percent), is further allocated by sector for a directed pollock fishery as follows: inshore - 50 percent; catcher/processor - 40 percent; and motherships - 10 percent. Under § 679.20(a)(5)(iii)(B)(2)(i) and (ii), the annual Aleutian Islands subarea pollock TAC, after subtracting first for the CDQ directed fishing allowance (10 percent) and second for the incidental catch allowance (1,600 mt), is allocated to the Aleut Corporation for a directed pollock fishery.

[4] The Pacific cod TAC is reduced by three percent from the ABC to account for the State of Alaska guideline harvest level in state waters of the Aleutian Islands subarea.

[5] For the Amendment 80 species (Atka mackerel, Aleutian Islands Pacific ocean perch, yellowfin sole, rock sole, flathead sole, and Pacific cod), 10.7 percent of the TAC is reserved for use by CDQ participants (see §§ 679.20(b)(1)(ii)(C) and 679.31). Twenty percent of the sablefish TAC allocated to hook-and-line gear or pot gear, 7.5 percent of the sablefish TAC allocated to trawl gear, and 10.7 percent of the TACs for Bering Sea Greenland turbot and arrowtooth flounder are reserved for use by CDQ participants (see § 679.20(b)(1)(ii)(B) and (D)). Aleutian Islands Greenland turbot, "other flatfish," Alaska plaice, Bering Sea Pacific ocean perch, northern rockfish, shortraker rockfish, rougheye rockfish, "other rockfish," squids, octopuses, skates, sculpins, and sharks are not allocated to the CDQ program.

[6] ''Rock sole'' includes Lepidopsetta polyxystra (Northern rock sole) and Lepidopsetta bilineata (Southern rock sole).

[7] ''Flathead sole'' includes Hippoglossoides elassodon (flathead sole) and Hippoglossoides robustus (Bering flounder).

[8] "Other flatfish" includes all flatfish species, except for halibut (a prohibited species), flathead sole, Greenland turbot, rock sole, yellowfin sole, arrowtooth flounder, Kamchatka flounder, and Alaska plaice.

[9] ''Rougheye rockfish'' includes Sebastes aleutianus (rougheye) and Sebastes melanostictus (blackspotted).

[10] "Other rockfish" includes all Sebastes and Sebastolobus species except for Pacific ocean perch, northern, shortraker, and rougheye rockfish.

Groundfish Reserves and the Incidental Catch Allowance (ICA) for Pollock, Atka Mackerel, Flathead Sole, Rock Sole, Yellowfin Sole, and AI Pacific Ocean Perch

The regulations at section 679.20(b) require NMFS to place certain amounts of BSAI TAC in reserve. Section 679.20(b)(1)(i) requires the placement of 15 percent of the TAC for each target species category, except for pollock, hook-and-line and pot gear allocation of sablefish, and Amendment 80 species, in a non-specified reserve. Section 679.20(b)(1)(ii)(B) requires that 20 percent of the hook-and-line and pot gear allocation of sablefish be allocated to the fixed gear sablefish CDQ reserve. Section 679.20(b)(1)(ii)(D) requires that 7.5 percent of the trawl gear allocations of sablefish and 10.7 percent of Bering Sea Greenland turbot, and arrowtooth flounder be allocated to the respective CDQ reserves. Additionally, unless NMFS receives comments that the CDQ groups do not intend to conduct directed fisheries for Kamchatka flounder, NMFS will assume that a directed fishery exists, under section 305(i)(1)(B)(i) of the MSA, and allocate 10.7 percent of the TAC for Kamchatka flounder to the CDQ reserves. Section 679.20(b)(1)(ii)(C) requires that 10.7 percent of the TACs for Atka mackerel, AI Pacific ocean perch, yellowfin sole, rock sole, flathead sole, and Pacific cod be allocated to the CDQ reserves. Sections 679.20(a)(5)(i)(A) and 679.31(a) also require the allocation of 10 percent of the BSAI pollock TACs to the pollock CDQ directed fishing allowance (DFA). The entire Bogoslof District pollock TAC is allocated as an ICA (see § 679.20(a)(5)(ii)). With the exception of the hook-and-line and pot gear sablefish CDQ reserve, the regulations do not further apportion the CDQ reserves by gear. Sections 679.30 and 679.31 set forth regulations governing the management of the CDQ reserves.

Pursuant to § 679.20(a)(5)(i)(A)(*1*), NMFS proposes a pollock ICA of 3 percent of the Bering Sea subarea pollock TAC after subtraction of the 10 percent CDQ reserve. This allowance is based on NMFS' examination of the pollock incidental catch, including the incidental catch by CDQ vessels, in target fisheries other than pollock from 1999 through 2011. During this 13-year period, the pollock incidental catch ranged from a low of 2.4 percent in 2006 to a high of 5 percent in 1999, with a 13-year average of 3.2 percent. Pursuant to § 679.20(a)(5)(iii)(B)(*2*)(*i*) and (*ii*), NMFS proposes a pollock ICA of 1,600 mt for the AI subarea after subtraction of the 10 percent CDQ DFA. This allowance is based on NMFS' examination of the pollock incidental catch, including the incidental catch by CDQ vessels, in target fisheries other than pollock from 2003 through 2011. During this 9-year period, the incidental catch of pollock ranged from a low of 5 percent in 2006 to a high of 10 percent in 2003, with a 9-year average of 7 percent.

Pursuant to § 679.20(a)(8) and (10), NMFS proposes ICAs of 5,000 mt of flathead sole, 10,000 mt of rock sole, 2,000 mt of yellowfin sole, 10 mt of Western Aleutian District Pacific ocean perch, 75 mt of Central Aleutian District Pacific ocean perch, 100 mt of Eastern Aleutian District Pacific ocean perch, 40 mt for Western Aleutian District Atka mackerel, 75 mt for Central Aleutian District Atka mackerel, and 1,000 mt of Eastern Aleutian District and Bering Sea subarea Atka mackerel after subtraction of the 10.7 percent CDQ reserve. These allowances are based on NMFS' examination of the average incidental

catch in other target fisheries from 2003 through 2011.

The regulations do not designate the remainder of the non-specified reserve by species or species group. Any amount of the reserve may be apportioned to a target species that contributed to the non-specified reserve, provided that such apportionments do not result in overfishing (see § 679.20(b)(1)(i)).

Allocations of Pollock TAC Under the American Fisheries Act (AFA)

Section 679.20(a)(5)(i)(A) requires that the pollock TAC apportioned to the Bering Sea subarea, after subtraction of 10 percent for the CDQ program and 3 percent for the ICA, be allocated as a DFA as follows: 50 percent to the inshore sector, 40 percent to the catcher/processor sector, and 10 percent to the mothership sector. In the Bering Sea subarea, 40 percent of the DFA is allocated to the A season (January 20 to June 10) and 60 percent of the DFA is allocated to the B season (June 10 to November 1) (§ 679.20(a)(5)(i)(B)). The AI directed pollock fishery allocation to the Aleut Corporation is the amount of pollock remaining in the AI subarea after subtracting 1,900 mt for the CDQ DFA (10 percent) and 1,600 mt for the ICA (§ 679.20(a)(5)(iii)(B)(*2*)(*ii*)). In the AI subarea, 40 percent of the ABC is allocated to the A season and the remainder of the directed pollock fishery is allocated to the B season. Table 2 lists these proposed 2012 and 2013 amounts.

Section 679.20(a)(5)(i)(A)(*4*) also includes several specific requirements regarding Bering Sea subarea pollock allocations. First, 8.5 percent of the pollock allocated to the catcher/processor sector will be available for harvest by AFA catcher vessels with catcher/processor sector endorsements, unless the Regional Administrator receives a cooperative contract that provides for the distribution of harvest among AFA catcher/processors and AFA catcher vessels in a manner agreed to by all members. Second, AFA catcher/processors not listed in the AFA are limited to harvesting not more than 0.5 percent of the pollock allocated to the catcher/processor sector. Table 2 lists the proposed 2012 and 2013 allocations of pollock TAC. Tables 9 through 12 list the AFA catcher/processor and catcher vessel harvesting sideboard limits. In past years, the proposed harvest specifications included text and tables describing pollock allocations to the Bering Sea subarea inshore pollock cooperatives and open access sector. These allocations are based on the submission of AFA inshore cooperative applications due to NMFS on December 1 of each calendar year. Because AFA inshore cooperative applications for 2012 have not been submitted to NMFS, thereby preventing NMFS from calculating 2012 allocations, NMFS has not included inshore cooperative text and tables in these proposed harvest specifications. NMFS will post 2012 AFA inshore cooperative allocations on the Alaska Region Web site at *http://alaskafisheries.noaa.gov* when they become available in December 2011.

Table 2 also lists proposed seasonal apportionments of pollock and harvest limits within the Steller Sea Lion Conservation Area (SCA). The harvest of pollock within the SCA, as defined at § 679.22(a)(7)(vii), is limited to 28 percent of the DFA until 12 noon, April 1 as provided in § 679.20(a)(5)(i)(C). The remaining 12 percent of the 40 percent annual DFA allocated to the A season may be taken outside the SCA before 12 noon, April 1 or inside the SCA after 12 noon, April 1. The A season pollock SCA harvest limit will be apportioned to each sector in proportion to each sector's allocated percentage of the DFA. Table 2 lists these proposed 2012 and 2013 amounts by sector.

TABLE 2–PROPOSED 2012 AND 2013 ALLOCATIONS OF POLLOCK TACS TO THE DIRECTED POLLOCK FISHERIES AND TO THE CDQ DIRECTED FISHING ALLOWANCES (DFA)[1]

[Amounts are in metric tons]

Area and sector	2012 and 2013 Allocations	A season		B season[1]
		A season DFA	SCA harvest limit[2]	B season DFA
Bering Sea subarea TAC	1,253,658	N/A	N/A	N/A
CDQ DFA	125,366	50,146	35,102	75,219
ICA[1]	33,849	N/A	N/A	N/A
AFA Inshore	547,222	218,889	153,222	328,333
AFA Catcher/Processors[3]	437,777	175,111	122,578	262,666
Catch by C/Ps	400,566	160,227	N/A	240,340
Catch by C/Vs[3]	37,211	14,884	N/A	22,327
Unlisted C/P Limit[4]	2,189	876	N/A	1,313
AFA Motherships	109,444	43,778	30,644	65,667
Excessive Harvesting Limit[5]	191,528	N/A	N/A	N/A
Excessive Processing Limit[6]	328,333	N/A	N/A	N/A
Total Bering Sea DFA (non-CDQ)	1,094,443	437,777	306,444	656,666
Aleutian Islands subarea[1]	19,000	N/A	N/A	N/A
CDQ DFA	1,900	760	N/A	1,140
ICA	1,600	800	N/A	800
Aleut Corporation	15,500	10,600	N/A	4,900
Bogoslof District ICA[7]	150	N/A	N/A	N/A

[1] Pursuant to § 679.20(a)(5)(i)(A), the annual Bering Sea subarea pollock TAC, after subtraction for the CDQ DFA (10 percent) and the ICA (3 percent), is allocated as a DFA as follows: inshore sector 50 percent, catcher/processor sector 40 percent, and mothership sector 10 percent. In the Bering Sea subarea, 40 percent of the DFA is allocated to the A season (January 20–June 10) and 60 percent of the DFA is allocated to the B season (June 10–November 1). Pursuant to § 679.20(a)(5)(iii)(B)(2)(i) and (ii), the annual AI pollock TAC, after subtracting first for the CDQ DFA (10 percent) and second the ICA (1,600 mt), is allocated to the Aleut Corporation for a directed pollock fishery. In the AI subarea, the A season is allocated 40 percent of the ABC and the B season is allocated the remainder of the directed pollock fishery.

[2] In the Bering Sea subarea, no more than 28 percent of each sector's annual DFA may be taken from the SCA before April 1. The remaining 12 percent of the annual DFA allocated to the A season may be taken outside of the SCA before April 1 or inside the SCA after April 1. If 28 percent of the annual DFA is not taken inside the SCA before April 1, the remainder is available to be taken inside the SCA after April 1.

[3] Pursuant to § 679.20(a)(5)(i)(A)(4), not less than 8.5 percent of the DFA allocated to listed catcher/processors (C/Ps) shall be available for harvest only by eligible catcher vessels (CVs) delivering to listed catcher/processors.

[4] Pursuant to § 679.20(a)(5)(i)(A)(4)(iii), the AFA unlisted catcher/processors are limited to harvesting not more than 0.5 percent of the catcher/processor sector's allocation of pollock.

[5] Pursuant to § 679.20(a)(5)(i)(A)(6), NMFS establishes an excessive harvesting share limit equal to 17.5 percent of the sum of the pollock DFAs not including CDQ.

[6] Pursuant to § 679.20(a)(5)(i)(A)(7), NMFS establishes an excessive processing share limit equal to 30.0 percent of the sum of the pollock DFAs not including CDQ.

[7] The Regional Administrator proposes closing the Bogoslof pollock fishery for directed fishing under the final 2012 and 2013 harvest specifications for the BSAI. The amounts specified are for incidental catch only and are not apportioned by season or sector.

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Allocation of the Atka Mackerel TACs

Section 679.20(a)(8)(ii) allocates the Atka mackerel TACs to the Amendment 80 and BSAI trawl limited access sectors, after subtraction of the CDQ reserves, jig gear allocation, and ICAs for the BSAI trawl limited access sector and non-trawl gear (Table 3). The allocation of the ITAC for Atka mackerel to the Amendment 80 and BSAI trawl limited access sectors is established in Table 33 to part 679 and in § 679.91. Pursuant to § 679.20(a)(8)(i), up to 2 percent of the Eastern Aleutian District and Bering Sea subarea Atka mackerel ITAC may be allocated to jig gear. The amount of this allocation is determined annually by the Council based on several criteria, including the anticipated harvest capacity of the jig gear fleet. The Council recommended and NMFS proposes a 0.5 percent allocation of the Atka mackerel ITAC in the Eastern Aleutian District and Bering Sea subarea to jig gear in 2012 and 2013. This percentage is applied after the subtraction of the CDQ reserve and the ICA.

Section 679.20(a)(8)(ii)(C)(*3*) limits the annual TAC for Area 542 to no more than 47 percent of the Area 542 ABC. Section 679.7(a)(19) prohibits retention of Atka mackerel in Area 543, and the proposed amount is set to account for discards in other fisheries.

Section 679.20(a)(8)(ii)(A) apportions the Atka mackerel TAC (including the CDQ reserve) into two equal seasonal allowances. The first seasonal allowance is made available for directed fishing with trawl gear from January 20 to June 10 (A season), and the second seasonal allowance is made available from June 10 to November 1 (B season). The jig gear allocation is not apportioned by season.

Sections 679.20(a)(8)(ii)(C)(*1*)(*i*) and (*ii*) require the Amendment 80 cooperatives and CDQ groups to limit harvest to 10 percent of their Central Aleutian District Atka mackerel allocation equally divided between the A and B seasons within waters 10 nm to 20 nm of Gramp Rock and Tag Island, as described on Table 12 to part 679. Vessels not fishing under the authority of an Amendment 80 cooperative quota or CDQ allocation are prohibited from conducting directed fishing for Atka mackerel inside Steller sea lion critical habitat in the Central Aleutian District.

Two Amendment 80 cooperatives have formed for the 2012 fishing year. Because all Amendment 80 vessels are part of a cooperative, no allocation to the Amendment 80 limited access sector is required. NMFS will post 2012 Amendment 80 cooperative allocations on the Alaska Region Web site at *http://alaskafisheries.noaa.gov* prior to the start of the fishing year on January 1, 2012, based on the harvest specifications effective on that date.

Table 3 lists these 2012 and 2013 Atka mackerel season and area allowances, as well as the sector allocations. The 2013 allocations for Amendment 80 species between Amendment 80 cooperatives and the Amendment 80 limited access sector will not be known until eligible participants apply for participation in the program by November 1, 2012.

TABLE 3–PROPOSED 2012 AND 2013 SEASONAL AND SPATIAL ALLOWANCES, GEAR SHARES, CDQ RESERVE, INCIDENTAL CATCH ALLOWANCE, AND AMENDMENT 80 ALLOCATIONS OF THE BSAI ATKA MACKEREL TAC

[Amounts are in metric tons]

Sector[1]	Season[2,3,4]	Allocation by area		
		Eastern Aleutian District/Bering Sea	Central Aleutian District	Western Aleutian District
TAC	n/a	36,800	10,293	1,500
CDQ reserve	Total	3,938	1,101	161
	Critical habitat[5]	n/a	661	96
ICA	Total	1,000	75	40
Jig[6]	Total	159	0	0
BSAI trawl limited access	Total	3,170	912	0
	A	1,585	456	0
	B	1,585	456	0
Amendment 80	Total	28,533	8,205	1,300
Alaska Seafood Cooperative	Total	11,896	3,393	539
	A	5,948	1,697	270
	Critical habitat[5]	n/a	1,018	162
	B	5,948	1,697	270
	Critical habitat[5]	n/a	1,018	162
Alaska Groundfish Cooperative	Total	16,637	4,812	761
	A	8,319	2,406	381
	Critical habitat[5]	n/a	1,444	228
	B	8,319	2,406	381
	Critical habitat[5]	n/a	1,444	228

[1] Section 679.20(a)(8)(ii) allocates the Atka mackerel TACs, after subtraction of the CDQ reserves, ICAs, and the jig gear allocation, to the Amendment 80 and BSAI trawl limited access sectors. The allocation of the ITAC for Atka mackerel to the Amendment 80 and BSAI trawl limited access sectors is established in Table 33 to part 679 and § 679.91. The CDQ reserve is 10.7 percent of the TAC for use by CDQ participants (see §§ 679.20(b)(1)(ii)(C) and 679.31).

[2] Sections 679.20(a)(8)(ii)(A) and 679.22(a) establish temporal and spatial limitations for the Atka mackerel fishery.

[3] The seasonal allowances of Atka mackerel are 50 percent in the A season and 50 percent in the B season.

[4] Section 679.23(e)(3) authorizes directed fishing for Atka mackerel with trawl gear during the A season from January 20 to June 10, and the B season from June 10 to November 1.

[5] Section 679.20(a)(8)(ii)(C) requires the TAC in area 542 shall be no more than 47% of ABC, and Atka mackerel harvests for Amendment 80 cooperatives and CDQ groups within waters 10 nm to 20 nm of Gramp Rock and Tag Island, as described in Table 12 to part 679, in Area 542 are limited to no more than 10 percent of the Amendment 80 cooperative Atka mackerel allocation or 10 percent of the CDQ Atka mackerel allocation.

[6] Section 679.20(a)(8)(i) requires that up to 2 percent of the Eastern Aleutian District and Bering Sea subarea TAC be allocated to jig gear after subtraction of the CDQ reserve and ICA. The amount of this allocation is 0.5 percent. The jig gear allocation is not apportioned by season.

Allocation of the Pacific Cod TAC

Sections 679.20(a)(7)(i) and (ii) allocate the Pacific cod TAC in the BSAI, after subtraction of 10.7 percent for the CDQ program, as follows: 1.4 percent to vessels using jig gear, 2.0 percent to hook-and-line and pot catcher vessels less than 60 ft (18.3 m) length overall (LOA), 0.2 percent to hook-and-line catcher vessels greater than or equal to 60 ft (18.3 m) LOA, 48.7 percent to hook-and-line catcher/processors, 8.4 percent to pot catcher vessels greater than or equal to 60 ft (18.3 m) LOA, 1.5 percent to pot catcher/processors, 2.3 percent to AFA trawl catcher/processors, 13.4 percent to non-AFA trawl catcher/processors, and 22.1 percent to trawl catcher vessels. The ICA for the hook-and-line and pot sectors will be deducted from the aggregate portion of Pacific cod TAC allocated to the hook-and-line and pot sectors. For 2012 and 2013, the Regional Administrator proposes an ICA of 500 mt based on anticipated incidental catch in these fisheries.

The allocation of the ITAC for Pacific cod to the Amendment 80 sector is established in Table 33 to part 679 and

§ 679.91. Two Amendment 80 cooperatives have formed for the 2012 fishing year. Because all Amendment 80 vessels are part of a cooperative, no allocation to the Amendment 80 limited access sector is required. NMFS will post 2012 Amendment 80 cooperative allocations on the Alaska Region Web site at *http://alaskafisheries.noaa.gov* prior to the start of the fishing year on January 1, 2012, based on the harvest specifications effective on that date.

The 2013 allocations for Amendment 80 species between Amendment 80 cooperatives and the Amendment 80 limited access sector will not be known until eligible participants to apply for participation in the program by November 1, 2012. NMFS will post 2013 Amendment 80 cooperatives and Amendment 80 limited access allocations on the Alaska Region Web site at *http://alaskafisheries.noaa.gov* when they become available in December 2012.

The Pacific cod ITAC is apportioned into seasonal allowances to disperse the Pacific cod fisheries over the fishing year (see §§ 679.20(a)(7) and 679.23(e)(5)). In accordance with § 679.20(a)(7)(iv)(B) and (C), any unused portion of a seasonal Pacific cod allowance will become available at the beginning of the next seasonal allowance.

The CDQ and non-CDQ season allowances by gear based on the proposed 2012 and 2013 Pacific cod TACs are listed in Table 4 based on the sector allocation percentages of Pacific cod set forth at §§ 679.20(a)(7)(i)(B) and 679.20(a)(7)(iv)(A); and the seasonal allowances of Pacific cod set forth at § 679.23(e)(5). Section 679.7(a)(19) prohibits retention of Pacific cod in Area 543 and § 679.7(a)(23) prohibits directed fishing for Pacific cod with hook-and-line, pot, or jig gear in the AI subarea November 1 through December 31.

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TABLE 4–PROPOSED 2012 AND 2013 GEAR SHARES AND SEASONAL ALLOWANCES OF THE BSAI PACIFIC COD TAC

[Amounts are in metric tons]

Gear sector	Percent	2012 and 2013 share of gear sector total	2012 and 2013 share of sector total	2012 and 2013 seasonal apportionment	
				Season	Amount
Total TAC	100	229,608	n/a	n/a	n/a
CDQ	10.7	24,568	n/a	See §679.20(a)(7)(i)(B)	n/a
Total hook-and-line/pot gear	60.8	124,664	n/a	n/a	n/a
Hook-and-line/pot ICA[1]	n/a	n/a	500	n/a	n/a
Hook-and-line/pot sub-total	n/a	124,164	n/a	n/a	n/a
Hook-and-line catcher/processors	48.7	n/a	99,454	Jan-1-Jun 10	50,722
				Jun 10-Dec 31	48,732
Hook-and-line catcher vessels≥ 60 ft LOA	0.2	n/a	408	Jan 1-Jun 10	208
				Jun 10-Dec 31	200
Pot catcher/processors	1.5	n/a	3,063	Jan 1-Jun 10	1,562
				Sept 1-Dec 31	1,501
Pot catcher vessels≥ 60 ft LOA	8.4	n/a	17,154	Jan 1-Jun 10	8,749
				Sept-1-Dec 31	8,406
Catcher vessels < 60 ft LOA using hook-and-line or pot gear	2	n/a	4,084	n/a	n/a
Trawl catcher vessels	22.1	45,314	n/a	Jan 20-Apr 1	33,532
				Apr 1-Jun 10	4,985
				Jun 10-Nov 1	6,797
AFA trawl catcher/processors	2.3	4,716	n/a	Jan 20-Apr 1	3,537
				Apr 1-Jun 10	1,179
				Jun 10-Nov 1	0
Amendment 80	13.4	27,475	n/a	Jan 20-Apr 1	20,607
				Apr 1-Jun 10	6,869
				Jun 10-Nov 1	0
Alaska Groundfish Cooperative for 2012[2]	n/a	5,116	n/a	Jan 20-Apr 1	3,837
				Apr 1-Jun 10	1,279
				Jun 10-Nov 1	0
Alaska Seafood Cooperative for 2012[2]	n/a	22,359	n/a	Jan 20- Apr 1	16,769
				Apr 1-Jun 10	5,590
				Jun 10-Nov 1	0
Jig	1.4	2,871	n/a	Jan 1-Apr 30	1,722
				Apr 30-Aug 31	574
				Aug 31-Dec 31	574

[1] The ICA for the hook-and-line and pot sectors will be deducted from the aggregate portion of Pacific cod TAC allocated to the hook-and-line and pot sectors. The Regional Administrator proposes an ICA of 500 mt for 2012 and 2013 based on anticipated incidental catch in these fisheries.

[2] The 2013 allocations for Amendment 80 species between Amendment 80 cooperatives and the Amendment 80 limited access sector will not be known until eligible participants apply for participation in the program by November 1, 2012.

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Sablefish Gear Allocation

Sections 679.20(a)(4)(iii) and (iv) require the allocation of sablefish TACs for the Bering Sea and AI subareas between trawl gear and hook-and-line or pot gear. Gear allocations of the TACs for the Bering Sea subarea are 50 percent for trawl gear and 50 percent for hook-and-line or pot gear. Gear allocations for the AI subarea are 25 percent for trawl gear and 75 percent for hook-and-line or pot gear. Section 679.20(b)(1)(ii)(B) requires apportionment of 20 percent of the hook-and-line and pot gear allocation of sablefish from the nonspecified reserves to the CDQ reserve. Additionally, § 679.20(b)(1)(ii)(D) requires apportionment of 7.5 percent of the trawl gear allocation of sablefish to the CDQ reserve. The Council recommended that only trawl sablefish TAC be established biennially. The harvest specifications for the hook-and-line gear and pot gear sablefish Individual Fishing Quota (IFQ) fisheries will be limited to the 2012 fishing year to ensure those fisheries are conducted concurrently with the halibut IFQ fishery. Concurrent sablefish and halibut IFQ fisheries would reduce the potential for discards of halibut and sablefish in those fisheries. The sablefish IFQ fisheries would remain

closed at the beginning of each fishing year until the final harvest specifications for the sablefish IFQ fisheries are in effect. Table 5 lists the proposed 2012 and 2013 gear allocations of the sablefish TAC and CDQ reserve amounts.

TABLE 5–PROPOSED 2012 AND 2013 GEAR SHARES AND CDQ RESERVE OF BSAI SABLEFISH TACS

[Amounts are in metric tons]

Subarea gear	Percent of TAC	2012 Share of TAC	2012 ITAC[1]	2012 CDQ reserve	2013 Share of TAC	2013 ITAC	2013 CDQ reserve
Bering Sea							
Trawl	50	1,305	1,109	98	1,305	1,109	98
Hook-and-line gear[2]	50	1,305	n/a	261	n/a	n/a	n/a
TOTAL	100	2,610	1,109	359	2,610	1,109	98
Aleutian Islands							
Trawl	25	435	370	33	435	370	33
Hook-and-line gear[2]	75	1,305	n/a	261	n/a	n/a	n/a
TOTAL	100	1,740	370	294	1,740	370	33

[1] Except for the sablefish hook-and-line or pot gear allocation, 15 percent of TAC is apportioned to the reserve. The ITAC is the remainder of the TAC after the subtraction of these reserves.

[2] For the portion of the sablefish TAC allocated to vessels using hook-and-line or pot gear, 20 percent of the allocated TAC is reserved for use by CDQ participants. Section 679.20(b)(1) does not provide for the establishment of an ITAC for sablefish allocated to hook-and-line or pot gear.

Allocation of the Aleutian Islands Pacific Ocean Perch, and BSAI Flathead Sole, Rock Sole, and Yellowfin Sole TACs

Sections 679.20(a)(10)(i) and (ii) require that an allocation be made to the Amendment 80 and BSAI trawl limited access sectors for AI Pacific ocean perch, and BSAI flathead sole, rock sole, and yellowfin sole TACs, after subtraction of 10.7 percent for the CDQ reserve and an ICA for the BSAI trawl limited access sector and vessels using non-trawl gear. The allocation of the ITAC for AI Pacific ocean perch, and BSAI flathead sole, rock sole, and yellowfin sole to the Amendment 80 sector is established in Tables 33 and 34 to part 679 and in § 679.91.

Two Amendment 80 cooperatives have formed for the 2012 fishing year. Because all Amendment 80 vessels are part of a cooperative, no allocation to the Amendment 80 limited access sector is required. NMFS will post 2012 Amendment 80 cooperative allocations on the Alaska Region Web site at *http://alaskafisheries.noaa.gov* prior to the start of the fishing year on January 1, 2012, based on the harvest specifications effective on that date.

The 2013 allocations for Amendment 80 species between Amendment 80 cooperatives and the Amendment 80 limited access sector will not be known until after November 1, 2012, the deadline date for eligible participants to apply for participation in the program. NMFS will post 2013 Amendment 80 cooperatives and Amendment 80 limited access allocations on the Alaska Region Web site at *http://alaskafisheries.noaa.gov* when they become available in December 2012.

Table 6 lists the proposed 2012 and 2013 allocations and seasonal apportionments of the AI Pacific ocean perch, and BSAI flathead sole, rock sole, and yellowfin sole TACs.

TABLE 6–PROPOSED 2012 AND 2013 COMMUNITY DEVELOPMENT QUOTA (CDQ) RESERVES, INCIDENTAL CATCH AMOUNTS (ICAS), AND AMENDMENT 80 ALLOCATIONS OF THE ALEUTIAN ISLANDS PACIFIC OCEAN PERCH, AND BSAI FLATHEAD SOLE, ROCK SOLE, AND YELLOWFIN SOLE TACS

[Amounts are in metric tons]

Sector	2012 and 2013 allocations					
	Pacific ocean perch			Flathead sole	Rock sole	Yellowfin sole
	Eastern Aleutian District	Central Aleutian District	Western Aleutian District	BSAI	BSAI	BSAI
TAC	5,660	4,960	8,370	41,548	85,000	197,660
CDQ	606	531	896	4,446	9,095	21,150
ICA	100	75	10	5,000	10,000	2,000
BSAI trawl limited access	495	435	149	0	0	34,746
Amendment 80	4,459	3,919	7,315	32,102	65,905	139,764
Alaska Groundfish Cooperative for 2011[1]	2,364	2,078	3,879	6,269	18,498	59,326
Alaska Seafood Cooperative for 2011[1]	2,095	1,841	3,436	25,833	47,407	80,438

[1] The 2013 allocations for Amendment 80 species between Amendment 80 cooperatives and the Amendment 80 limited access sector will not be known until eligible participants apply for participation in the program by November 1, 2012.

Allocation of PSC Limits for Halibut, Salmon, Crab, and Herring

Section 679.21(e) sets forth the BSAI PSC limits. Pursuant to § 679.21(e)(1)(iv) and (e)(2), the 2012 and 2013 BSAI halibut mortality limits are 3,675 mt for trawl fisheries and 900 mt for the non-trawl fisheries. Sections 679.21(e)(3)(i)(A)(*2*) and (e)(4)(i)(A) allocate 326 mt of the trawl halibut mortality limit and 7.5 percent, or 67 mt, of the non-trawl halibut mortality limit as the PSQ reserve for use by the groundfish CDQ program.

Section 679.21(e)(4)(i) authorizes the apportionment of the non-trawl halibut PSC limit into PSC bycatch allowances among six fishery categories. Table 7c lists the fishery bycatch allowances for the trawl and non-trawl fisheries.

Pursuant to section 3.6 of the BSAI FMP, the Council recommends, and NMFS agrees, that certain specified non-trawl fisheries be exempt from the halibut PSC limit. As in past years after consultation with the Council, NMFS exempts pot gear, jig gear, and the sablefish IFQ hook-and-line gear fishery categories from halibut bycatch restrictions for the following reasons: (1) The pot gear fisheries have low halibut bycatch mortality; (2) NMFS estimates halibut mortality for the jig gear fleet to be negligible because of the small size of the fishery and the selectivity of the gear; and (3) the sablefish and halibut IFQ fisheries have low halibut bycatch mortality because the IFQ program requires legal-size halibut to be retained by vessels using hook-and-line gear if a halibut IFQ permit holder or a hired master is aboard and is holding unused halibut IFQ (subpart D of 50 CFR part 679). In 2011, total groundfish catch for the pot gear fishery in the BSAI was 29,305 mt, with an associated halibut bycatch mortality of 6 mt.

The 2011 jig gear fishery harvested about 505 mt of groundfish. Most vessels in the jig gear fleet are less than 60 ft (18.3 m) LOA and thus are exempt from observer coverage requirements. As a result, observer data are not available on halibut bycatch in the jig gear fishery. However, as mentioned above, NMFS estimates a negligible amount of halibut bycatch mortality because of the selective nature of jig gear and the low mortality rate of halibut caught with jig gear and released.

Section 679.21(f)(2), annually allocates portions of either 47,591 or 60,000 Chinook salmon PSC among the AFA sectors depending upon past catch performance and upon whether or not Chinook salmon bycatch incentive plan agreements are formed. If an AFA sector participates in an approved Chinook salmon bycatch incentive plan agreement, then NMFS will allocate a portion of the 60,000 PSC limit to that sector as specified in § 679.21(f)(3)(iii)(A). If no Chinook salmon bycatch incentive plan agreement is approved, or if the sector has exceeded its performance standard under § 679.21(f)(6), NMFS will allocate a portion of the 47,591 Chinook salmon PSC limit to that sector as specified in § 679.21(f)(3)(iii)(B). In 2012, the Chinook salmon PSC limit is 60,000 and the AFA sector Chinook salmon allocations are seasonally allocated with 70 percent of the allocation for the A season pollock fishery, and 30 percent of the allocation for the B season pollock fishery as stated in § 679.21(f)(3)(iii)(A). The basis for these PSC limits is described in detail in the final rule implementing management measures for Amendment 91 (75 FR 53026, August 30, 2010). NMFS publishes the approved Chinook salmon bycatch incentive plan agreements, allocations and reports at: *http://alaskafisheries.noaa.gov/sustainablefisheries/bycatch/default.htm.*

Section 679.21(e)(1)(viii) specifies 700 fish as the 2012 and 2013 Chinook salmon PSC limit for the AI subarea pollock fishery. Section 679.21(e)(3)(i)(A)(*3*)(*i*) allocates 7.5 percent of the 700 fish, or 53 Chinook salmon, as the AI subarea PSQ for the CDQ program and allocates the remaining 92.5 percent, or 647 Chinook salmon, to the non-CDQ fisheries.

Section 679.21(e)(1)(vii) specifies 42,000 fish as the 2011 and 2012 non-Chinook salmon PSC limit. Section 679.21(e)(3)(i)(A)(*3*)(*ii*) allocates 10.7

percent, or 4,494 non-Chinook salmon, as the PSQ for the CDQ program and allocates the remaining 89.3 percent, or 37,506 non-Chinook salmon, to the non-CDQ fisheries.

PSC limits for crab and herring are specified annually based on abundance and spawning biomass. Due to the lack of new information as of October 2011 regarding red king crab and herring PSC limits and apportionments, the Council recommended and NMFS proposes using the crab and herring 2011 and 2012 PSC limits and apportionments based on the 2010 survey data for the proposed 2012 and 2013 limits and apportionments. The Council will reconsider these amounts in December 2011. Pursuant to § 679.21(e)(3)(i)(A)(*1*), 10.7 percent of each PSC limit specified for crab is allocated as a PSQ reserve for use by the groundfish CDQ program.

Based on 2010 survey data, the red king crab mature female abundance is estimated at 31.5 million red king crabs, and the effective spawning biomass is estimated at 67.4 million lb (30,572 mt). Based on the criteria set out at § 679.21(e)(1)(i), the proposed 2012 and 2013 PSC limit of red king crab in Zone 1 for trawl gear is 197,000 animals. This limit derives from the mature female abundance estimate of more than 8.4 million king crab and the effective spawning biomass estimate of more than 55 million lbs (24,948 mt).

Section 679.21(e)(3)(ii)(B)(*2*) establishes criteria under which NMFS must specify an annual red king crab bycatch limit for the Red King Crab Savings Subarea (RKCSS). The regulations limit the RKCSS to up to 25 percent of the red king crab PSC allowance based on the need to optimize the groundfish harvest relative to red king crab bycatch. NMFS proposes the Council's recommendation that the red king crab bycatch limit be equal to 25 percent of the red king crab PSC allowance within the RKCSS (Table 7b). Based on 2010 survey data, Tanner crab (*Chionoecetes bairdi*) abundance is estimated at 379 million animals. Pursuant to criteria set out at § 679.21(e)(1)(ii), the calculated 2012 and 2013 *C. bairdi* crab PSC limit for trawl gear is 830,000 animals in Zone 1 and 2,520,000 animals in Zone 2. These limits derive from the *C. bairdi* crab abundance estimate being in excess of the 270 million animals for the Zone 1 allocation and 290 million animals for the Zone 2 allocation, but less than 400 million animals for both zones allocations. Pursuant to § 679.21(e)(1)(iii), the PSC limit for snow crab (*C. opilio*) is based on total abundance as indicated by the NMFS annual bottom trawl survey. The *C. opilio* crab PSC limit is set at 0.1133 percent of the Bering Sea abundance index minus 150,000 crab if left unajusted. However, if the abundance is less than 4.5 million animals, the minimum PSC limit will be 4,350,000 animals pursuant to § 679.21(e)(1)(iii)(A) and (B). Based on the 2010 survey estimate of 7.5 billion animals, the calculated limit is 8,310,480 animals.

Pursuant to § 679.21(e)(1)(v), the PSC limit of Pacific herring caught while conducting any trawl operation for BSAI groundfish is 1 percent of the annual eastern Bering Sea herring biomass. The best estimate of 2012 and 2013 herring biomass is 197,400 mt. This amount was derived using 2010 survey data and an age-structured biomass projection model developed by the Alaska Department of Fish and Game. Therefore, the herring PSC limit proposed for 2012 and 2013 is 2,273 mt for all trawl gear as presented in Tables 7a and 7b.

Section 679.21(e)(3)(A) requires PSQ reserves to be subtracted from the total trawl PSC limits. The amount of the 2012 PSC limits assigned to the Amendment 80 and BSAI trawl limited access sectors are specified in Table 35 to part 679. The resulting allocation of PSC to CDQ PSQ, the Amendment 80 sector, and the BSAI trawl limited access sector are listed in Table 7a. Pursuant to § 679.21(e)(1)(iv) and § 679.91(d) through (f), crab and halibut trawl PSC assigned to the Amendment 80 sector is then further allocated to Amendment 80 cooperatives as PSC cooperative quota as presented in Table 7d. Two Amendment 80 cooperatives have formed for the 2012 fishing year. Because all Amendment 80 vessels are part of a cooperative, an allocation to the Amendment 80 limited access sector is not required. NMFS will post 2012 Amendment 80 cooperative allocations on the Alaska Region Web site at *http://alaskafisheries.noaa.gov* prior to the start of the fishing year on January 1, 2012, based on the harvest specifications effective on that date.

The 2013 allocations for Amendment 80 species between Amendment 80 cooperatives and the Amendment 80 limited access sector will not be known until after November 1, 2012, the deadline date for eligible participants to apply for participation in the program. NMFS will post 2013 Amendment 80 cooperatives and Amendment 80 limited access allocations on the Alaska Region Web site at *http://alaskafisheries.noaa.gov* when they become available in December 2012.

Section 679.21(e)(5) authorizes NMFS, after consultation with the Council, to establish seasonal apportionments of PSC amounts for the BSAI trawl limited access and Amendment 80 limited access sectors in order to maximize the ability of the fleet to harvest the available groundfish TAC and to minimize bycatch. The factors considered are (1) seasonal distribution of prohibited species, (2) seasonal distribution of target groundfish species, (3) PSC bycatch needs on a seasonal basis relevant to prohibited species biomass, (4) expected variations in bycatch rates throughout the year, (5) expected start of fishing effort, and (6) economic effects of seasonal PSC apportionments on industry sectors.

NMFS proposes the Council's recommendation of the seasonal PSC apportionments in Table 7c to maximize harvest among gear types, fisheries, and seasons while minimizing bycatch of PSC based on the above criteria.

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TABLE 7a–PROPOSED 2012 AND 2013 APPORTIONMENT OF PROHIBITED SPECIES CATCH ALLOWANCES TO NON-TRAWL GEAR, THE CDQ PROGRAM, AMENDMENT 80, AND THE BSAI TRAWL LIMITED ACCESS SECTORS

PSC species	Total non-trawl PSC	Non-trawl PSC remaining after CDQ PSQ[1]	Total trawl PSC	Trawl PSC remaining after CDQ PSQ[1]	CDQ PSQ reserve[1]	Amendment 80 sector[2]	BSAI trawl limited access fishery
Halibut mortality (mt) BSAI	900	832	3,675	3,349	393	2,325	875
Herring (mt) BSAI	n/a	n/a	2,273	n/a	n/a	n/a	n/a
Red king crab (animals) Zone 1[1]	n/a	n/a	197,000	175,921	21,079	87,925	53,797
C. opilio (animals) COBLZ[3]	n/a	n/a	8,310,480	7,421,259	889,221	3,647,549	2,385,193
C. bairdi crab (animals) Zone 1[3]	n/a	n/a	830,000	741,190	88,810	312,115	348,285
C. bairdi crab (animals) Zone 2[3]	n/a	n/a	2,520,000	2,250,360	269,640	532,660	1,053,394

[1] Section 679.21(e)(3)(i)(A)(2) allocates 326 mt of the trawl halibut mortality limit and § 679.21(e)(4)(i)(A) allocates 7.5 percent, or 67 mt, of the non-trawl halibut mortality limit as the PSQ reserve for use by the groundfish CDQ program. The PSQ reserve for crab species is 10.7 percent of each crab PSC limit.

[2] The Amendment 80 program reduced apportionment of the trawl PSC limits by 150 mt for halibut mortality and 20 percent for crab PSC. These reductions are not apportioned to other gear types or sectors.

[3] Refer to § 679.2 for definitions of zones.

TABLE 7b-PROPOSED 2012 AND 2013 HERRING AND RED KING CRAB SAVINGS SUBAREA PROHIBITED SPECIES CATCH ALLOWANCES FOR ALL TRAWL SECTORS

Fishery categories	Herring (mt) BSAI	Red king crab (animals) Zone 1
Yellowfin sole	195	n/a
Rock sole/flathead sole/other flatfish [1]	33	n/a
Greenland turbot/arrowtooth/sablefish[2]	16	n/a
Rockfish	12	n/a
Pacific cod	33	n/a
Midwater trawl pollock	1,737	n/a
Pollock/Atka mackerel/other species[3,4]	247	n/a
Red king crab savings subarea non-pelagic trawl gear[5]	n/a	49,250
Total trawl PSC	2,273	197,000

[1]"Other flatfish" for PSC monitoring includes all flatfish species, except for halibut (a prohibited species), arrowtooth flounder, flathead sole, Greenland turbot, Kamchatka flounder, rock sole, and yellowfin sole.

[2]"Arrowtooth flounder" for PSC monitoring includes Kamchatka flounder.

[3]Pollock other than pelagic trawl pollock, Atka mackerel, and "other species" fishery category.

[4]"Other species" for PSC monitoring includes sculpins, sharks, skates, and octopuses.

[5]In October 2011 the Council recommended that the red king crab bycatch limit for non-pelagic trawl fisheries within the RKCSS be limited to 25 percent of the red king crab PSC allowance (see § 679.21(e)(3)(ii)(B)(2)).

TABLE 7c–PROPOSED 2012 AND 2013 PROHIBITED SPECIES BYCATCH ALLOWANCES FOR THE BSAI TRAWL LIMITED ACCESS SECTOR AND NON-TRAWL FISHERIES

BSAI trawl limited access fisheries	Prohibited species and area[1]					
	Halibut mortality (mt) BSAI		Red king crab (animals) Zone 1	C. opilio (animals) COBLZ	C. bairdi (animals)	
					Zone 1	Zone 2
Yellowfin sole	167		47,397	2,247,640	293,234	1,005,879
Rock sole/flathead sole/other flatfish[2]	0		0	0	0	0
Turbot/arrowtooth/sablefish[3]	0		0	0	0	0
Rockfish April 15-December 31	5		0	3,821	0	848
Pacific cod	453		6,000	95,523	50,816	42,424
Pollock/Atka mackerel/other species[4]	250		400	38,209	4,235	4,242
Total BSAI trawl limited access PSC	875		53,797	2,385,193	348,285	1,053,394
Non-trawl fisheries	Catcher/processor	Catcher vessel				
Pacific cod-Total	760	15				
January 1-June 10	455	10				
June 10-August 15	190	3				
August 15-December 31	115	2				
Other non-trawl-Total	58					
May 1-December 31	58					
Groundfish pot and jig	Exempt					
Sablefish hook-and-line	Exempt					
Total non-trawl PSC	833					

[1] Refer to § 679.2 for definitions of areas.

[2] "Other flatfish" for PSC monitoring includes all flatfish species, except for halibut (a prohibited species), arrowtooth flounder, flathead sole, Greenland turbot, Kamchatka flounder, rock sole, and yellowfin sole.

[3] "Arrowtooth flounder" for PSC monitoring includes Kamchatka flounder.

[4] "Other species" for PSC monitoring includes sculpins, sharks, skates, and octopuses.

TABLE 7d–PROPOSED 2012 PROHIBITED SPECIES BYCATCH ALLOWANCE FOR THE BSAI AMENDMENT 80 COOPERATIVES

Cooperative	Prohibited species and zones[1]				
	Halibut mortality (mt) BSAI	Red king crab (animals) Zone 1	C. opilio (animals) COBLZ	C. bairdi (animals)	
				Zone 1	Zone 2
Alaska Seafood Cooperative	1,643	59,881	2,354,948	219,719	367,520
Alaska Groundfish Cooperative	732	28,045	1,292,600	92,396	165,140

[1] Refer to § 679.2 for definitions of zones.

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Halibut Discard Mortality Rates (DMRs)

To monitor halibut bycatch mortality allowances and apportionments, the Regional Administrator uses observed halibut bycatch rates, DMRs, and estimates of groundfish catch to project when a fishery's halibut bycatch mortality allowance or seasonal apportionment is reached. The DMRs are based on the best information available, including information contained in the annual SAFE report.

NMFS proposes the halibut DMRs developed and recommended by the International Pacific Halibut Commission (IPHC) and the Council for the 2012 and 2013 BSAI groundfish fisheries for use in monitoring the 2012 and 2013 halibut bycatch allowances (see Tables 7a–7d). The IPHC developed these DMRs for the 2010 to 2012 BSAI fisheries using the 10-year mean DMRs for those fisheries. The IPHC will analyze observer data annually and recommend changes to the DMRs when a fishery DMR shows large variation from the mean. A discussion of the DMRs and their justification is presented in Appendix 2 in the final 2009 SAFE report dated November 2009 (see **ADDRESSES**). Table 8 lists the 2012 and 2013 DMRs.

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TABLE 8–PROPOSED 2012 AND 2013 ASSUMED PACIFIC HALIBUT DISCARD MORTALITY RATES FOR THE BSAI

Gear	Fishery	Halibut discard mortality rate (percent)
Non-CDQ hook-and-line	Greenland turbot	11
	Other species	10
	Pacific cod	10
	Rockfish	9
Non-CDQ trawl	Arrowtooth flounder	76
	Atka mackerel	76
	Flathead sole	74
	Greenland turbot	67
	Non-pelagic pollock	73
	Pelagic pollock	89
	Other flatfish	72
	Other species	71
	Pacific cod	71
	Rockfish	81
	Rock sole	82
	Sablefish	75
	Yellowfin sole	81
Non-CDQ pot	Other species	8
	Pacific cod	8
CDQ trawl	Atka mackerel	85
	Flathead sole	88
	Non-pelagic pollock	84
	Pelagic pollock	85
	Pacific cod	90
	Pelagic pollock	90
	Rockfish	84
	Rock sole	87
	Yellowfin sole	85
CDQ hook-and-line	Greenland turbot	4
	Pacific cod	10
CDQ pot	Pacific cod	8
	Sablefish	32

Listed AFA Catcher/Processor Sideboard Limits

Pursuant to § 679.64(a), the Regional Administrator is responsible for restricting the ability of listed AFA catcher/processors to engage in directed fishing for groundfish species other than pollock to protect participants in other groundfish fisheries from adverse effects resulting from the AFA and from fishery cooperatives in the directed pollock fishery. The basis for these proposed sideboard limits is described in detail in the final rules implementing the major provisions of the AFA (67 FR 79692, December 30, 2002) and Amendment 80 (72 FR 52668, September 14, 2007). Table 9 lists the proposed 2012 and 2013 catcher/processor sideboard limits.

All harvests of groundfish sideboard species by listed AFA catcher/processors, whether as targeted catch or incidental catch, will be deducted from the proposed sideboard limits in Table 9. However, groundfish sideboard species that are delivered to listed AFA catcher/processors by catcher vessels will not be deducted from the proposed 2012 and 2013 sideboard limits for the listed AFA catcher/processors.

TABLE 9–PROPOSED 2012 AND 2013 BSAI GROUNDFISH SIDEBOARD LIMITS FOR LISTED AMERICAN FISHERIES ACT CATCHER/PROCESSORS (C/Ps)

[Amounts are in metric tons]

Target species	Area	1995-1997			2012 and 2013 ITAC available to all trawl C/Ps[1]	2012 and 2013 AFA C/P sideboard limit
		Retained catch	Total catch	Ratio of retained catch of total catch		
Sablefish trawl	BS	8	497	0.016	1,109	18
	AI	0	145	0	370	0
Atka mackerel	Central AI					
	A season[2]	n/a	n/a	0.115	4,596	529
	B season[2]	n/a	n/a	0.115	4,596	529
	Western AI					
	A season[2]	n/a	n/a	0.2	670	134
	B season[2]	n/a	n/a	0.2	670	134
Yellowfin sole[3]	BSAI	100,192	435,788	0.23	176,510	40,597
Rock sole	BSAI	6,317	169,362	0.037	75,905	2,808
Greenland turbot	BS	121	17,305	0.007	2,975	21
	AI	23	4,987	0.005	1,233	6
Arrowtooth flounder	BSAI	76	33,987	0.002	22,015	44
Kamchatka flounder	BSAI	76	33,987	0.002	15,045	30
Flathead sole	BSAI	1,925	52,755	0.036	37,102	1,336
Alaska plaice	BSAI	14	9,438	0.001	13,600	14
Other flatfish	BSAI	3,058	52,298	0.058	2,550	148
Pacific ocean perch	BS	12	4,879	0.002	4,854	10
	Eastern AI	125	6,179	0.02	5,054	101
	Central AI	3	5,698	0.001	4,429	4
	Western AI	54	13,598	0.004	7,474	30
Northern rockfish	BSAI	91	13,040	0.007	3,400	24
Shortraker rockfish	BSAI	50	2,811	0.018	334	6
Rougheye rockfish	EBS/EAI	50	2,811	0.018	204	4
	CAI/WAI	50	2,811	0.018	191	3
Other rockfish	BS	18	621	0.029	425	12
	AI	22	806	0.027	425	11
Squids	BSAI	73	3,328	0.022	361	8
Sharks	BSAI	553	68,672	0.008	43	0
Skates	BSAI	553	68,672	0.008	14,025	112
Sculpins	BSAI	553	68,672	0.008	4,420	35
Octopuses	BSAI	553	68,672	0.008	128	1

[1] Aleutians Islands Pacific ocean perch, and BSAI Atka mackerel, flathead sole, rock sole, and yellowfin sole are multiplied by the remainder of the TAC of that species after the subtraction of the CDQ reserve under § 679.20(b)(1)(ii)(C).

[2] The seasonal apportionment of Atka mackerel in the open access fishery is 50 percent in the A season and 50 percent in the B season. Listed AFA catcher/processors are limited to harvesting no more than zero in the Eastern Aleutian District and Bering Sea subarea, 20 percent of the annual ITAC specified for the Western Aleutian District, and 11.5 percent of the annual ITAC specified for the Central Aleutian District.

[3] Section 679.64(a)(1)(v) exempts AFA catcher/processors from a yellowfin sole sideboard limit because the 2012 and 2013 aggregate ITAC of yellowfin sole assigned to the Amendment 80 sector and BSAI trawl limited access sector is greater than 125,000 mt.

Section 679.64(a)(2) and Tables 40 and 41 to part 679 establish a formula for calculating PSC sideboard limits for listed AFA catcher/processors. The basis for these sideboard limits is described in detail in the final rules implementing the major provisions of the AFA (67 FR 79692, December 30, 2002) and Amendment 80 (72 FR 52668, September 14, 2007).

PSC species listed in Table 10 that are caught by listed AFA catcher/processors participating in any groundfish fishery other than pollock will accrue against the proposed 2012 and 2013 PSC sideboard limits for the listed AFA catcher/processors. Section 679.21(e)(3)(v) authorizes NMFS to close directed fishing for groundfish other than pollock for listed AFA catcher/processors once a proposed 2012 or 2013 PSC sideboard limit listed in Table 10 is reached.

Crab or halibut PSC caught by listed AFA catcher/processors while fishing for pollock will accrue against the bycatch allowances annually specified for either the midwater pollock or the pollock/Atka mackerel/ ''other species'' fishery categories according to regulations at § 679.21(e)(3)(iv).

TABLE 10–PROPOSED 2012 AND 2013 BSAI PROHIBITED SPECIES SIDEBOARD LIMITS FOR AMERICAN FISHERIES ACT LISTED CATCHER/PROCESSORS

PSC species and area	Ratio of PSC to total PSC	Proposed 2012 and 2013 PSC available to trawl vessels after subtraction of PSQ[1]	Proposed 2012 and 2013 C/P sideboard limit[1]
BSAI Halibut mortality	n/a	n/a	286
Red king crab Zone 1[2]	0.007	175,921	1,231
C. opilio (COBLZ) [2]	0.153	7,421,259	1,135,453
C. bairdi	n/a	n/a	n/a
Zone 1[2]	0.14	830,000	116,200
Zone 2[2]	0.05	2,250,360	112,518

[1] Halibut amounts are in metric tons of halibut mortality. Crab amounts are in numbers of animals

[2] Refer to § 679.2 for definitions of areas.

AFA Catcher Vessel Sideboard Limits

Pursuant to § 679.64(b), the Regional Administrator is responsible for restricting the ability of AFA catcher vessels to engage in directed fishing for groundfish species other than pollock to protect participants in other groundfish fisheries from adverse effects resulting from the AFA and from fishery cooperatives in the directed pollock fishery. Section 679.64(b) establishes formulas for setting AFA catcher vessel groundfish and PSC sideboard limits for the BSAI. The basis for these sideboard limits is described in detail in the final rules implementing the major provisions of the AFA (67 FR 79692, December 30, 2002) and Amendment 80 (72 FR 52668, September 14, 2007). Tables 11 and 12 list the proposed 2012 and 2013 AFA catcher vessel sideboard limits.

All catch of groundfish sideboard species made by non-exempt AFA catcher vessels, whether as targeted catch or as incidental catch, will be deducted from the proposed 2012 and 2013 sideboard limits listed in Table 11.

TABLE 11–PROPOSED 2012 AND 2013 BSAI GROUNDFISH SIDEBOARD LIMITS FOR AMERICAN FISHERIES ACT CATCHER VESSELS (CVs)

[Amounts are in metric tons]

Species	Fishery by area/gear/season	Ratio of 1995-1997 AFA CV catch to 1995-1997 TAC	2012-2013 initial TAC[1]	2012 and 2013 AFA catcher vessel sideboard limits
Pacific cod	BSAI	n/a	n/a	n/a
	Jig gear	0	2,871	0
	Hook-and-line CV	n/a	n/a	n/a
	Jan 1-Jun 10	0.0006	208	0
	Jun 10-Dec 31	0.0006	200	0
	Pot gear CV	n/a	n/a	n/a
	Jan 1-Jun 10	0.0006	8,749	5
	Sept 1-Dec 31	0.0006	8,406	5
	CV< 60 ft LOA using hook-and-line or pot gear	0.0006	4,084	2
	Trawl gear CV	n/a	n/a	n/a
	Jan 20-Apr 1	0.8609	33,532	28,868
	Apr 1-Jun 10	0.8609	4,985	4,292
	Jun 10-Nov 1	0.8609	6,797	5,852
Sablefish	BS trawl gear	0.0906	1,109	100
	AI trawl gear	0.0645	370	24
Atka mackerel	Eastern AI/BS	n/a	n/a	n/a
	Jan 1-Jun 10	0.0032	16,431	53
	Jun 10-Nov 1	0.0032	16,431	53
	Central AI	n/a	n/a	n/a
	Jan 1-Jun 10	0.0001	4,596	0
	Jun 10-Nov 1	0.0001	4,596	0
	Western AI	n/a	n/a	n/a
	Jan 1-Jun 10	0	670	0
	Jun 10-Nov 1	0	670	0
Yellowfin sole[2]	BSAI	0.0647	176,510	n/a
Rock sole	BSAI	0.0341	75,905	2,588
Greenland turbot	BS	0.0645	2,975	192
	AI	0.0205	1,233	25
Arrowtooth flounder	BSAI	0.069	22,015	1,519
Kamchatka flounder	BSAI	0.069	15,045	1,038
Flathead sole	BS trawl gear	0.0505	37,102	1,874
Alaska plaice	BSAI	0.0441	13,600	600
Other flatfish	BSAI	0.0441	2,550	112
Pacific ocean perch	BS	0.1	4,854	485
	Eastern AI	0.0077	5,054	39
	Central AI	0.0025	4,429	11
	Western AI	0	7,474	0
Northern rockfish	BSAI	0.0084	3,400	29
Shortraker rockfish	BSAI	0.0037	334	1
Rougheye rockfish	EBS/EAI	0.0037	204	1
	CAI/WAI	0.0037	191	1
Other rockfish	BS	0.0048	425	2
	AI	0.0095	425	4
Squids	BSAI	0.3827	361	138
Sharks	BSAI	0.0541	43	2
Skates	BSAI	0.0541	14,025	759
Sculpins	BSAI	0.0541	4,420	239
Octopuses	BSAI	0.0541	128	7

[1] Aleutians Islands Pacific ocean perch, Atka mackerel, flathead sole, rock sole, and yellowfin sole are multiplied by the remainder of the TAC of that species after the subtraction of the CDQ reserve under §

679.20(b)(1)(ii)(C).

[2] Section 679.64(b)(6) exempts AFA catcher vessels from a yellowfin sole sideboard limit because the 2012 and 2013 aggregate ITAC of yellowfin sole assigned to the Amendment 80 sector and BSAI trawl limited access sector is greater than 125,000 mt.

Halibut and crab PSC limits listed in Table 12 that are caught by AFA catcher vessels participating in any groundfish fishery other than pollock will accrue against the proposed 2012 and 2013 PSC sideboard limits for the AFA catcher vessels. Sections 679.21(d)(8) and 679.21(e)(3)(v) authorize NMFS to close directed fishing for groundfish other than pollock for AFA catcher vessels once a proposed 2012 and 2013 PSC sideboard limit listed in Table 12 is reached. The PSC that is caught by AFA catcher vessels while fishing for pollock in the Bering Sea subarea will accrue against the bycatch allowances annually specified for either the midwater pollock or the pollock/Atka mackerel/''other species'' fishery categories under regulations at § 679.21(e)(3)(iv).

TABLE 12–PROPOSED 2012 AND 2013 AMERICAN FISHERIES ACT CATCHER VESSEL PROHIBITED SPECIES CATCH SIDEBOARD LIMITS FOR THE BSAI[1]

PSC species	Target fishery category[2]	AFA catcher vessel PSC sideboard limit ratio	Proposed 2012 and 2013 PSC limit after subtraction of PSQ reserves[2]	Proposed 2012 and 2013 AFA catcher vessel PSC sideboard limit[2]
Halibut	Pacific cod trawl	n/a	n/a	887
	Pacific cod hook-and-line or pot	n/a	n/a	2
	Yellowfin sole total	n/a	n/a	101
	Rock sole/flathead sole/other flatfish[3]	n/a	n/a	228
	Greenland turbot/arrowtooth/sablefish	n/a	n/a	0
	Rockfish	n/a	n/a	2
	Pollock/Atka mackerel/other species[4]	n/a	n/a	5
Red king crab Zone 1	n/a	0.299	175,921	52,600
C. opilio COBLZ[5]	n/a	0.168	7,421,259	1,246,772
C. bairdi Zone 1[5]	n/a	0.33	741,190	244,593
C. bairdi Zone 2[5]	n/a	0.186	2,250,360	418,567

[1] Halibut amounts are in metric tons of halibut mortality. Crab amounts are in numbers of animals.

[2] Target fishery categories are defined in regulation at § 679.21(e)(3)(iv).

[3] "Other flatfish" for PSC monitoring includes all flatfish species, except for halibut (a prohibited species), arrowtooth flounder, flathead sole, Greenland turbot, Kamchatka flounder, rock sole, and yellowfin sole.

[4] "Other species" for PSC monitoring includes sculpins, sharks, skates, and octopuses.

[5] Refer to § 679.2 for definitions of areas.

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Classification

NMFS has determined that the proposed harvest specifications are consistent with the FMP and preliminarily determined that the proposed harvest specifications are consistent with the Magnuson-Stevens Act and other applicable laws.

This action is authorized under 50 CFR 679.20 and is exempt from review under Executive Order 12866.

NMFS prepared an EIS for this action (see **ADDRESSES**) and made it available to the public on January 12, 2007 (72 FR 1512). On February 13, 2007, NMFS issued the Record of Decision (ROD) for the EIS. Copies of the EIS and ROD for this action are available from NMFS. The EIS analyzes the environmental consequences of the proposed groundfish harvest specifications and its alternatives on resources in the action area. The EIS found no significant environmental consequences from the proposed action or its alternatives.

NMFS prepared an Initial Regulatory Flexibility Analysis (IRFA) as required by section 603 of the Regulatory Flexibility Act analyzing the methodology for establishing the relevant TACs. The IRFA evaluates the impacts on small entities of alternative harvest strategies for the groundfish fisheries in the exclusive economic zone off Alaska. As set forth in the methodology, TACs are set to a level that fall within the range of ABCs recommended by the SSC; the sum of the TACs must achieve optimum yield specified in the FMP. While the specific numbers that the methodology may produce vary from year to year, the methodology itself remains constant.

A description of the proposed action, why it is being considered, and the legal basis for this proposed action are contained in the preamble above. A copy of the analysis is available from NMFS (see **ADDRESSES**). A summary of the IRFA follows. The action under consideration is a harvest strategy to govern the catch of groundfish in the BSAI. The preferred alternative is the existing harvest strategy in which TACs fall within the range of ABCs recommended by the SSC. This action is taken in accordance with the FMP prepared by the Council pursuant to the Magnuson-Stevens Act.

The directly regulated small entities include approximately 191 small catcher vessels, fewer than 18 small catcher/processors, and six CDQ groups.

The entities directly regulated by this action are those that harvest groundfish in the exclusive economic zone of the BSAI and in parallel fisheries within State of Alaska waters. These include entities operating CVs and C/Ps within the action area, and entities receiving direct allocations of groundfish. Catcher vessels and C/Ps were considered to be small entities if they had annual gross receipts of $4 million per year or less from all economic activities, including the revenue of their affiliated operations (see Table 37 to the Economic Status of the Groundfish off Alaska, 2010, in the 2010 SAFE report, dated November 2010, available from the Council (see **ADDRESSES**)).

The preferred alternative (Alternative 2) was compared to four other alternatives. These included Alternative 1, which would have set TACs to generate fishing rates equal to the maximum permissible ABC (if the full TAC were harvested), unless the sum of TACs exceeded the BSAI optimum yield, in which case TACs would have been limited to the optimum yield. Alternative 3 would have set TACs to produce fishing rates equal to the most recent five-year average fishing rates. Alternative 4 would have set TACs equal to the lower limit of the BSAI optimum yield range. Alternative 5, the ''no action'' alternative, would have set TACs equal to zero.

The Council adopted the TACs associated with the preferred harvest strategy, as per Alternative 2, in October 2011. OFLs and ABCs for the species were based on recommendations prepared by the Council's GOA Plan Team in August and September 2011, and reviewed and modified by the Council's SSC in October 2011. The Council based its TAC recommendations on those of its AP, which were consistent with the SSC's OFL and ABC recommendations.

Alternative 1 selects harvest rates that will allow fishermen to harvest stocks at the level of ABCs, unless total harvests were constrained by the upper bound of the BSAI OY of two million mt. As shown in Table 1 of the preamble, the sum of ABCs in 2012 and 2013 would be about 2,911,610 mt, which falls above the upper bound of the OY range. The sum of TACs is equal to the sum of ABCs. In this instance, Alternative 1 is consistent with the preferred alternative 2, meets the objectives of that action, and has small entity impacts that are equivalent to the preferred alternative.

Alternative 3 selects harvest rates based on the most recent five years of harvest rates (for species in Tiers 1 through 3) or for the most recent five years of harvests (for species in Tiers 4 through 6). This alternative is inconsistent with the objectives of this action, (the Council's preferred harvest strategy), because it does not take account of the most recent biological information for this fishery. Harvest rates are listed for each species category for each year in the SAFE reports (see **ADDRESSES**).

Alternative 4 would lead to significantly lower harvests of all species to reduce TACs from the upper end of the OY range in the BSAI, to its lower end of 1.4 million mt. Overall this would reduce 2012 TACs by about 30 percent. This would lead to significant reductions in harvests of species harvested by small entities. While reductions of this size would be associated with offsetting price increases, the size of these increases is very uncertain. There are close substitutes for BSAI groundfish species available from the GOA. While production declines in the BSAI would undoubtedly be associated with significant price increases in the BSAI, these increases would still be constrained by production of substitutes, and are very unlikely to offset revenue declines from smaller production. Thus, this alternative action would have a detrimental impact on small entities.

Alternative 5, which sets all harvests equal to zero, may also address conservation issues, but would have a significant adverse economic impact on small entities. Tables 2 and 3 from the IRFA provide information on numbers of individual vessels with gross revenues less than $4 million, and with the average gross revenues for these vessels. These tables indicate that the median annual aggregate revenues for these vessels in the years from 2005 to 2009 were $310 million; annual aggregate revenues for this group of vessels ranged from $286 to $347 million. These estimates do not take account of affiliations among vessels, and thus overstate the revenues flowing to small entities.

The proposed specifications extend the current 2012 OFLs, ABCs, and TACs, to 2012 and 2013. As noted in the IRFA, the Council may modify these OFLs, ABCs, and TACs in December 2011, when it reviews the November meeting reports from its groundfish plan teams, and the December Council meeting reports of its SSC and AP. Because most TACs in the proposed 2012 and 2013 harvest specifications are unchanged from the 2011 TACs, NMFS does not expect adverse impacts on small entities. Also, NMFS does not expect any changes made by the Council in December to be large enough to have an impact on small entities.

This action does not modify recordkeeping or reporting requirements, or duplicate, overlap, or conflict with any federal rules.

Adverse impacts on marine mammals resulting from fishing activities conducted under these harvest specifications are discussed in the EIS (see **ADDRESSES**).

Authority: 16 U.S.C. 773 *et seq.;* 16 U.S.C. 1540(f); 16 U.S.C. 1801 *et seq.;* 16 U.S.C. 3631 *et seq.;* Pub. L. 105–277; Pub. L. 106–31; Pub. L. 106–554; Pub. L. 108–199; Pub. L. 108–447; Pub. L. 109–241; Pub. L. 109–479.

Dated: December 21, 2011.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

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Proposed Rules

Federal Register

Vol. 76, No. 248

Tuesday, December 27, 2011

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

FEDERAL ELECTION COMMISSION

11 CFR Part 114

[Notice 2011–18]

Independent Expenditures and Electioneering Communications by Corporations and Labor Organizations

AGENCY: Federal Election Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Federal Election Commission seeks comments on proposed changes to its rules regarding corporate and labor organization funding of expenditures, independent expenditures and electioneering communications. These and other proposed changes are in response to a Petition for Rulemaking filed by the James Madison Center for Free Speech urging the Commission to amend its regulations in response to the decision of the Supreme Court in *Citizens United* v. *FEC.* The Commission has made no final decision on the issues presented in this rulemaking.

DATES: Comments must be received on or before February 3, 2012. Reply comments must be limited to the issues raised in the initial comments and must be received on or before February 17, 2012. The Commission will hold a hearing on these proposed rules and any modifications or amendments thereto that may be proposed on March 7, 2012. Anyone wishing to testify at the hearing must file written comments by the due date and must include a request to testify in the written comments.

ADDRESSES: All comments must be in writing. Comments may be submitted electronically via the Commission's Web site at *http://www.fec.gov/fosers/.* Commenters are encouraged to submit comments electronically to ensure timely receipt and consideration. Alternatively, comments may be submitted in paper form. Paper comments must be sent to the Federal Election Commission, Attn.: Robert M. Knop, Assistant General Counsel, 999 E Street NW., Washington, DC 20463. All comments must include the full name and postal service address of the commenter, and of each commenter if filed jointly, or they will not be considered. The Commission will post comments on its Web site at the conclusion of the comment period.

FOR FURTHER INFORMATION CONTACT: Mr. Robert M. Knop, Assistant General Counsel, or Attorneys Ms. Esther D. Heiden, Mr. Theodore M. Lutz, or Ms. Joanna S. Waldstreicher, 999 E Street NW., Washington, DC 20463, (202) 694–1650 or (800) 424–9530.

SUPPLEMENTARY INFORMATION: The Federal Election Campaign Act of 1971,[1] as amended, (''the Act'') prohibits corporations and labor organizations from using general treasury funds to make contributions or expenditures in connection with Federal elections. 2 U.S.C. 441b. The term ''contribution or expenditure'' includes any ''direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value * * * to any candidate, campaign committee, or political party or organization,'' in connection with any Federal election. 2 U.S.C. 441b(b)(2); 11 CFR 114.1(a)(1); *see also* 2 U.S.C. 431(8)(A) and (9)(A); 11 CFR 100.52 and 100.111. The Act's prohibition on expenditures by corporations and labor organizations includes ''independent expenditures,'' which are expenditures expressly advocating the election or defeat of a clearly identified candidate that are not made in concert or cooperation with, or at the request or suggestion of, a clearly identified candidate, the candidate's authorized political committee, or their agents, or a political party committee and its agents. 2 U.S.C. 431(17); 11 CFR 100.16(a).

The Bipartisan Campaign Reform Act of 2002 [2] (''BCRA'') amended the Act to also prohibit corporations and labor organizations from using general treasury funds to make electioneering communications. 2 U.S.C. 441b(b)(2). Electioneering communications are broadcast, cable, or satellite communications that refer to a clearly identified candidate for Federal office, are publicly distributed within sixty days before a general election or thirty days before a primary election, and are targeted to the relevant electorate. 2 U.S.C. 434(f)(3)(A)(i) and (f)(3)(C); 11 CFR 100.29(a)(1)–(3). The Commission's regulations prohibiting independent expenditures and electioneering communication made by corporations and labor organizations are found at 11 CFR part 114. The Act and Commission regulations also require entities that make independent expenditures and electioneering communications to report certain information to the Commission, which the Commission then places on the public record. 2 U.S.C. 434(c) and 434(f); 11 CFR 104.20 and 109.10. In addition, the Act and Commission regulations require communications expressly advocating the election or defeat of a clearly identified candidate, as well as electioneering communications, to include disclaimers stating who paid for the communication and whether the communication was authorized by a Federal candidate or a Federal candidate's authorized political committee or its agents. 2 U.S.C. 441d(a); 11 CFR 110.11.

In *Citizens United* v. *FEC,* the Supreme Court held that the two statutory provisions prohibiting corporations from making independent expenditures and electioneering communications violate the First Amendment. 558 U.S. __, 130 S. Ct. 876 (2010). At the same time, the Supreme Court reaffirmed the validity of the Act's reporting, disclosure, and disclaimer requirements for independent expenditures and electioneering communications at 2 U.S.C. 434(f) and 441d(a)(3) and (d)(2). *Id.* at 913–16.[3]

The James Madison Center for Free Speech filed a Petition for Rulemaking urging the Commission to amend its regulations to conform to the decision in *Citizens United.* Specifically, the Petition for Rulemaking asked the

[1] Public Law 92–225, 86 Stat. 3 (1971); 2 U.S.C. 431 *et seq.*

[2] Public Law 107–155, 116 Stat. 81 (2002).

[3] Although *Citizens United* did not directly address whether labor organizations also have a First Amendment right to use their general treasury funds for independent expenditures and electioneering communications, the Act and Commission regulations treat labor organizations in a similar manner to corporations. *See* 2 U.S.C. 441b; *see generally* CFR part 114; *see also* Advisory Opinion 2010–11 (Commonsense Ten) at n.3. When addressing corporations, the Court in *Citizens United* often referred to labor organizations, and provided no basis for treating labor organization communications differently than corporate communications under the First Amendment. Therefore, the Commission proposes to make the same regulatory changes discussed in this Notice of Proposed Rulemaking for both corporations and labor organizations.

Commission to remove 11 CFR 114.2, 114.4, 114.9, and 114.14 to the extent that these regulations implement the Act's ban on the use of general treasury funds by corporations and labor organizations to make independent expenditures and electioneering communications. The Petition for Rulemaking also asked the Commission to remove 11 CFR 114.10, because that regulation implements an exception to the prohibition on independent expenditures and electioneering communications by corporations that is no longer necessary after *Citizens United.* Finally, the petitioners requested that the Commission remove 11 CFR 114.15, because that regulation relating to certain permissible communications by corporations and labor organizations is also no longer necessary after *Citizens United.*

On June 21, 2011, the Commission published a Notice of Availability seeking public comment on the Petition for Rulemaking. Notice of Availability on Independent Expenditures and Electioneering Communications by Corporations and Labor Organizations, 76 FR 36001 (June 21, 2011). The Commission received three comments in response to the Notice of Availability.

Two commenters urged the Commission to adopt the changes recommended in the Petition for Rulemaking. One of these two comments urged the Commission to repeal portions of 11 CFR 114.2, 114.3, 114.4, 114.9 and 114.14, insofar as these regulations implement the 2 U.S.C. 441b bans on independent expenditures and electioneering communications. The comment went on to request that the Commission either clarify or repeal sections 114.10 and 114.15. The other comment supporting the petition asked the Commission to remove portions of sections 114.2, 114.3, 114.4, 114.9 and 114.14 to the extent that they are invalid after the Court's decision in *Citizens United.* Both of these commenters further stated that any NPRM issued in response to the *Citizens United* decision and the Petition for Rulemaking should address only those regulations clearly invalidated by the Court decision, and should address no other issues.

One of the two commenters supporting the petition stated that further rulemaking is not appropriate at this time because the Commission has had only brief experience with the post-*Citizens United* legal landscape. That commenter suggested that the Commission should wait until ''expert research'' is conducted on a number of issues before engaging in broader rulemaking. Both commenters also suggested that the Commission should limit its rulemaking to those regulations directly affected by *Citizens United* so that the Commission can reach consensus.

A third commenter urged the Commission not to amend or remove its regulations in response to the Petition for Rulemaking or *Citizens United.* That commenter noted that the *Citizens United* decision was not unanimous and suggested that the Court's rationale was incorrect. The commenter expressed concern that the Court's decision and any subsequent rulemaking implementing the decision would reduce transparency of corporate spending on Federal elections.

The Commission is issuing this Notice of Proposed Rulemaking to address certain regulations implicated by the *Citizens United* decision and raised by the Petition for Rulemaking, and the comments received in response to its Notice of Availability. The Commission seeks comment on: (1) Eliminating the prohibitions in 11 CFR 114.2 and 114.14 on the use of corporate and labor organization general treasury funds to finance independent expenditures and electioneering communications; (2) eliminating 11 CFR 114.15, which permits corporations and labor organizations to make electioneering communications that are not the functional equivalent of express advocacy; (3) eliminating the prohibitions in 11 CFR 114.3 and 114.4 regarding express advocacy in communications to the general public and revising the standards for voter registration and get-out-the-vote (''GOTV'') drives; (4) revising 11 CFR 114.9, which governs the use of corporate and labor organization facilities for political activity; and (5) eliminating or amending the regulation at 11 CFR 114.10, which governs the making of independent expenditures and electioneering communications by qualified nonprofit corporations.

I. Background

The Act and Commission regulations prohibit corporations and labor organizations from using general treasury funds to make expenditures, including independent expenditures. 2 U.S.C. 441b(a) and (b)(2); 11 CFR 114.2(b)(2).

In enacting section 203 of BCRA, Congress extended the Act's prohibitions on the use of general treasury funds for corporate and labor organization expenditures under 2 U.S.C. 441b to include electioneering communications. 2 U.S.C. 441b(b)(2); *see also* 2 U.S.C. 434(f)(3); 11 CFR 100.29, 104.3, 114.2, 114.10, and 114.14.

In *Citizens United,* the Supreme Court held that the Act's prohibitions on financing independent expenditures and electioneering communications with corporate general treasury funds were unconstitutional. Citizens United, a non-profit corporation, in January 2008 released a film in theaters and on DVD about then-Senator Hillary Clinton, who was a candidate in the Democratic Party's 2008 Presidential primary elections. Citizens United wanted to pay cable companies to make the film available to digital cable subscribers for free through video-on-demand, which allows subscribers to view programming, including movies. Citizens United planned to make the film available within thirty days of the 2008 primary elections.

Citizens United filed suit seeking a preliminary injunction, arguing that the ban on corporate electioneering communications at 2 U.S.C. 441b(b)(2) was unconstitutional as applied to payments to make the film available through video-on-demand and that the disclosure and disclaimer requirements at 2 U.S.C. 434(f) and 441d were unconstitutional as applied to payments for the film and for three planned advertisements for the movie. The district court denied the request for a preliminary injunction and granted the Commission's motion for summary judgment. 530 F. Supp. 2d 274 (D.D.C. 2008).

The Supreme Court invalidated section 441b's restrictions on corporate independent expenditures and electioneering communications. 130 S.Ct. at 913. The Supreme Court held that the prohibition on corporate independent expenditures and electioneering communications is a ban on speech and concluded that section 441b was therefore ''subject to strict scrutiny.'' *Id.* at 898.

The Court noted that ''[p]olitical speech is 'indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual.''' *Id.* at 904 (quoting *First Nat'l Bank of Boston* v. *Bellotti,* 435 U.S. 765, 777 (1978)). The Court stated that the anti-distortion rationale previously used to justify restrictions on corporate speech ''interferes with the 'open marketplace of ideas' protected by the First Amendment.'' *Id.* at 906.[4] The Supreme Court also disagreed that corporate independent expenditures can be limited because of an interest in

[4] The Court therefore overruled its previous decisions in *Austin* v. *Michigan Chamber of Commerce,* 494 U.S. 652 (1990), and, in part, *McConnell.*

protecting dissenting shareholders from being compelled to fund corporate political speech and held that such disagreements may be corrected by shareholders through the procedures of corporate democracy. *Id.* at 911. ''All speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech, and the First Amendment protects the resulting speech.'' *Id.* at 905. Accordingly, the Supreme Court held that ''the rule that political speech cannot be limited based on a speaker's wealth is a necessary consequence of the premise that the First Amendment generally prohibits the suppression of political speech based on the speaker's identity.'' *Id.*

The Supreme Court further held that, while the government has a compelling interest in preventing corruption or the appearance of corruption, ''independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.'' *Id.* at 909. Thus, the Court invalidated section 441b's restrictions on corporate independent expenditures and electioneering communications. *Id.* at 913.

Citizens United also challenged the Act's disclaimer and disclosure provisions at sections 434(f) and 441d as applied to the film and three advertisements for the film. Under the Act, electioneering communications must include a statement identifying the person responsible for payment for the advertisement. 2 U.S.C. 441d(a). Also, any person who spends more than $10,000 on electioneering communications within a calendar year must file a disclosure statement with the Commission identifying the person making the electioneering communication, the election to which the communication pertains, and providing information about certain contributors who gave $1000 or more within a specified time period. 2 U.S.C. 434(f)(2). The Court rejected the challenge to the statutory requirement and upheld the reporting provisions because ''transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.'' *Citizens United,* 130 S. Ct. at 913–16. The Court recognized that disclaimer and disclosure requirements impose no ceiling on campaign activities, do not prevent anyone from speaking, and advance the public's ''interest in knowing who is speaking about a candidate shortly before an election.'' *Id.* at 914–15. ''Prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters.'' *Id.* at 916.

II. Overview of Changes to 11 CFR Part 114: Corporate and Labor Organization Activity

Commission regulations implementing the statutory provisions struck down by *Citizens United* are no longer valid. The Commission previously released a statement saying that it would no longer enforce statutory provisions or regulations prohibiting corporations and labor organizations from making independent expenditures and electioneering communications. FEC Statement on the Supreme Court's Decision in *Citizens United* v. *FEC* (Feb. 5, 2010) (available at *http://www.fec.gov/press/press2010/20100205CitizensUnited.shtml*). These regulations include portions of current 11 CFR part 114, which concern corporate and labor organization activity. In this rulemaking, the Commission proposes to amend 11 CFR 114.2, 114.3, 114.4, and 114.10, and to remove 11 CFR 114.14, and 114.15. The Commission has not made any determination as to which, if any, of the proposed alternatives it should adopt in its final rules.

The Commission proposes to change 11 CFR part 114 by: (1) Modifying specific language within sections of part 114 that prohibit corporations and labor organizations from using general treasury funds to finance independent expenditures and electioneering communications, and (2) removing language that may be superfluous, given the permissible uses of general treasury funds under *Citizens United.*

Among the Commission's proposals are alternatives for modifying current 11 CFR 114.2(b)(2)(i), which prohibits corporations and labor organizations from making expenditures, including independent expenditures. The Commission proposes to modify 11 CFR 114.2(b)(2)(i) in one of two ways: (1) Narrow the prohibition to allow all expenditures except those that are coordinated with a candidate or a political party committee, including coordinated communications, or (2) narrow the prohibition to allow only communications that are not coordinated with a candidate or a political party committee, while continuing to prohibit expenditures that are not made for communications. These alternative approaches would also apply to the expenditure prohibition for voter registration and GOTV drives, discussed below in the proposed changes to section 114.3 (with respect to the restricted class) and section 114.4 (with respect to the general public).

With respect to 11 CFR 114.4, the Commission proposes to remove the prohibition on making express advocacy communications to those outside the restricted class, but would maintain the restrictions on coordinating with candidates and political parties when making communications to those outside the restricted class. Regarding 11 CFR 114.9, the Commission seeks comment on whether 11 CFR 114.9 should be revised and, if so, how.[5] Additionally, the Commission seeks comment on whether to repeal or revise certain provisions of 11 CFR 114.10. These provisions currently exempt qualified nonprofit corporations (''QNC'') from the pre-*Citizens United* ban on corporate independent expenditures and electioneering communications. The proposed revisions would apply to all corporations and labor organizations, not limited to QNCs, making independent expenditures and electioneering communications.[6] The existing provisions currently reference other Commission regulations that apply to QNCs making independent expenditures or electioneering communications, including references to the reporting requirements for independent expenditures and electioneering communications under 11 CFR 104.4(a), 109.10(b), and 104.20(b), and the disclaimer provisions of 11 CFR 110.11. The Commission seeks comment on whether to remove section 114.10 or to revise section 114.10 to expand these rules to apply to all corporations and labor organizations that make such independent expenditures or electioneering communications. Finally, the Commission proposes to remove 11 CFR 114.14, and 114.15, which implement exceptions to the general prohibition against corporate and labor organization funding of independent expenditures and electioneering communications.

[5] While the Commission proposes to retain the reporting requirements currently at 11 CFR 114.3(b), which require corporations and labor organizations to report disbursements for communications containing express advocacy made to the restricted class, it recognizes that a communication containing express advocacy may now be made both to the general public and the restricted class, thereby triggering different thresholds for reporting obligations.

[6] Corporations that are foreign nationals, government contractors, or national banks, and corporations that are organized by authority of any law of Congress continue to be prohibited from making independent expenditures or electioneering communications. 2 U.S.C. 441b, 441c and 441e.

III. Proposed 11 CFR 114.2(b)—Prohibitions on Certain Expenditures

The Commission regulation at 11 CFR 114.2(b) implements 2 U.S.C. 441b(a) by prohibiting corporations and labor organizations from making expenditures, including independent expenditures.[7] This rule also prohibits corporations and labor organizations from making payments for electioneering communications unless certain criteria are met. The Supreme Court's decision in *Citizens United* invalidated the prohibitions on corporate independent expenditures and electioneering communications in 2 U.S.C. 441b(a).[8] Accordingly, certain portions of 11 CFR 114.2(b) are no longer valid. The Commission therefore proposes to revise this regulation to remove the prohibitions on independent expenditures and electioneering communications.

A. 11 CFR 114.2(b)(2)(i)—Prohibition on Corporate and Labor Organization Expenditures

Current 11 CFR 114.2(b)(2)(i) prohibits corporations and labor organizations from making ''expenditures,'' as defined in 11 CFR part 100, subpart D. With certain exceptions, this prohibition applies to all expenditures, whether they are independent, coordinated, or any other form of expenditure, including in-kind contributions.[9]

The Commission is considering two alternatives for revising 11 CFR 114.2(b)(2)(i). Both alternatives would permit corporations and labor organizations to make expenditures from their general treasury funds for communications that are not coordinated with a candidate or political party, and both alternatives would maintain the prohibition on corporate and labor organization expenditures for all activities that are coordinated with a candidate or political party as defined in 11 CFR 109.20 or 109.21. The alternatives differ in that Alternative A would permit corporations and labor organizations to make all types of expenditures from their general treasuries for any non-coordinated activities, whether or not they are communications, while Alternative B would maintain the prohibition on non-expressive expenditures by corporations and labor organizations regardless of whether they are coordinated with a candidate or political party.

Alternative A proposes treating all expenditures the same on the ground that *Citizens United* did not distinguish among different types of expenditures so long as they are made independently of any campaign or political party. By contrast, Alternative B suggests distinguishing between expenditures for communications and other types of expenditures, on the ground that the Court's holding in *Citizens United* struck down prohibitions on political speech as inconsistent with the First Amendment, but did not address non-communicative conduct because ''independent expenditures'' are defined as communications. The Commission invites comment on which of the two approaches reflects the more appropriate response to *Citizens United* and why. In considering both alternatives, the Commission seeks comment on whether it should distinguish between communicative and non-communicative expenditures and how. For example, how should the Commission treat corporate or labor organization expenditures for transporting voters to polling places as part of a non-coordinated get-out-the-vote (''GOTV'') campaign supporting or opposing a specific candidate which includes both communicative and non-communicative elements? Such expenses might include the driver's salary, vehicle rental, and fuel, and, if workers were brought in from another geographical area to assist in the efforts, the payment for their travel, lodging, and food costs.

Alternative A—Permit Corporations and Labor Organizations To Make Expenditures Except for Coordinated Expenditures and Coordinated Communications

Alternative A would remove the existing broad prohibition on corporate and labor organization expenditures from general treasury funds and replace it with a regulation specifically prohibiting only (a) expenditures that are coordinated with a candidate or a political party committee and (b) coordinated communications. Alternative A would permit independent corporate and labor organization communications that contain express advocacy, which is one component of the statutory and regulatory definition of an ''independent expenditure'' (*e.g.,* a television advertisement that urges its audience to vote for a clearly identified Senate candidate), and those that do not contain express advocacy (*e.g.,* a mass mailing that exhorts readers to vote for unspecified candidates who support a particular cause). Expenditures that are not for communications would also be permitted under Alternative A as long as these expenditures are not in-kind contributions, such as expenditures that are coordinated with candidates or political party committees. Permissible expenditures would include: (a) Payment for transportation of volunteers to campaign events, (b) payment for expenses of voter registration drives, (c) the provision of food to campaign volunteers, or (d) the provision of babysitting services to enable voters supporting a particular candidate or political party to vote.

The Commission seeks comment on Alternative A. Does Alternative A eliminate too much or too little of the prohibition on corporate and labor organization expenditures? Does Alternative A provide clear guidance on the types of expenditures corporations and labor organizations may make in accordance with *Citizens United*?

The Commission also seeks comment on whether Alternative A should distinguish between expenditures for communications and other types of non-coordinated expenditures. If spending by corporations or labor organizations—

[7] An ''independent expenditure'' is defined by the Act as ''an expenditure by a person— (A) expressly advocating the election or defeat of a clearly identified candidate; and (B) that is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents.'' 2 U.S.C. 431(17); *see also* 11 CFR 100.16(a). Express advocacy is defined in 11 CFR 100.22 as ''any communication that—(a) Uses phrases such as ''vote for the President,'' ''re-elect your Congressman,'' ''support the Democratic nominee,'' ''cast your ballot for the Republican challenger for U.S. Senate in Georgia,'' ''Smith for Congress,'' ''Bill McKay in '94,'' ''vote Pro-Life'' or ''vote Pro-Choice'' accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice, vote against Old Hickory,'' ''defeat'' accompanied by a picture of one or more candidate(s), ''reject the incumbent,'' or communications of campaign slogan(s) or individual word(s), which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s), such as posters, bumper stickers, advertisements, *etc.* which say ''Nixon's the One,'' ''Carter '76,'' ''Reagan/Bush'' or ''Mondale!''; or (b) When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because—(1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and (2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.''

[8] *See* discussion above regarding the applicability of the *Citizens United* holding to labor organizations.

[9] An in-kind contribution is an expenditure. 11 CFR 100.111(e)(1). All corporate and labor organization contributions, including in-kind contributions, continue to be prohibited after *Citizens United*. Coordinated communications and coordinated expenditures continue to be prohibited because they are a form of in-kind contribution. 11 CFR 109.20(b) and 109.21(b).

whether for communicative or non-communicative expenditures—is neither coordinated with a federal candidate or political party nor is an in-kind contribution, can it be banned post-*Citizens United*? Does Alternative A's removal of the ban on non-coordinated corporate and labor organization expenditures accurately reflect the Court's holding and rationale?

Alternative B—Permit Corporations and Labor Organizations To Make Independent Expenditures But Not Coordinated Communications or Non-Communicative Expenditures

Alternative B would amend the prohibition on corporate and labor organization expenditures to permit independent expenditures from general treasury funds for non-coordinated communications, but would continue to prohibit non-communicative expenditures (including in-kind contributions) and coordinated communications. Alternative B would distinguish expenditures for communications from other types of expenditures. Under Alternative B, corporations and labor organizations would be permitted to make expenditures from general treasury funds solely for ''political speech presented to the electorate that is not coordinated with a candidate.'' *Citizens United,* 130 S. Ct. at 910. Coordinated communications as well as all non-communicative expenditures would continue to be prohibited.

The Commission seeks comment on whether the decision in *Citizens United* should be read to apply to non-communicative activities, and whether Alternative B is consistent with *Citizens United.* Is Alternative B specific enough as to the types of expenditures corporations and labor organizations may make? To what extent does the Act contemplate the distinction between speech and non-speech expenditures? Would maintaining the ban on non-speech expenditures further the government's interest in preventing corruption or the appearance of corruption?

B. 11 CFR 114.2(b)(2)(ii) and (b)(3)—Prohibition on Corporate and Labor Organization Express Advocacy Communications and Electioneering Communications to Those Outside the Restricted Class

Currently, 11 CFR 114.2(b)(2)(ii) prohibits corporations and labor organizations from ''making expenditures with respect to a Federal election * * * for communications to those outside the restricted class that expressly advocate the election or defeat of one or more clearly identified candidate(s) or the candidates of a clearly identified political party.'' Because the Supreme Court held in *Citizens United* that corporations and labor organizations have a constitutional right to make expenditures for communications containing express advocacy to those not in their restricted classes, the Commission proposes to remove paragraph (b)(2)(ii).

Similarly, 11 CFR 114.2(b)(3) prohibits corporations and labor organizations from making payments for electioneering communications to those outside their restricted classes unless permissible under 11 CFR 114.10 or 114.15.[10] Because *Citizens United* held that corporations may make electioneering communications, including to audiences outside their restricted classes, the Commission proposes to remove paragraph (b)(3) of section 114.2. The Commission seeks comment on this proposal.

IV. Proposed 11 CFR 114.3—Disbursements for Communications to the Restricted Class by Corporations and Labor Organizations in Connection With a Federal Election

Current 11 CFR 114.3 implements certain statutory exceptions to the general ban on contributions and expenditures by corporations and labor organizations. Before *Citizens United* was decided, corporations and labor organizations could make communications containing express advocacy only to their restricted classes. 2 U.S.C. 441b(a) and (b)(2)(A). Section 114.3 implements these provisions of the Act, and sets out the requirements and restrictions on those communications to the restricted class, including publications; candidate and party appearances; phone banks; and voter registration and GOTV drives.

The Commission's current regulations at 11 CFR 114.4 set out the restrictions and prohibitions for communications by corporations and labor organizations beyond the restricted class. The Act establishes specific reporting requirements for communications made by corporations and labor organizations to their restricted class and exempts disbursements for such communications from the definition of expenditure, whether or not the communications contain express advocacy. 2 U.S.C. 431(9)(B)(iii). The Commission proposes to maintain the current structure in which 11 CFR 114.3 addresses disbursements for communications made to the restricted class and 11 CFR 114.4 addresses disbursements for communications made to those outside the restricted class, with certain proposed changes discussed below. The Commission requests comment on this approach. Should the Commission maintain the separate regulations as they are now, or divide them in a different way? Would combining 11 CFR 114.3 and 114.4 be more readily understandable to the public now that corporations and labor organizations can make express advocacy communications beyond the restricted class?

A. 11 CFR 114.3(b)—Reporting of Disbursements for Express Advocacy Communications

1. Reporting of Disbursements for Express Advocacy Communications Solely to the Restricted Class Under Current 11 CFR 114.3(b)

The proposed rules would not change the requirement, currently at 11 CFR 114.3(b), that corporations and labor organizations report disbursements for communications containing express advocacy made to the restricted class in accordance with 11 CFR 100.134 and 104.6. The Act exempts express advocacy communications made by corporations and labor organizations to their restricted class from the definition of ''expenditure.'' 2 U.S.C. 431(9)(B)(iii). However, the Act requires that corporations and labor organizations that make disbursements for express advocacy communications to the restricted class in excess of $2,000 for any election file quarterly reports in an election year and pre-election reports for any general election. 2 U.S.C. 431(9)(B)(iii), 434(a)(4)(A)(i) and (ii). This statutory requirement is implemented in the Commission regulations at current 11 CFR 100.134(a), 104.6(a), and 114.3(b).

2. Reporting of Disbursements for Express Advocacy Communications Beyond the Restricted Class

As discussed in Section VII.B below, proposed 11 CFR 114.10(b) would require corporations and labor organizations that make independent expenditures for communications to persons outside the restricted class to report these independent expenditures

[10] This provision does not apply to State party committees and State candidate committees that incorporate under 26 U.S.C. 527(e)(1), provided that: (1) The committee is not a political committee as defined in 11 CFR 100.5; (2) the committee incorporated for liability purposes only; (3) the committee does not use any funds donated by corporations or labor organizations to make electioneering communications; and (4) the committee complies with the reporting requirements for electioneering communications at 11 CFR part 104.

under 2 U.S.C. 434(c). This provision requires that ''every person (other than a political committee) who makes independent expenditures in an aggregate amount or value in excess of $250 during a calendar year'' report such expenditures to the Commission.

The Commission does not propose to change the language of current 11 CFR 114.3(b) because *Citizens United* upheld disclosure requirements, and did not affect the provision of the Act at 2 U.S.C. 431(9)(B)(iii) that exempts disbursements for express advocacy communications to the restricted class from the definition of ''expenditure'' and establishes the reporting requirement for such communications. The Commission requests comment on this approach.

3. Reporting of Express Advocacy Communications Both to the Restricted Class and Outside the Restricted Class

Prior to *Citizens United,* corporations and labor organizations were prohibited from making payments for independent expenditures directed to individuals outside of the restricted class. Now that the Court has struck down the prohibition on independent expenditures, the Commission seeks comment on how a corporation or labor organization should report spending for communications containing express advocacy directed both to the restricted class and outside the restricted class. If a corporation or labor organization makes a single disbursement for a communication containing express advocacy that is made both to the general public, which is an independent expenditure, and the restricted class, which is exempt from the definition of expenditure, should the fact that the communication went outside the restricted class result in the entire disbursement being treated as an independent expenditure, subject to the relevant reporting requirements? Alternatively, should the corporation or labor organization allocate the expense between the cost of the communication made to the restricted class and the cost of the communication made outside the restricted class and report the allocated expenses separately under the two reporting regimes?

B. Proposed 11 CFR 114.3(c)(4)—Voter Registration and Get-Out-the-Vote Drives

Current 11 CFR 114.3(c)(4) provides that a corporation or a labor organization may conduct voter registration and GOTV drives ''aimed at its restricted class.'' Section 114.3(c)(4) states that voter registration and GOTV drives include providing transportation to the place of registration and to the polls. The current provision further permits such drives to include communications containing express advocacy, ''such as urging individuals to register with a particular political party or to vote for a particular candidate.'' 11 CFR 114.3(c)(4). However, the current provision prohibits corporations and labor organizations from withholding or refusing to give information and other assistance regarding registering or voting ''on the basis of support for or opposition to particular candidates, or a particular political party.'' *Id.*

The Commission is proposing two alternatives to revise paragraph (c)(4). Alternative A would also remove the existing requirement that corporations or labor organizations may not withhold or refuse to give information or other assistance on the basis of support for, or opposition to, particular candidates or a particular political party, but maintain the exemption from the definition of ''contribution or expenditure'' under 2 U.S.C. 441b(b)(2)(B) for voter registration and GOTV drives that meet that requirement. Alternative B would not make any changes to current 11 CFR 114.3(c)(4) except the technical change, and therefore retain the current prohibition on withholding or refusing to give information and other assistance regarding registering or voting ''on the basis of support for or opposition to particular candidates, or a particular political party.'' The Commission invites comment on which, if either, of the two proposals better comports with *Citizens United* and the Act.

Alternative A—Remove Requirement That Corporations and Labor Organizations Not Withhold or Refuse To Provide Assistance on the Basis of Support for, or Opposition to, Particular Candidates or a Particular Party

This alternative would remove the prohibition on withholding or refusing to provide information or other assistance regarding registering or voting based on support for or opposition to particular candidates, or a particular party. Instead, Alternative A would prohibit corporations and labor organizations from conducting voter registration or GOTV drives only if the activity is coordinated with a candidate or political party. As discussed in Section III.A above, one approach to revising the Commission's regulations would be to eliminate the existing broad prohibition on corporate and labor organization expenditures, and instead prohibit only those expenditures that are coordinated with a candidate or a political party committee. Similarly, Alternative A would permit corporations and labor organizations to conduct voter registration and GOTV drives without restriction, so long as they were not coordinated with a candidate or political party.

Alternative A, however, would adhere to the statutory exception to the definition of ''contribution or expenditure'' for nonpartisan voter registration and GOTV drives. *See* 2 U.S.C. 441b(b)(2)(B). Under existing regulations, corporations and labor organizations do not have to report to the Commission disbursements for voter registration and GOTV drives that meet the conditions of the statutory exception, since such disbursements are neither contributions nor expenditures. While voter registration and GOTV drives are permissible under Alternative A, regardless of whether the drives meet the conditions of the statutory exception, corporations or labor organizations conducting drives that meet those conditions are not required to report disbursements for those drives. Thus, Alternative A would specify that disbursements for voter registration and GOTV drives are not contributions or expenditures if the drives are conducted in such a manner that the corporation or labor organization does not withhold or refuse to provide information or other assistance regarding registering or voting on the basis of support for or opposition to particular candidates or a particular political party, consistent with the statutory exception in 2 U.S.C. 441b(b)(2)(B).

The Commission requests comment on this proposal. Is Alternative A consistent with *Citizens United*? Does the proposal eliminate too much or too little in implementing the remaining prohibitions on corporate and labor organization expenditures? Is this consistent with the uniform treatment of all expenditures under Alternative A? Should this reporting regime inform the Commission's choice of alternatives for amending section 114.4?

In *Citizens United,* the Court rejected an ''intricate case-by-case determination'' to determine whether political speech is banned, given that a corporation has a constitutional right to speak. 130 S. Ct. at 892. By not weighing the expressive elements of expenditures, does Alternative A avoid the need for such ''intricate case-by-case determinations''?

Alternative B—Retain Existing Regulation at 11 CFR 114.3(c)(4)

Alternative B would make no changes to the existing regulation at 11 CFR 114.3(c)(4) other than the technical change discussed above. As discussed

in Section III.A above, one alternative for revising the Commission's regulations to comply with the decision in *Citizens United* would be to specifically exclude expenditures for communications (*i.e.,* ''independent expenditures'') from the broader prohibition on expenditures, while still prohibiting corporate and labor organization expenditures such as in-kind contributions, coordinated expenditures, or expenditures that do not involve communications. Like proposed Alternative B for 11 CFR 114.2(b)(2)(i) discussed above, Alternative B for 11 CFR 114.3(c)(4) would also distinguish between speech and non-speech activity.

In promulgating the current regulation at 11 CFR 114.3(c)(4), the Commission distinguished between the '''pure speech' aspects of the drives [that] may be partisan,'' and the non-speech activity aspects of the drives that ''must be conducted in a nonpartisan manner.'' 1977 E&J at 105 (1977). The Commission's implementation of the nonpartisan requirement of 2 U.S.C. 441b(b)(2)(B) reflects this distinction between ''pure speech'' and non-speech elements of voter registration and GOTV drives. Because Alternative B takes the approach that *Citizens United* did not overturn the prohibition on corporate and labor organization disbursements that do not involve political speech in the form of independent expenditures and electioneering communications, under Alternative B the Commission would continue to regulate the non-speech aspects of voter registration and GOTV drives in order to implement 2 U.S.C. 441b. These expenses might include, for example, the driver's salary, vehicle rental and fuel, and travel, lodging, and food costs in instances where volunteers or workers were brought in from other locations to participate in a voter registration or GOTV drive. These expenses might also include office leasing and other general office costs, as well as child care costs for voter registration and GOTV workers and for voters.

In Alternative B, as in Alternative A, a corporation or labor organization would continue to be able to make voter registration or GOTV *communications,* including express advocacy, to its restricted class under 11 CFR 114.3(c)(4). Furthermore, in Alternative B, as in Alternative A, voter registration and GOTV drives conducted in accordance with proposed 11 CFR 114.3(c)(4) would remain exempt from the definition of ''expenditure'' under 2 U.S.C. 441b(b)(2)(B). However, Alternative B would maintain the prohibition on withholding or refusing to provide information or other assistance regarding registering or voting based on support for or opposition to particular candidates, or a particular party. Additionally, under Alternative B, corporations and labor organizations would remain prohibited from engaging in *non-communicative* activities related to voter registration and GOTV drives other than those conducted in accordance with proposed 11 CFR 114.3(c)(4).

The Commission also notes the significance of this reporting regime for the Commission's choice of alternatives for amending section 114.4, discussed below. Corporations and labor organizations are not required to report disbursements associated with qualifying voter registration or GOTV drives, such as driver salaries and the cost of fuel, while persons who file reports with the Commission must report all expenditures for communications (both independent expenditures and electioneering communications). Does the statute implicitly distinguish between communications and voter registration and GOTV drives?

The Commission requests comments on this approach. Is Alternative B consistent with the holding in *Citizens United*? Is it appropriate to interpret *Citizens United's* holding as related only to pure speech and therefore not to extend these holdings to these types of non-communicative conduct? Alternatively, do all aspects of voter registration and GOTV drives possess inherently communicative qualities that would prohibit such regulation? The Commission seeks comment on where voter registration and GOTV drives fall on the spectrum ranging from speech to conduct.

V. Proposed 11 CFR 114.4—Disbursements for Communications by Corporations and Labor Organizations Beyond the Restricted Class in Connection With a Federal Election

Current 11 CFR 114.4 sets out a number of exceptions to the prohibitions on corporations and labor organizations making expenditures. The regulation permits certain communications and activities directed outside the restricted class, both to employees outside the restricted class and the general public. This section also permits certain communications made to those outside the restricted class to be coordinated, to a limited extent, with candidates. Specifically, section 114.4(b) covers candidate and party appearances on corporate or labor organization premises or at a meeting, convention, or other function that is attended by employees outside the restricted class.

Current section 114.4(c) identifies the types of communications that corporations and labor organizations can make to the general public, namely: (1) Voter registration and voting communications; (2) official registration and voting information; (3) voting records; (4) voter guides; (5) endorsements; (6) candidate appearances on educational institution premises; and (7) electioneering communications, and the relevant requirements and restrictions that apply to each. The proposed changes to 11 CFR 114.4 would eliminate the prohibition on express advocacy communications made outside the restricted class, but would maintain the restrictions on coordination with candidates and political parties in communications outside the restricted class.

A. Proposed 11 CFR 114.4(a)—General

Current 11 CFR 114.4(a) provides that any communications that a corporation or labor organization makes to the general public may also be made to the restricted class and to its employees outside the restricted class. Paragraph (a) also provides that communications described in section 114.4 may be coordinated with candidates and political committees only to the extent permitted in section 114.4. The Commission is proposing minor changes to the language of paragraph (a) to clarify the meaning of the provisions.

B. Proposed 11 CFR 114.4(c)—Communications by a Corporation or Labor Organization to the General Public

Current 11 CFR 114.4(c) addresses communications by corporations and labor organizations to the general public, and currently includes specific provisions on seven types of communications, listed above, that corporations and labor organizations may make to the general public. Each of the provisions within paragraph (c) prohibits coordinating the communication with a candidate or a candidate's committee or agent, with the exception of paragraph (c)(7) addressing candidate appearances on incorporated non-profit educational institution premises and paragraph (c)(8) regarding electioneering communications. The Commission proposes to restructure paragraph (c) by adding to paragraph (c)(1) a general prohibition on a corporation or labor organization acting in cooperation, consultation, or concert with or at the request or suggestion of a candidate, a candidate's committee or

agent, or a political party committee or its agent regarding the preparation, contents, and distribution of any of the specific types of communications described at proposed 11 CFR 114.4(c)(2) through (c)(6). This language would replace the separate prohibitions on coordination contained in each of the specific paragraphs at current 11 CFR 114.4(c)(2) through (c)(6). The Commission seeks comment on this approach.

1. Removal of Express Advocacy Prohibition

Proposed 11 CFR 114.4(c)(1) would remove the current language specifically permitting qualified nonprofit corporations (''QNCs'') under 11 CFR 114.10(c) to include express advocacy in any communication made to the general public. *See* Section VII, below. After *Citizens United,* all corporations and labor organizations may include express advocacy in any communication made to the general public so long as the communication is not coordinated with candidates or political parties. Hence, this language is now superfluous.

Current 11 CFR 114.4(c)(2) through (c)(6) govern several types of communications that corporations and labor organizations may make to the general public and set out the conditions under which corporations and labor organizations may make them. These communications are: voter registration and GOTV communications; official voter registration and voting information; voting records; voter guides; and endorsements. Proposed 11 CFR 114.4(c)(1) would include a reference to proposed 11 CFR 114.10 to make clear that corporations and labor organizations are no longer limited to the specific types of communications listed in these paragraphs. Nonetheless, the Commission proposes to retain these paragraphs to provide specific information about some of the types of election-related communications that corporations and labor organizations may make. All five of these paragraphs currently prohibit corporations or labor organizations from expressly advocating the election or defeat of clearly identified candidates in these communications. Proposed 11 CFR 114.4(c)(2) through (6) would eliminate the prohibition on express advocacy contained in each of the current paragraphs when these communications are not coordinated with any candidate or political party. The Commission requests comment on these proposed deletions.

2. Proposed 11 CFR 114.4(c)(2)—Voter Registration and GOTV Communications

Current 11 CFR 114.4(c)(2) contains a list of media through which corporations and labor organizations may make voter registration and voting communications to the general public. The list currently includes: posters, billboards, broadcasting media, newspapers, newsletters, brochures, and ''similar means of communication with the general public.'' 11 CFR 114.4(c)(2). The Commission proposes to add mail, Internet communications, emails, text messages, and telephone calls to the list. These changes are intended to reflect additional common means of political communication. The Commission requests comment on these proposed additions. Are there any other methods of communications that should specifically be included in the list? Alternatively, is a list of media through which corporations and labor organizations may make registration and voting communications to the general public necessary at all or, should the Commission modify the regulation simply to state generically that such communications to the general public are permissible?

3. Proposed 11 CFR 114.4(c)(5)—Voter Guides

Current 11 CFR 114.4(c)(5) sets forth certain requirements for and restrictions on the preparation and distribution of voter guides by corporations and labor organizations to the general public. This provision currently requires that voter guides present the positions of two or more candidates on campaign issues. It further requires that all candidates for a particular seat or office be given an equal opportunity to respond, and prohibits the corporation or labor organization from giving greater prominence to any one candidate or substantially more space for a candidate's responses, and from including an electioneering message in the voter guide or accompanying materials. Paragraph (c)(5) would be revised by eliminating the requirement that the voter guide contain the positions of two or more candidates, or that all candidates for a particular office or seat be permitted to respond. The prohibitions on giving one candidate more prominence or space on electioneering communications would also be removed. The Commission proposes these deletions to conform its voter guide rules to the holding in *Citizens United* that corporations and labor organizations may expressly advocate the election or defeat of candidates in communications to the general public and may make electioneering communications so long as such communications are not coordinated with candidates. The Commission requests comments on these proposed changes.

4. Proposed 11 CFR 114.4(c)(6)—Endorsements

Current 11 CFR 114.4(c)(6) permits corporations and labor organization to endorse candidates, and sets out certain requirements and restrictions on such endorsements. Current 11 CFR 114.4(c)(6) permits a corporation or labor organization to communicate the endorsement only to its restricted class through specific types of publications, and prohibits these publications from being distributed to the general public other than at a *de minimis* level. Current 11 CFR 114.4(c)(6) then sets out the circumstances under which a corporation and labor organization may announce an endorsement to the general public. The Commission proposes to remove these restrictions on the manner of announcing a corporation or labor organization's endorsement of a candidate in proposed 11 CFR 114.4(c)(6) consistent with *Citizens United.* The Commission requests comments on these proposed deletions.

5. Proposed 11 CFR 114.4(c)(8)—Electioneering Communications

Current 11 CFR 114.4(c)(8) permits corporations and labor organizations to make electioneering communications to the general public only to the extent permitted under current 11 CFR 114.15. Section 114.15 permits corporations and labor organizations to make electioneering communications, unless the communication is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate. As noted below, the Commission proposes to remove Section 114.15.

Current 11 CFR 114.4(c)(8) further permits QNCs to make electioneering communications to the general public in accordance with current 11 CFR 114.10. Section 114.10(d)(2), in turn, permits QNCs to make any electioneering communication. Because *Citizens United* struck down the prohibition on corporations and labor organizations making electioneering communications, the exception to the prohibition on electioneering communications at 11 CFR 114.4(c)(8) is superfluous. Therefore, the Commission proposes to eliminate current 11 CFR 114.4(c)(8) in its entirety. The Commission seeks comment on this approach.

C. Proposed 11 CFR 114.4(d)—Voter Registration and GOTV Drives

Current 11 CFR 114.4(d) permits corporations and labor organizations to conduct voter registration and GOTV drives aimed at the general public. It states that registration and GOTV drives include providing transportation to the place of registration and to the polls. The current provision prohibits such drives from including communications containing express advocacy and states that the drives may not be coordinated with any candidate or political party. The current provision also prohibits corporations or labor organizations (1) from withholding or refusing to give information and other assistance regarding registering or voting on the basis of support for, or opposition to, particular candidates or a particular political party; (2) from directing the drives primarily at individuals based on registration with a particular party; and (3) from paying individuals conducting such drives on the basis of number of individuals registered or transported to the polls who support a particular candidate or candidates or political party.

In light of *Citizens United,* the Commission is proposing two alternatives to revise 11 CFR 114.4(d). Both Alternatives A and B would remove the prohibition on communications expressly advocating the election or defeat of candidates or political parties made in connection with a voter registration or GOTV drive. Alternative A, however, as discussed in more detail below, would also remove all of the existing requirements and prohibitions regarding voter registration and GOTV drives, with the exception of the prohibition on coordination with candidates or political parties. Alternative A would maintain the exemption from the definition of ''expenditure'' under 2 U.S.C. 431(9)(B)(ii) and 11 CFR 100.133 for voter registration and GOTV drives that meet the existing requirements and prohibitions. In contrast, as discussed in more detail below, Alternative B would retain current 11 CFR 114.4(d), except that it would remove the prohibition on express advocacy currently at 11 CFR 114.4(d)(1). The Commission invites comment on which, if either, of the two proposals better comports with *Citizens United* and why.

Alternative A—Remove All Restrictions on Voter Registration and GOTV Drives Except for the Prohibition on Coordinating With Candidates and Political Parties

This alternative would remove all the requirements for and restrictions on voter registration and GOTV drives at current 11 CFR 114.4(d)(3) through (6), while retaining the prohibition on coordinating drives with candidates or political parties, currently at 11 CFR 114.4(d)(2). As discussed in Sections III.A and IV.E above, one approach to revising the Commission's regulations to make them consistent with *Citizens United* would be to eliminate the existing broad prohibition on corporate and labor organization expenditures, and instead prohibit only those expenditures that are coordinated with a candidate or a political party committee, including coordinated communications, or in-kind contributions. Similarly, Alternative A would permit corporations and labor organizations to conduct voter registration and GOTV drives without restriction, as long as they were not coordinated with a candidate or political party.

Alternative A, however, would maintain the statutory exemption from the definition of ''expenditure'' at 2 U.S.C. 431(9)(B)(ii) for voter registration and GOTV drives. Under the Commission's existing rules, corporations and labor organizations do not have to *report* to the Commission disbursements for voter registration and GOTV drives that meet the conditions of the statutory exception because such disbursements are neither contributions nor expenditures. While voter registration and GOTV drives are permissible under Alternative A regardless of whether the drives meet the conditions of the statutory exception, corporations or labor organizations conducting drives that meet those conditions are not required to report disbursements for those drives. Proposed Alternative A would state that disbursements for voter registration and GOTV drives are not expenditures if the drive meets the requirements for, and restrictions on, voter registration and GOTV drives that are currently located at 11 CFR 114.4(d)(1) and (3)–(6). These requirements would include the prohibition on express advocacy, as well as the prohibition on withholding or refusing to provide information or other assistance regarding registration or voting on the basis of support for, or opposition to, particular candidates or a particular political party.

The Commission requests comment on this proposal. Is this alternative appropriately consistent with *Citizens United*? Does the proposal eliminate too much or too little in implementing the remaining prohibitions on corporate and labor organization expenditures?

Alternative B—Retain Existing Regulation at 11 CFR 114.4(d) Except for the Prohibition on Express Advocacy

Alternative B would make no changes to the existing regulation at 11 CFR 114.4(d), except to remove the prohibition on corporations and labor organizations making communications expressly advocating the election or defeat of clearly identified candidates currently at 11 CFR 114.4(d)(1). As discussed in Sections III.A and IV.E above, Alternative B would exclude expenditures for communications from the prohibition on expenditures, while still prohibiting other corporate and labor organization expenditures, such as in-kind contributions, coordinated expenditures, and expenditures that are not for communications.

After *Citizens United,* corporations and labor organizations are no longer prohibited from making independent expenditures for communications. Because Alternative B is based on the interpretation that *Citizens United* did not disturb the prohibition on corporate and labor organization expenditures that do not involve communications, Alternative B would continue to implement the Act's restrictions on the non-speech aspects of voter registration and GOTV drives, such as the costs associated with driving voters to registration sites or the polls or ''providing babysitting services to enable voters to go to the polls.'' 1977 E&J at 106. Therefore, under Alternative B, three current prohibitions would remain in effect: (1) Directing voter drives at individuals based on party affiliation; (2) withholding or refusing to provide information or other assistance regarding registration or voting on the basis of support for, or opposition to, particular candidates or a particular political party; and (3) paying individuals conducting voter drives based on the number of individuals registered or transported who support a particular candidate or political party. Voter registration and GOTV drives conducted in accordance with proposed Alternative B would remain exempt from the definition of ''expenditure'' under 2 U.S.C. 431(9)(B)(ii).

The current rule at 11 CFR 114.4, like the rule at 114.3, recognizes the distinction between expenditures for communications and for non-communicative activities. Current

114.4(c)(2) specifically allows for voter registration or GOTV *communications* to the general public, provided that the communications do not contain express advocacy, while current 114.4(d), following 2 U.S.C. 441b(b)(2)(B), exempts voter registration and GOTV *drives* conducted in a nonpartisan manner from the definition of ''expenditure.'' In Alternative B, as in Alternative A, a corporation or labor organization would be able to make voter registration or GOTV *communications,* including express advocacy, to the general public under proposed 11 CFR 114.4(c)(2). Furthermore, under both Alternative A and Alternative B, voter registration and GOTV drives conducted in accordance with proposed 11 CFR 114.4(d) would remain exempt from the definition of ''expenditure'' in 2 U.S.C. 441b(b)(2)(B). However, under Alternative B, corporations and labor organizations would continue to be prohibited from engaging in *non-communicative* activities related to voter registration and GOTV drives other than those conducted in accordance with proposed 11 CFR 114.4(d).

The Commission requests comments on this proposal. Is this alternative consistent with *Citizens United*? Does the proposal eliminate too much or too little in implementing the remaining prohibitions on corporate and labor organization expenditures?

VI. Proposed 11 CFR 114.9—Use of Corporate and Labor Organization Facilities

The use of corporate or labor organization facilities in connection with Federal elections is generally treated as both a contribution and an expenditure under the Act. Section 114.9 establishes certain limited exceptions to this requirement for minimal usage of these facilities by certain individuals, and also requires corporations and labor organization to obtain reimbursement from individuals who use their facilities in connection with Federal elections for more than minimal usage. 1977 E&J at 115; *see also* Explanation and Justification for Final Rules for Internet Communications, 71 FR 18589, 18611 (Apr. 12, 2006); Advisory Opinion 1985–26 (General Mills) (concluding that, under 114.9(c), an employee's failure to reimburse a corporation for the corporation's distribution of campaign materials could result in prohibited corporate expenditure). *Citizens United* invalidated the prohibition on corporate and labor organization independent expenditures at 2 U.S.C. 441b(a). The *Citizens United* decision did not address the prohibition on contributions by corporations and labor organizations at 2 U.S.C. 441b.

The Commission seeks comment on whether 11 CFR 114.9 should be revised in light of the *Citizens United* decision. If so, how should the Commission revise the regulation? To what extent should 11 CFR 114.9 be revised, if at all, to account for the continued validity of the contribution ban at 2 U.S.C. 441b?

VII. Proposed Revision of 11 CFR 114.10—Corporations and Labor Organizations Making Independent Expenditures and Electioneering Communications

The Commission promulgated 11 CFR 114.10 primarily in response to the Supreme Court's decision in *MCFL* v. *FEC,* 479 U.S. 238 (1986). In *MCFL,* the Court considered the application of the independent expenditure prohibition in 2 U.S.C. 441b to MCFL, a nonprofit corporation organized to promote certain ideological views. The Court concluded that, because MCFL did not have the potential to corrupt the electoral process, it did not implicate the concerns that prompted regulation of corporations by Congress. *See MCFL,* 479 U.S. at 259. In response to *MCFL,* the Commission adopted 11 CFR 114.10, creating a regulatory exception to the independent expenditure ban in section 441b for organizations with the same characteristics as MCFL, referred to as ''qualified nonprofit corporations'' or ''QNCs.'' After Congress enacted BCRA's electioneering communications provisions in 2002, the Commission added an exception in 11 CFR 114.10 for QNCs making electioneering communications. Because *Citizens United* struck down the statutory bans on independent expenditures and electioneering communications for all corporations and labor organizations, the regulatory exceptions for QNCs are now superfluous.

To determine if the Commission should revise 11 CFR 114.10, or remove the provision in its entirety, the Commission seeks comments on a proposal to remove current paragraphs (a) through (c) and (e)(1), as these regulations specifically apply only to QNCs. The Commission proposes to redesignate the provision currently at 11 CFR 114.10(d) and revise it to recognize explicitly the right of all corporations and labor organizations to make independent expenditures and electioneering communications. The Commission further proposes to retain and redesignate the regulations at 11 CFR 114.10(e)(2) through (i), and would expand them to apply to *all* corporations and labor organizations that make independent expenditures and electioneering communications. These provisions include: (1) The reporting requirements for QNCs making independent expenditures or electioneering communications at 11 CFR 114.10(e); (2) the solicitation disclaimer requirement at 11 CFR 114.10(f); (3) the non-authorization disclaimer requirement at 11 CFR 114.10(g); (4) the provision in 11 CFR 114.10(h) permitting QNCs to establish segregated bank accounts for disbursements for electioneering communications; and (5) 11 CFR 114.10(i), which states that nothing in section 114.10 authorizes any organization exempt from taxation under 26 U.S.C. 501(a) to carry out any activity that it is prohibited from undertaking by the Internal Revenue Code. The Commission seeks comment as to whether maintaining any or all of these regulations is necessary or appropriate.

A. Proposed 11 CFR 114.10(a)—Independent Expenditures and Electioneering Communications by Corporations and Labor Organizations

Current 11 CFR 114.10(d) specifically permits QNCs to make independent expenditures and electioneering communications. Because *Citizens United* made independent expenditures and electioneering communications permissible for all corporations and labor organizations, proposed 11 CFR 114.10(a) would expand certain provisions of current 11 CFR 114.10(d) to cover all corporations and labor organizations. As discussed above, the Commission seeks comments on whether it would be helpful for corporations and labor organizations to have a regulation explicitly permitting them to make independent expenditures and electioneering communications. Should the regulation instead more broadly state that corporations and labor organizations may make any communication in connection with an election so long as it is not a coordinated communication under 11 CFR 109.21? Alternatively, would it be sufficient to remove the current prohibitions in 11 CFR 114.2(b)(2) and (b)(3) on corporations and labor organizations making disbursements for independent expenditures and electioneering communications from general treasury funds?

B. Proposed 11 CFR 114.10(b)—Reporting Independent Expenditures and Electioneering Communications

Current 11 CFR 114.10(e)(2) sets forth the reporting requirements for QNCs making independent expenditures and

electioneering communications. Proposed 11 CFR 114.10(b) would expand this language to include independent expenditures and electioneering communications made by all corporations and labor organizations. Proposed 11 CFR 114.10(b)(1) would state that corporations and labor organizations that make independent expenditures aggregating in excess of $250 with respect to a given election in a calendar year must file reports according to 11 CFR 104.4(a) and 109.10(b) through (e). Section 104.4(a) requires that ''*every person that is not a political committee* must report independent expenditures in accordance with paragraphs (e) and (f) of this section and 11 CFR 109.10'' (emphasis added).

Proposed 11 CFR 114.10(b)(2) would state that corporations or labor organizations that make electioneering communications aggregating in excess of $10,000 in a calendar year must file statements as required by 11 CFR 104.20(b). Section 104.20(b), in turn, requires that ''*every person* who has made an electioneering communication * * * aggregating in excess of $10,000 during any calendar year'' file a statement on FEC Form 9, disclosing information set out in paragraph (c) of that section (emphasis added). Given that the definition of ''person'' already covers corporations and labor organizations, is it necessary or helpful to have an additional regulation that specifically states that corporations and labor organizations are subject to these requirements? *See* 2 U.S.C. 431(11); 11 CFR 100.10.

C. Proposed 11 CFR 114.10(c)—Solicitation; Disclosure of Use of Contributions for Political Purposes

Current 11 CFR 114.10(f) requires that solicitations for donations by QNCs disclose to potential donors that their donations may be used for political purposes, such as supporting or opposing candidates.

Proposed 11 CFR 114.10(c) would maintain this requirement, and would expand it to cover solicitations for donations that may be used for political purposes where the solicitations are made by any corporation or labor organization.

The requirement at current section 114.10(f) derives from the Supreme Court's decision in *MCFL.* Explanation and Justification for Final Rules on Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures, 60 FR 35292, 35303 (July 6, 1995). In holding the prohibition on independent expenditures unconstitutional as applied to QNCs, the Supreme Court reasoned that ''[t]he rationale for regulation is not compelling with respect to independent expenditures by [MCFL]'' because ''[i]ndividuals who contribute to appellee are fully aware of its political purposes, and in fact contribute precisely because they support those purposes.'' *MCFL,* 479 U.S. at 260–61. ''*Given a contributor's awareness of the political activity of [MCFL],* as well as the readily available remedy of refusing further donations, the interest [of] protecting contributors is simply insufficient to support § 441b's restriction on the independent spending of MCFL.'' *Id.* at 262 (emphasis added).

In *Citizens United,* the Court upheld the disclaimer requirements of 2 U.S.C. 441d(d)(2) and the disclosure requirements of 2 U.S.C. 434(f). In analyzing the disclaimer requirements, the Court recognized that ''[t]he disclaimers required by [BCRA] § 311 'provide the electorate with information,' *McConnell,* 540 U.S. at 196, and thereby 'insure that the voters are fully informed' about the person or group who is speaking, *Buckley,* 424 U.S. at 76.'' *Citizens United,* 130 S. Ct. at 915 (additional citation omitted). Regarding disclosure requirements, the Court cited its previous explanation that ''disclosure is a less restrictive alternative to more comprehensive regulations of speech.'' *Id.* The Court further recognized that ''disclosure permits citizens and shareholders to react to the [political] speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.'' *Id.* at 916.

Although the Supreme Court's decision in *Citizens United* to strike down the independent expenditure and electioneering communications ban in section 441b appears to have rendered the QNC exception unnecessary, is the solicitation disclosure requirement in *MCFL* still important in ensuring that those solicited have the information necessary to make informed decisions about how their donations may be used? The Commission seeks comment as to whether any or all of these proposed regulations are necessary. If the statutory basis for such a requirement remains sound, does language in the Court's opinion in *Citizens United* regarding disclosure and disclaimers mean that the Commission may and should continue to have a specific requirement that QNCs provide disclosure to potential donors and contributors? If so, should the rules at current 11 CFR 114.10(c) defining ''QNC'' be retained so that these entities will be apprised of this requirement? Should the Commission establish a broader disclosure requirement so that all corporations and labor organizations must disclose to those they solicit that any money given to the corporation or labor organization may be used for political purposes, such as making communications supporting or opposing candidates? Should the Commission require corporations and labor organizations to state in such disclosures that the funds received may be used specifically for independent expenditures or electioneering communications, as opposed to for ''political purposes'' generally?

Because *Citizens United* struck down the statutory bans on independent expenditures and electioneering communications for all corporations and labor organizations, is the regulatory requirement that QNC include a solicitation disclaimer now superfluous? Should the Commission remove 11 CFR 114.10(f) in its entirety instead of revising it?

D. Proposed 11 CFR 114.10(d)—Non-Authorization Notice

Current 11 CFR 114.10(g) requires that QNCs comply with the disclaimer requirements of 11 CFR 110.11. The Court in *Citizens United* upheld the disclaimer provisions of 2 U.S.C. 441d. 130 S. Ct. at 914–16. Section 441d(a) requires that certain communications include statements identifying the person who paid for the communication and whether the communication is authorized by any candidate or candidate's committee, and sets out the requirements for such statements. These communications include all public communications *by any person* that expressly advocate the election or defeat of a clearly identified candidate, and all electioneering communications *by any person.* 2 U.S.C. 441d(a). The Act defines ''person'' to include corporations and labor organizations. 2 U.S.C. 431(11).

Section 110.11 implements the requirements of 2 U.S.C. 441d. Because the requirements of 2 U.S.C. 441d and 11 CFR 110.11 apply to public communications containing express advocacy and electioneering communications made by *any person,* the provision applies equally to corporations and labor organizations. Therefore, if a corporation or labor organization makes an independent expenditure or electioneering communication as permitted after *Citizens United,* the communication must include a statement identifying, among other things, the name and

address of the corporation or labor organization that paid for the communication. Proposed 11 CFR 114.10(d) would follow current 11 CFR 114.10(g), but would expand it to require that all corporations and labor organizations comply with 11 CFR 110.11. Although the requirements at 2 U.S.C. 441d and 11 CFR 110.11 already apply to corporations and labor organizations because they are considered ''persons'' under the Act, should proposed section 114.10(d) explicitly state that all corporations and labor organizations must comply with the requirements of 11 CFR 110.11?

E. Proposed 11 CFR 114.10(e)—Segregated Bank Account

The Commission proposes a regulation to state affirmatively that a corporation or labor organization may establish a segregated bank account for funds to be used for the making of electioneering communications. This regulation would not affect other restrictions and limitations applicable to those that make electioneering communications. Current 11 CFR 114.10(h) states that a QNC may, but is not required to, establish a segregated bank account into which it deposits only funds donated or otherwise provided by individuals, as described in 11 CFR part 104, and from which it makes disbursements for electioneering communications. Proposed 11 CFR 114.10(e) would adopt this language and expand it to state that all corporations or labor organizations may establish such accounts.[11] The current regulation at 11 CFR 114.10(h) implements 2 U.S.C. 434(f)(2)(E) and (F), which sets out the reporting requirements for every person making disbursements for electioneering communications paid out of segregated bank accounts. Aside from this reporting requirement, however, the Act does not otherwise affirmatively state that a person may establish such a segregated account. Furthermore, 11 CFR 114.10(h) is the only place in the current regulations that affirmatively states that a person may, but is not required to, set up such a segregated bank account, and this regulation is limited to QNCs.

The Commission requests comment on the proposed regulation that would affirmatively state that any corporation or labor organization may, but is not required to, set up a segregated bank account for the purpose of making electioneering communications, as described in 2 U.S.C. 434(f)(2)(E). Is such a regulation necessary, given that the reporting requirements in the Act already contemplate the existence of such a segregated bank account? Should the Commission adopt a broader regulation that would permit, but not require, any person (other than a political committee) to set up such an account? Alternatively, should the Commission require corporations and labor organizations that make independent expenditures and electioneering communications to use a segregated bank account?

F. Proposed 11 CFR 114.10(f)—Activities Prohibited by the Internal Revenue Code

Current 11 CFR 114.10(i) states that nothing in section 114.10 shall be construed to authorize any organization exempt from taxation under 26 U.S.C. 501(a) to carry out any activity that it is prohibited from undertaking by the Internal Revenue Code. The Commission proposes to move this provision to new section 114.10(f). The language referring specifically to QNCs would be removed, for the reasons discussed above. The Commission requests comments on this proposed change.

VIII. Proposed Removal of 11 CFR 114.14 and 114.15

The Commission proposes to remove existing 11 CFR 114.14 and 114.15 in their entirety. Together, these sections prohibit corporations and labor organizations from providing general treasury funds to other persons to make electioneering communications that are the functional equivalent of express advocacy.

The Court held in *Citizens United* that corporations may make electioneering communications. Because 11 CFR 114.14 is a prophylactic regulation designed to prohibit corporations and labor organizations from doing through other persons what the corporation or labor organization could not do directly, the decision in *Citizens United* could be interpreted to have rendered unnecessary the prohibition in 11 CFR 114.14. The Commission therefore seeks comment on whether it should remove the prohibition in this section.

In considering this issue, the Commission notes that section 434(f) of the Act requires that entities making electioneering communications report certain information to the Commission, including the identification of persons who have provided funds to segregated bank accounts for the purpose of making such communications. 2 U.S.C. 434(f). The Commission promulgated 11 CFR 104.20(c)(7) to implement this statutory requirement. Explanation and Justification for Final Rules on Bipartisan Campaign Reform Act of 2002 Reporting, 68 FR 404, 413 (Jan. 3, 2003). In doing so, the Commission interpreted the statute to treat funds provided for the purpose of making electioneering communications as ''donations,'' rather than as ''contributions'' under the Act. *Id.* Should this same interpretation of section 434(f) apply to corporate and labor organization funds provided to *other* persons for the purpose of making electioneering communications? If such funds are donations, they would not violate the prohibition on corporate and labor organization contributions in section 441b(a) of the Act. The Commission seeks comment on whether there should be a distinction drawn between the treatment of funds provided *by individuals* to other persons for electioneering communications as *donations* in 11 CFR 104.20(c)(7) and the treatment of funds provided *by corporations and labor organizations* to other persons for electioneering communications as *contributions* in 2 U.S.C. 441b(b)(2). If so, why, and if not, why not?

In addition to current section 114.14, the Commission seeks comment on the proposed removal of section 114.15, which provides a safe harbor for certain electioneering communications made by corporations and labor organizations. If the prohibition in section 114.14 is removed as proposed, should any portion of section 114.15 be retained? Is section 114.15 relevant to any remaining valid Commission regulations, such that they should not be removed? The Commission notes that, if the Commission decides to remove section 114.15, references to this section in other rules will need to be deleted. If the Commission decides to remove section 114.15, should the Commission consider revising other relevant cross-references?

Certification of No Effect Pursuant to 5 U.S.C. 605(b) (Regulatory Flexibility Act)

The Commission certifies that the attached proposed rules, if adopted, would not have a significant economic impact on a substantial number of small entities. There are two bases for this certification. First, there are few small entities that would be affected by these proposed rules. The Commission's proposed revisions may affect some for-profit corporations, labor organizations, individuals, and some non-profit organizations. Individuals and labor organizations are not ''small entities'' under 5 U.S.C. 601(6). Many non-profit

[11] This provision applies to corporation and labor organizations but not to political committees, because, by definition, political committees do not make electioneering communications. 2 U.S.C. 434(f)(3); *see also* 11 CFR 104.20(b).

organizations that might use general treasury funds to make independent expenditures or electioneering communications are not ''small organizations'' under 5 U.S.C. 601(4) because they are not financed by a small identifiable group of individuals, but rather rely on contributions from a large number of individuals to fund operations and activities.

Second, the proposed rules would not have a significant economic impact on the small entities affected by this rulemaking. Overall, the proposed rules would relieve a funding restriction that the current rules place on some corporations and labor organizations. The proposed rules would allow small entities to engage in activity they were previously prohibited from funding with corporation or labor organization funds. Thus, while one effect of the proposed rule would be to increase substantially the number of corporations and labor organizations that use general treasury funds to make independent expenditures or electioneering communications, these entities will do so voluntarily and not because of any new Federal requirement to do so. Although they would incur some costs in complying with the obligation to report independent expenditures and electioneering communications, these costs would not be very great and thus would not have a significant economic impact on the small entities affected by this rulemaking. In fact, the obligation for corporations and labor organizations to report electioneering communications should not be burdensome because the trigger to report electioneering communications remains high. Further, because qualified non-profit corporations would continue to be able to make independent expenditures and electioneering communications just as they have done before, their reporting obligations will not change or become more burdensome because of this rulemaking. Therefore, the attached rule would not have a significant economic impact on a substantial number of small entities.

List of Subjects in 11 CFR Part 114

Business and industry, elections, Labor.

For the reasons set out in the preamble, the Federal Election Commission proposes to amend Subchapter A of Chapter I of Title 11 of the Code of Federal Regulations as follows:

PART 114—CORPORATE AND LABOR ORGANIZATION ACTIVITY

1. The authority citation for part 114 continues to read as follows:

Authority: 2 U.S.C. 431(8), 431(9), 432, 434, 437d(a)(8), 438(a)(8), 441b.

2. Section 114.2 is amended by revising the section heading and paragraph (b)(2), and removing paragraph (b)(3), to read as follows:

§ 114.2 Prohibitions on contributions and expenditures.

* * * * *

(b) * * *

Alternative A for paragraph (b)(2).

(2) Corporations and labor organizations are prohibited from making coordinated expenditures as defined in 11 CFR 109.20 and coordinated communications as defined in 11 CFR 109.21.

Alternative B for paragraph (b)(2).

(2) Corporations and labor organizations are prohibited from making expenditures as defined in 11 CFR part 100, subpart D, except for payments for communications that are not coordinated communications as defined in 11 CFR 109.21.

* * * * *

3. In § 114.3, paragraph (c)(4) is revised to read as follows:

§ 114.3 Disbursements for communications to the restricted class in connection with a Federal election.

* * * * *

(c) * * *

Alternative A for paragraph (c)(4).

(4) *Registration and get-out-the-vote drives.*

(i) Voter registration and get-out-the-vote drives permitted. A corporation or labor organization may conduct registration and get-out-the-vote drives aimed at its restricted class. Registration and get-out-the-vote drives include providing transportation to the place of registration and to the polls. The corporation or labor organization must not act in cooperation, consultation, or concert with or at the request or suggestion of any candidates, candidates' committees or agents, or political party regarding the planning, organization, timing, or administration of a voter registration or get-out-the-vote drive.

(ii) Disbursements for certain voter registration and get-out-the-vote drives not expenditures or contributions. Disbursements for voter registration and get-out-the-vote drives are not contributions or expenditures, provided that the drive is conducted so that information and other assistance regarding registering or voting, including transportation and other services offered, is not withheld or refused on the basis of support for or opposition to particular candidates, or a particular political party. *See* 2 U.S.C. 441b(b)(2)(B). Such drives may include communications containing express advocacy, such as urging individuals to register with a particular party or to vote for a particular candidate or candidates.

Alternative B for paragraph (c)(4).

(4) *Registration and get-out-the-vote drives.* A corporation or a labor organization may conduct registration and get-out-the-vote drives aimed at its restricted class. Registration and get-out-the-vote drives include providing transportation to the place of registration and to the polls. Such drives may include communications containing express advocacy, such as urging individuals to register with a particular party or to vote for a particular candidate or candidates. Information and other assistance regarding registering or voting, including transportation and other services offered, shall not be withheld or refused on the basis of support for or opposition to particular candidates, or a particular political party.

4. Section 114.4 is amended by revising the section heading, paragraphs (a), (c)(1), (c)(2), (c)(3)(i), (c)(4), (c)(5), (c)(6) and (d), and by removing paragraphs (c)(3)(iv), (c)(3)(v), and (c)(8) to read as follows:

§ 114.4 Disbursements for communications by corporations and labor organizations beyond the restricted class in connection with a Federal election.

(a) *General.* A corporation or labor organization may communicate beyond the restricted class in accordance with this section. Communications that a corporation or labor organization may make only to its employees (including its restricted class) and their families, but not to the general public, are set forth in paragraph (b) of this section. Any communications that a corporation or labor organization may make to the general public are set forth in paragraph (c) of this section, and may also be made to the corporation's or labor organization's restricted class and to other employees and their families. Communications that a corporation or labor organization may make only to its restricted class are set forth at 11 CFR 114.3. The activities described in paragraphs (b) and (c) of this section may be coordinated with candidates and political committees only to the extent permitted by this section. *See* 11 CFR 100.16, 109.21, and 114.2(c) regarding independent expenditures and coordination with candidates.

Incorporated membership organizations, incorporated trade associations, incorporated cooperatives, and corporations without capital stock will be treated as corporations for the purpose of this section.

* * * * *

(c) *Communications by a corporation or labor organization to the general public.*

(1) *General.* A corporation or labor organization may make independent expenditures or electioneering communications pursuant to 11 CFR 114.10. This section addresses specific communications, described in paragraphs (c)(2) through (c)(7) of this section, a corporation or labor organization may make to the general public. The general public includes anyone who is not in the corporation's or labor organization's restricted class. The corporation or labor organization must not act in cooperation, consultation, or concert with or at the request or suggestion of any candidates, candidates' committees or agents, or political party committee or party committee's agent regarding the preparation, contents and distribution of any of the communications described in paragraphs (c)(2) through (7) of this section.

(2) *Voter registration and get-out-the-vote communications.* A corporation or labor organization may make voter registration and get-out-the-vote communications to the general public. A corporation or labor organization may make communications permitted under this paragraph (c)(2) through posters, billboards, broadcasting media, newspapers, newsletters, brochures, mail, Internet communications, emails, text messages, telephone calls, or similar means of communication with the general public.

(3) *Official registration and voting information.*

(i) A corporation or labor organization may distribute to the general public, or reprint in whole and distribute to the general public, any registration or voting information, such as instructional materials, that has been produced by the official election administrators.

* * * * *

(4) *Voting records.* A corporation or labor organization may prepare and distribute to the general public the voting records of Members of Congress.

(5) *Voter guides.* A corporation or labor organization may prepare and distribute to the general public voter guides, including voter guides obtained from a nonprofit organization that is described in 26 U.S.C. 501(c)(3) or (c)(4).

(6) *Endorsements.* A corporation or labor organization may endorse a candidate, and may communicate the endorsement to its restricted class or to the general public. The Internal Revenue Code and regulations promulgated thereunder should be consulted regarding restrictions or prohibitions on endorsements by nonprofit corporations described in 26 U.S.C. 501(c)(3).

* * * * *

Alternative A for paragraph (d).

(d) *Voter registration and get-out-the-vote drives.*

(1) *Voter registration and get-out-the-vote drives permitted.* A corporation or labor organization may support or conduct voter registration and get-out-the-vote drives that are aimed at employees outside its restricted class and the general public. The corporation or labor organization must not act in cooperation, consultation, or concert with or at the request or suggestion of any candidates, candidates' committees or agents, or political party regarding the planning, organization, timing, or administration of a voter registration or get-out-the-vote drive. Voter registration and get-out-the-vote drives include providing transportation to the polls or to the place of registration.

(2) *Disbursements for certain voter registration and get-out-the-vote drives not expenditures.* Voter registration or get-out-the-vote drives that are conducted in accordance with paragraphs (d)(2)(i) through (d)(2)(v) of this section are not expenditures.

(i) The corporation or labor organization shall not make any communication expressly advocating the election or defeat of any clearly identified candidate(s) or candidates of a clearly identified political party as part of the voter registration or get-out-the-vote drive.

(ii) The voter registration drive shall not be directed primarily to individuals previously registered with, or intending to register with, the political party favored by the corporation or labor organization. The get-out-the-vote drive shall not be directed primarily to individuals currently registered with the political party favored by the corporation or labor organization.

(iii) These services shall be made available without regard to the voter's political preference. Information and other assistance regarding registering or voting, including transportation and other services offered, shall not be withheld or refused on the basis of support for or opposition to particular candidates or a particular political party.

(iv) Individuals conducting the voter registration or get-out-the-vote drive shall not be paid on the basis of the number of individuals registered or transported who support one or more particular candidates or political party.

(v) The corporation or labor organization shall notify those receiving information or assistance of the requirements of paragraph (d)(4) of this section. The notification shall be made in writing at the time of the registration or get-out-the-vote drive.

Alternative B for paragraph (d).

(d) *Voter registration and get-out-the-vote drives.* A corporation or labor organization may support or conduct voter registration and get-out-the-vote drives that are aimed at employees outside its restricted class and the general public in accordance with the conditions set forth in paragraphs (d)(1) through (d)(5) of this section. Voter registration and get-out-the-vote drives include providing transportation to the polls or to the place of registration.

(1) The corporation or labor organization must not act in cooperation, consultation, or concert with or at the request or suggestion of any candidates, candidates' committees or agents, or political party regarding the planning, organization, timing, or administration of a voter registration or get-out-the-vote drive.

(2) The voter registration drive shall not be directed primarily to individuals previously registered with, or intending to register with, the political party favored by the corporation or labor organization. The get-out-the-vote drive shall not be directed primarily to individuals currently registered with the political party favored by the corporation or labor organization.

(3) These services shall be made available without regard to the voter's political preference. Information and other assistance regarding registering or voting, including transportation and other services offered, shall not be withheld or refused on the basis of support for or opposition to particular candidates or a particular political party.

(4) Individuals conducting the voter registration or get-out-the-vote drive shall not be paid on the basis of the number of individuals registered or transported who support one or more particular candidates or political party.

(5) The corporation or labor organization shall notify those receiving information or assistance of the requirements of paragraph (d)(3) of this section. The notification shall be made in writing at the time of the registration or get-out-the-vote drive.

5. Section 114.10 is revised to read as follows:

§ 114.10 Corporations and labor organizations making independent expenditures and electioneering communications.

(a) *General.* Corporations and labor organizations may make independent expenditures, as defined in 11 CFR 100.16, and electioneering communications, as defined in 11 CFR 100.29.

(b) *Reporting independent expenditures and electioneering communications.* (1) Corporations and labor organizations that make independent expenditures aggregating in excess of $250 with respect to a given election in a calendar year shall file reports as required by 11 CFR 104.4(a) and 11 CFR 109.10(b) through (e).

(2) Corporations and labor organizations that make electioneering communications aggregating in excess of $10,000 in a calendar year shall file the statements required by 11 CFR 104.20(b).

(c) *Solicitation; disclosure of use of contributions for political purposes.* Whenever a corporation or labor organization solicits donations that may be used for political purposes, the solicitation shall inform potential donors that their donations may be used for political purposes, such as supporting or opposing candidates.

(d) *Non-authorization notice.* Corporations or labor organizations making independent expenditures or electioneering communications shall comply with the requirements of 11 CFR 110.11.

(e) *Segregated bank account.* A corporation or labor organization may, but is not required to, establish a segregated bank account into which it deposits only funds donated or otherwise provided by individuals, as described in 11 CFR part 104, from which it makes disbursements for electioneering communications.

(f) *Activities prohibited by the Internal Revenue Code.* Nothing in this section shall be construed to authorize any organization exempt from taxation under 26 U.S.C. 501(a) to carry out any activity that it is prohibited from undertaking by the Internal Revenue Code, 26 U.S.C. 501 *et seq.*

§§ 114.14 and 114.15 [Removed].

6. Sections 114.14 and 114.15 are removed.

Dated: December 15, 2011.

On behalf of the Commission.

Cynthia L. Bauerly,

Chair, Federal Election Commission.

[FR Doc. 2011–32632 Filed 12–23–11; 8:45 am]

BILLING CODE 6715–01–P

FARM CREDIT ADMINISTRATION

12 CFR Part 615

RIN 3052–AC54

Funding and Fiscal Affairs, Loan Policies and Operations, and Funding Operations; Liquidity and Funding

AGENCY: Farm Credit Administration.

ACTION: Proposed rule.

SUMMARY: The Farm Credit Administration (FCA, we or us) proposes to amend its liquidity regulation. The purpose of the proposed rule is to strengthen liquidity risk management at Farm Credit System (FCS or System) banks, improve the quality of assets in the liquidity reserve, and bolster the ability of System banks to fund their obligations and continue their operations during times of economic, financial, or market adversity.

DATES: Comments should be received on or before February 27, 2012.

ADDRESSES: We offer a variety of methods for you to submit your comments. For accuracy and efficiency, commenters are encouraged to submit comments by email or through the FCA's Web site. As facsimiles (fax) are difficult for us to process and achieve compliance with section 508 of the Rehabilitation Act, we are no longer accepting comments submitted by fax. Regardless of the method you use, please do not submit your comment multiple times via different methods. You may submit comments by any of the following methods:

- *Email:* Send us an email at *reg-comm@fca.gov.*
- *FCA Web site: http://www.fca.gov.* Select ''Public Comments'' and follow the directions for ''Submitting a Comment.''
- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Gary K. Van Meter, Director, Office of Regulatory Policy, Farm Credit Administration, 1501 Farm Credit Drive, McLean, VA 22102–5090.

You may review copies of comments we receive at our office in McLean, Virginia, or from our Web site at *http://www.fca.gov.* Once you are in the Web site, select ''Public Commenters,'' then ''Public Comments,'' and follow the directions for ''Reading Submitted Public Comments.'' We will show your comments as submitted, but for technical reasons we may omit items such as logos and special characters. Identifying information that you provide, such as phone numbers and addresses, will be publicly available. However, we will attempt to remove email addresses to help reduce Internet spam.

FOR FURTHER INFORMATION CONTACT: David J. Lewandrowski, Senior Policy Analyst, Office of Regulatory Policy, Farm Credit Administration, 1501 Farm Credit Drive, McLean, VA, (703) 883–4498, TTY (703) 883–4434; or

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SUPPLEMENTARY INFORMATION:

I. Objectives

The objectives of the proposed rule are to:

- Improve the capacity of FCS banks to pay their obligations and fund their operations by maintaining adequate liquidity to withstand various market disruptions and adverse financial or economic conditions;
- Strengthen liquidity management at all FCS banks;
- Enhance the marketability of assets that System banks hold in their liquidity reserve;
- Require that cash and highly liquid investments comprise the first 30 days of the 90-day liquidity reserve;
- Establish a supplemental liquidity buffer that a bank can draw upon during an emergency and that is sufficient to cover the bank's liquidity needs beyond the 90-day liquidity reserve; and
- Strengthen each bank's Contingency Funding Plan (CFP).

II. Background

The FCS is a nationwide network of borrower-owned financial cooperatives that lend to farmers, ranchers, aquatic producers and harvesters, agricultural cooperatives, rural utilities, farm-related service businesses, and rural homeowners. By law, FCS institutions are instrumentalities of the United States,[1] and Government-sponsored enterprises (GSEs).[2] According to section 1.1(a) of the Farm Credit Act of 1971, as amended, (Act), Congress established the System for the purpose

[1] *See* sections 1.3(a), 2.0(a), 2.10(a), 3.0, 4.25, and 8.1(a)(1) of the Act; 12 U.S.C. 2011(a), 2071(a), 2091(a), 2121, 2211, and 2279aa–1.

[2] *See* Public Law 101–73, sec. 1404(e)(1)(A), 103 Stat. 183, 552–53 (Aug. 9, 1989).

of furnishing ''sound, adequate, and constructive credit and closely related services'' to farmers, ranchers, aquatic producers and harvesters, their cooperatives, and certain farm-related businesses necessary to fund efficient agricultural operations in the United States.

In many respects, the FCS is different from other lenders. In contrast to commercial banks and most other financial institutions, the System lends mostly to agriculture and in rural areas. Unlike most other lenders, FCS banks and associations are cooperatives that are owned and controlled by their agricultural borrowers, and their common equity is not publicly traded.

The System funds its operations differently than most commercial lenders. FCS banks issue System-wide debt securities, which are the System's primary source for funding loans to agricultural producers, their cooperatives, and other eligible borrowers.[3] Although section 4.2(a) of the Act authorizes FCS banks to borrow from commercial banks and other lending institutions, lines of credit with non-System lenders are a negligible source of FCS funding. FCS banks and associations are not depository institutions.

The System's ability to finance agriculture, rural housing, and rural utilities in both good and bad economic times primarily depends on continuing access to the debt markets. During normal economic conditions, access to debt markets provides the System with funds it needs to operate. However, if access to the debt markets becomes impeded for any reason, Farm Credit banks must rely on assets to continue operations and pay maturing obligations. Liquidity is the ability to convert assets into cash quickly and at a price that is close to their book value.

In contrast to commercial banks, savings associations, and credit unions, the FCS does not have guaranteed access to a government provider of liquidity in an emergency.[4] If market access is impeded, FCS banks must rely on their liquidity reserves more heavily than other federally regulated lending institutions[5] because they do not have an assured lender of last resort.[6]

The liquidity of System banks has drawn more scrutiny from the FCA, credit rating agencies, and investors as economic and financial turmoil have roiled the markets with greater frequency and magnitude in recent years. As a result, the FCA proposes to amend its liquidity regulations so that FCS banks are better able to withstand uncertainty and instability in the financial markets.[7]

Liquidity is important for the financial system as a whole. Recent market disruptions have raised concerns among regulators, credit rating agencies, investors, and other market participants about the ability of financial institutions to maintain sufficient liquidity to meet their immediate funding needs during times of economic and financial turmoil.[8] The experience of these crises demonstrates why sound liquidity risk management is important to the safety and soundness of individual financial institutions and the financial system as a whole.

Regulatory agencies, in particular, have responded by formulating more comprehensive supervisory approaches toward liquidity risk management at financial institutions. For example, the Basel Committee on Banking Supervision (Basel Committee) issued in September 2008, the *Principles for Sound Liquidity Risk Management and Supervision,* which contains 17 principles detailing international supervisory guidance for sound liquidity risk management. In December, 2010, the Basel Committee issued *Basel III: International framework for liquidity risk measurement, standards, and monitoring* (Basel III Liquidity Framework). On March 22, 2010, the five Federal agencies that regulate depository institutions (Federal banking agencies)[9] published their Interagency Policy Statement on Funding and Liquidity Risk Management[10], which sets forth the supervisory expectations for depository institutions. The purpose of all these documents is to guide the supervisory efforts of Federal and international regulators of depository institutions into the future.

The FCA has considered the guidance of both the Basel Committee and the Federal banking agencies as part of its efforts to develop revised liquidity regulations. Many of the core concepts that the Basel Committee and the Federal banking agencies articulated about liquidity are appropriate for our proposed rule. However, the corporate, funding, and lending structures of the FCS are fundamentally different from those of depository institutions and, therefore, the FCA has modified and adapted the guidance of international regulators and Federal banking agencies concerning liquidity risk management so they are relevant to the System's unique circumstances, needs, and structure. The FCA also added other requirements that are tailored to the System's unique nature.

In addition to the guidance of the Basel Committee and other Federal regulators, both the FCA and the System have implemented various measures to improve liquidity management so FCS banks are in a better position to withstand financial and economic shocks. More specifically, System banks agreed to a common framework that stipulated the days of liquidity coverage that they would maintain, and

[3] Farm Credit banks (which are the four Farm Credit Banks and the Agricultural Credit Bank) issue and market System-wide debt securities through the Federal Farm Credit Banks Funding Corporation (Funding Corporation). The Funding Corporation, which is established pursuant to section 4.9 of the Act, is owned by all Farm Credit banks.

[4] The Federal Reserve Banks, the Federal Home Loan Banks, and National Credit Union Administration Central Liquidity Facility serve as a source of liquidity for commercial banks, savings associations, and credit unions both in ordinary times and during emergencies.

[5] Section 1101 of the Dodd-Frank Wall Street Reform and Consumer Protection Act amended section 13(3) of the Federal Reserve Act, 12 U.S.C. 343(3), to allow the Board of Governors of the Federal Reserve System, in consultation with the Secretary of the Treasury, to establish by regulation, policies and procedures that would govern emergency lending under a program or facility for the purpose of providing liquidity to the financial system. Under section 13(3) of the Federal Reserve Act, as amended, the Board of Governors of the Federal Reserve System must establish procedures that prohibit insolvent and failing entities from borrowing under the emergency program or facility. Pursuant to section 13(3) of the Federal Reserve Act, as amended, the Board of Governors of the Federal Reserve System, with the approval of the Secretary of the Treasury could authorize the Federal Reserve Banks to serve as an emergency source of liquidity for the FCS, but it is not obligated to do so. *See* Public Law 11–203, title XI, sec. 1101(a), 124 Stat. 2113 (Jul. 21, 2010).

[6] If market access is completely impeded, the Farm Credit Insurance Fund would also be available to ensure the payments of maturing insured debt obligations. *See* 12 U.S.C. 2277a–9(c)(1).

[7] The FCA has broad authority under various provisions of the Act to supervise and regulate liquidity management at FCS banks. Section 5.17(a) of the Act authorizes the FCA to: (1) Approve the issuance of FCS debt securities under section 4.2(c) and (d) of the Act; (2) establish standards regarding loan security requirements at FCS institutions, and regulate the borrowing, repayment, and transfer of funds between System institutions; (3) prescribe rules and regulations necessary or appropriate for carrying out the Act; and (4) exercise its statutory enforcement powers for the purpose of ensuring the safety and soundness of System institutions.

[8] For example, financial institutions collectively had difficulty maintaining sufficient short-term liquidity in the aftermath of the attacks on September 11, 2001, and again in September and October of 2008 after several large financial institutions collapsed. During these crises, the Federal Reserve injected additional liquidity into the financial system in the United States.

[9] The five agencies are the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the National Credit Union Administration, and the now-defunct Office of Thrift Supervision.

[10] *See* 75 FR 13656 (Mar. 22, 2010).

established the parameter for the quality of investments held in their liquidity reserves.

The FCA also took action to improve the ability of FCS banks to maintain sufficient liquidity to outlast episodes of market turbulence. On November 13, 2008, the FCA Board passed a Market Emergency Standby Resolution that waives the 90-day liquidity reserve requirement in § 615.5134 for a limited period of time if a crisis shuts, or severely restricts access to, debt markets. On May 5, 2009, the FCA issued a letter to FCS banks and the Funding Corporation that required the standing monthly collateral certification of all banks to include detailed information about days of liquidity in a specified format. This directive also required reporting of days of liquidity for each FCS bank and the FCS in aggregate, and detailed information about the type and remaining term of the investments from which those days of liquidity are derived.

FCS banks withstood recent economic and financial turmoil with their liquidity intact. Both the FCA and FCS have gained valuable experience and insights into the effects that sudden and severe stress have on liquidity at individual FCS institutions and the financial system as a whole. The FCA has identified several vulnerabilities that need to be addressed:

(1) Banks must ensure that the liquidity reserve is managed primarily as an emergency source of funding;

(2) Board policies need to provide clearer guidance to the asset-liability committee (ALCO) for monitoring, measuring, and managing liquidity risk;

(3) Risk analyses need to address how investments that the bank purchases and hold actually achieve its primary liquidity objective.

(4) Contingency funding plans need to provide orderly and effective procedures that would allow the bank to maintain sufficient liquidity to fund its operations during each phase of an emerging crisis;

(5) Discounts that FCS banks apply to the market values of assets in the liquidity reserve pursuant to current § 615.5134(c) need to be increased for certain types of investments;

(6) Counterparty risk needs to be reduced; and

(7) Liquidity policies need to take into account the continuing uncertainty as to whether the Federal Reserve System would provide a line of credit to FCS banks under section 13(3) of the Federal Reserve Act during a systemic liquidity crisis.

As our colleagues at international financial regulators and the Federal banking agencies are doing, we are drawing conclusions from the lessons that we learned during recent crises. As a result, we are revising our regulatory and supervisory approaches towards liquidity so that System institutions are in a better position to withstand whatever future crises may arise. As part of our ongoing efforts to limit the adverse effect of rapidly changing economic, financial, and market conditions on the liquidity of any FCS bank,[11] we now propose amendments to § 615.5134 that would redress these vulnerabilities.

III. Section-by Section Analysis of the Proposed Rule

A. Section 615.5134(a)—Liquidity Policy

The board of directors is responsible for ensuring that the bank always has readily available funds to continue operations and pay maturing obligations. The board discharges this responsibility by adopting policies and procedures for management to follow. A provision in the existing investment management regulation, § 615.5133(c)(3), requires FCS banks to address liquidity risk in their investment policies. However, the only affirmative requirement that § 615.5133(c)(3) imposes on FCS banks is that their investment policies must describe the liquidity characteristics of eligible investments that they hold to meet their liquidity needs and institutional objectives. Although the existing regulation gives FCS banks ample flexibility to formulate liquidity policies that meet their particular needs and objectives, the FCA is proposing to add a new paragraph (a) to § 615.5134 that for the first time, would require each FCS bank to address other specific issues in its liquidity policies. The banks have the option of either incorporating these new liquidity policies in their investment management policies required under § 615.5133, or in a separate document.

Proposed § 615.5134(a) addresses the board's responsibility for establishing and implementing liquidity policies for the bank. Proposed § 615.5134(a)(1) would require the board of directors of each FCS bank to adopt written liquidity policies that are consistent with the investment management policies that the board adopts under § 615.5133. The guidance that the FCA has provided to FCS banks about investment management policies and practices in § 615.5133 also applies to their liquidity policies.[12] The FCA expects the bank's liquidity policies to be consistent with, and fit into its overall investment strategy. Liquidity risk management is critically important to the long-term viability of the bank, and for this reason, it must be integrated into the bank's overall investment management and risk management processes.[13]

In discharging its responsibility, the board must establish appropriate strategies, policies, procedures, and limits that will enable the bank to monitor, measure, manage, and mitigate liquidity risk.[14] The board's policy should provide adequate guidance to management as it develops and implements strategies for managing liquidity risk. At a minimum, the policy should provide clear direction to management about limiting and controlling risk exposures, and keeping them within the board's risk tolerance levels. Additionally, these policies should establish parameters that enable management to determine whether particular investments belong in the liquidity reserve given their potential suitability for managing interest rate risks.

Proposed § 615.5134(a)(1) would also require the board to: (1) Review its liquidity policies at least once every year; (2) affirmatively validate the sufficiency of its liquidity policies; and (3) make any revisions it deems necessary. The purpose of this provision is to compel every FCS bank board to ascertain whether its policies enable the bank to respond promptly and effectively to events that may occur and threaten its liquidity. More specifically, the board should determine, as part of its review, whether its current policies enable the bank to consistently maintain sufficient liquidity for its ongoing funding needs, thus covering both

[11] The FCA has periodically amended its liquidity regulations over the past 18 years. The FCA originally adopted § 615.5134 in 1993, and subsequently amended it 1999 and 2005. *See* 58 FR 63056 (Nov. 30, 1993); 64 FR 28896 (May 28, 1999); 70 FR 51590 (Aug. 31, 2005). Originally, § 615.5134 required each FCS bank to maintain 15 days of liquidity, and to separately identify investments held for the purpose of meeting its liquidity reserve requirement. In 1999, the FCA repealed the provision requiring FCS banks to separately identify investments held for liquidity. In 2005, the FCA expanded the liquidity reserve requirement to 90 days, increased the limit on investments from 30 to 35 percent of total outstanding loans, and for the first time, required all FCS banks to develop CFPs for liquidity.

[12] The FCA recently proposed substantive amendments to § 615.5133. The preamble to the proposed rule discusses the FCA's expectations concerning proper investment practices at FCS banks and associations. *See* 76 FR 51289 (Aug. 18, 2011). The FCA incorporates by reference its guidance about proper investment management practices in the preamble to § 615.5133 into this preamble.

[13] *See* Interagency Policy Statement on Funding and Liquidity Risk Management, *supra* at 13661.

[14] *Id.*

expected and unexpected deviations in the availability of funds to meet cash demands.[15] A bank's viability often depends on effective liquidity risk management (that is fully integrated into its overall risk management strategies and processes), and the annual review should determine whether the policies achieve these objectives.[16] As part of its review, the bank board should consider whether it needs to adjust its liquidity policies based both on past experiences and on expected trends in the economy, agriculture, and financial markets.

The final provision of proposed § 615.5134(a)(1) would require the board to ensure that adequate and effective internal controls are in place, and that management complies with and carries out the bank's liquidity policies. Besides preventing losses caused by fraud or mismanagement, strong internal controls will enable FCS banks to respond more quickly and effectively when significant market turmoil arises and impedes access to funding.

The content of the board's liquidity policies are the focus of § 615.5134(a)(2). This regulatory provision identifies seven different issues that, at a minimum, a bank must address in its liquidity policies. The bank's policies should be comprehensive and commensurate with the complexity of the bank's operations and risk profile.

Proposed § 615.5134(a)(2)(i) would require policies to address the purpose and objectives of the liquidity reserve. This section of the bank's policies should distinguish the purpose and objectives of the liquidity reserve from the other operations and asset-liability functions of the bank, including interest rate management. The board's philosophy and position on the purpose and objectives of the liquidity reserve are of prime importance to effective liquidity management at the bank. In normal times, access to the debt markets provides the System with ready liquidity. However, when market access is impeded, the liquidity reserve should enable each FCS bank to maintain sufficient cash flows to pay its obligations, meet its collateral needs, and fund operations in a safe and sound manner.[17]

In normal times, FCS banks may pay more attention to the financial performance of the liquidity reserve rather than its role as an emergency source of funding. Incorrectly prioritizing these two objectives is problematic because the liquidity reserve should consist of cash and high-quality investments that can be quickly converted into cash at, or close to, par value. Cash-like investments pose little risk to the investor and, therefore, they usually do not earn the highest rate of return.

During the crisis in 2008, some FCS banks experienced losses that were larger than expected given the primary purpose of the liquidity reserve is an emergency source of funding. The FCA expects FCS banks to select investments for the liquidity reserve by their liquidity characteristics, and to match these assets closely to the bank's maturing liabilities. Choosing investments primarily for their ability to generate revenue is fundamentally incompatible with the System's GSE status.[18] Pursuant to proposed § 615.5134(a)(2)(i), the board should provide guidance to management about these issues when it addresses the objectives and purposes of the liquidity reserve in its policies.

Proposed § 615.5134(a)(2)(ii) would require the board's policies to address the diversification of the liquidity reserve portfolio. This diversification requirement would apply to both the liquidity reserve in proposed § 615.5134(e) and the supplemental liquidity buffer in proposed § 615.5134(f). Diversification by tenor, issuer, issuer type, size, asset type, and other factors can reduce certain investment risks. The bank's diversification policy should address the board's desired mix of cash and investments that the bank should hold for liquidity under a variety of scenarios, including both normal and adverse conditions. Within the spectrum of eligible qualified investments, proposed § 615.5134(a)(2)(ii) would require the policy to establish criteria for diversifying these assets based on issuers, maturity, and other factors that the bank deems relevant. In formulating these criteria, each bank should consider, in light of its needs and circumstances, how diversification would better enable the liquidity reserve and supplemental liquidity buffer to serve as its emergency or supplemental funding source when market access is curtailed or fully impeded. The FCA expects each bank to tailor its policy to its individual circumstances and financial conditions, and to revise it in response to changes in the business environment.

Proposed § 615.5134(a)(2)(iii) would require the board's policies to establish maturity limits and credit quality standards for investments that the bank is holding in its liquidity reserve. This aspect of the bank's policies would help management to target and match cash inflows from loans and investments to outflows that pay its maturing obligations. In devising its diversification strategy the bank should consider how it may need to rely on its liquidity portfolio as an available funding source in the short-, intermediate-, and long-term. As high-quality investments season and come closer to maturity, they become more liquid. In this context, a well-reasoned policy should guide management about deploying the strata of investments throughout the liquidity reserve and the supplemental liquidity buffer.

Proposed § 615.5134(a)(2)(iii) also focuses on the credit quality standards that board policies should establish for investments that the bank will hold to meet the liquidity reserve requirements of this regulation. Investments with short terms to maturity and high credit quality tend to be liquid and, therefore, are generally suitable for the bank's liquidity reserve and supplemental liquidity buffer. The preamble to § 615.5134(c) below, will discuss many of the attributes of high-quality liquidity investments in greater detail. The bank's liquidity policies should base credit quality standards for investments on factors and standards that the financial services industry uses to determine that the risk of default for both the asset and its issuer are negligible. In determining the credit quality of a security, FCS banks may consider the credit ratings issued by a Nationally Recognized Statistical Rating Organization (NRSRO), but may not rely solely or disproportionately on such ratings. System banks must document their credit quality determinations.

Under proposed § 615.5134(a)(2)(iv), the board's policies should cover the target amount of days of liquidity that the bank needs based on its business model and its risk profile. Estimating the target amount of days of liquidity that the bank will need to outlast various stress events is an effective tool for managing and mitigating liquidity risks. The FCA expects each FCS bank to include a prudent amount of unfunded commitments in its calculation of the target amount of days of liquidity it will need to survive a liquidity crisis in the markets.

Proposed § 615.5134(a)(2)(v) would require the bank's policies address the elements of the Contingency Funding Plan (CFP) in paragraph (h) of the

[15] *Id.*

[16] *Id.*

[17] *Id* at 13660.

[18] *See* 70 FR 51587 (Aug. 31, 2005); 58 FR 63039 (Nov, 30, 1993).

proposed rule. The purpose of the CFP is to address unexpected events or unusual business conditions that increase liquidity risk at FCS banks. Our existing regulation, § 615.5134(d), requires each FCS bank to have a formal written CFP to address liquidity shortfalls that may occur during market disruptions. The proposed rule would strengthen contingency funding planning at FCS banks. Under proposed § 615.5134(a)(2)(v), an effective CFP would cover at a minimum: (1) Strategies, policies, and procedures to manage a range of stress scenarios; (2) chains of communications and responsibility within the bank; and (3) implementation of the CFP during all phases of an adverse liquidity event. The preamble to proposed § 615.5134(h) will discuss the substantive requirements of the CFP and our expectations of FCS banks in greater detail.

The next provision of this regulation, proposed § 615.5134(a)(2)(vi), covers delegations of authority pertaining to the liquidity reserve in the bank's liquidity policies. As with all other aspects of the bank's operations, an explicit delegation of authority within a clearly defined chain of command strengthens the effectiveness and efficiency of an institution's operations and mitigates the risk of loss. The purpose of a delegation of authority is to clearly establish lines of authority and responsibility for managing the bank's liquidity risk.[19] The policies should clearly identify those individuals and committees that are responsible for making decisions involving liquidity risk and implementing risk mitigation strategies. Additionally, the policies should ensure that the ALCO has sufficiently broad representation across the operational functions of the bank that influence the bank's liquidity risk profile.

Under proposed § 615.5134(a)(2)(vii), the policies must contain reporting requirements, which at a minimum, would require management to report to the board at least once every quarter about compliance with the bank's liquidity policies, and to what extent the liquidity reserve portfolio has achieved the bank's liquidity objectives. This provision would also require management to report immediately to the board about any deviation from its liquidity policies, or any failure to meet the liquidity targets in the board's policies. The purpose of this provision is to ensure that an effective reporting process is in place, and management communicates accurate and timely information to the board about the level and sources of the bank's exposure to liquidity risk. These reports should enable the board to take prompt corrective action. The board should also consider these quarterly reports when it conducts its annual review of the bank's liquidity policies and decides whether to make any revisions to its policies, pursuant to proposed § 615.5134(a)(1).

B. Liquidity Reserve Requirement—§ 615.5134(b)

Proposed § 615.5134(b) is the cornerstone of the FCA's proposal because it articulates the core liquidity reserve requirements for FCS banks. Proposed § 615.5134(b) is not a departure from the liquidity reserve requirement in FCA's existing liquidity regulation. Instead, it builds upon and strengthens the concepts, principles, and requirements of existing § 615.5134. The purpose of proposed § 615.5134(b) is to better prepare FCS banks so they can withstand future liquidity crises. The FCA designed this proposal to address the vulnerabilities identified during recent crises. In developing proposed § 615.5134(b), we also considered the Basel Committee's recommendations for an international framework for liquidity, and the Federal banking agencies' Interagency Policy Statement on Funding and Liquidity Risk Management.

Both the existing and proposed regulations require each FCS bank to maintain a liquidity reserve sufficient to fund 90 days of the principal portion of maturing obligations and other borrowings of the bank at all times. However, in contrast to the existing regulation, proposed § 615.5134(b) and (e) would divide the bank's liquidity reserve into two levels. The first level of the liquidity reserve would fund a bank's maturing obligations and operations for the first 30 days from the onset of a significant stress event. Cash and certain instruments that mature within 3 years or less must comprise at least 15 days of the first level of the bank's liquidity reserve. The bank would draw on the second level of the reserve if market turmoil continued to persist for the subsequent 60 days after the initial 30 days thereby comprising together a stratified 90-day liquidity reserve.

Proposed § 615.5134(b) would require FCS banks, for the first time, to maintain a supplemental liquidity buffer pursuant to proposed § 615.5134(f). The new regulation would require each FCS bank to hold supplemental liquid assets (comprised of cash and other qualified assets listed in § 615.5140) in excess of the 90-day minimum liquidity reserve. The supplemental liquidity buffer would complement the 90-day liquidity reserve, and its purpose is to enable each FCS bank to continue operations if market access becomes impeded for a prolonged period of time in differing stress scenarios.

Proposed § 615.5134(b) would also require FCS banks to discount the assets in their liquidity reserve by the percentages specified in proposed § 615.5134(g). Although the existing regulation already requires FCS banks to discount assets in the liquidity reserve, the proposed rule would change some of the percentages to reflect the new two-tier structure of the liquidity reserve. The preamble to proposed § 615.5134(g) discusses in detail how we are revising the discounting requirements for the liquidity reserve.

The final sentence of proposed § 615.5134(b) states that the liquidity reserve must be comprised only of cash, including cash due from traded but not yet settled debt, and qualified eligible investments under § 615.5140 that are marketable under proposed § 615.5134(d). Proposed § 615.5134(b) is similar, but not identical, to existing § 615.5134(a). Both the existing and the proposed rule specify that the liquidity reserve must be comprised of cash, including cash due from traded but not yet settled debt, and investments listed in § 615.5140.

The final sentence of proposed § 615.5140(b), however, differs from existing § 615.5140(a) in two crucial respects. First, the proposed rule emphasizes that all investments held in liquidity reserves must be marketable. As the preamble to proposed § 615.5134(d) explains in greater detail below, the new regulation would establish specific regulatory benchmarks for determining whether particular investments are marketable. Marketability of a security is an essential attribute of its liquidity and helps determine its suitability for the liquidity reserve.

Second, the proposed rule would repeal the provisions in existing § 615.5134(a) that impose specific credit ratings on investments that FCS banks hold in their liquidity reserves. Under the existing regulation, money market instruments and floating and fixed rate debt securities held in the banks' liquidity reserve must maintain one of the two highest NSRSO credit ratings. In the event that an unrated instrument is in the liquidity reserve, the existing regulation requires the issuer to carry one of the two highest NRSRO ratings. Section 939A of the Dodd-Frank Wall

[19] *See* Interagency Policy Statement on Funding and Liquidity Risk, 75 FR 13656, 13661 (Mar. 22, 2010).

Street Reform and Consumer Protection Act[20] requires each Federal agency to: (1) Review any references or requirements in its regulations concerning the credit ratings of securities and money market instruments, and (2) replace references to, and requirements that regulated entities rely on such credit ratings with standards of creditworthiness that the agency determines is appropriate. In making this determination, every agency must seek to establish, to the extent feasible, uniform standards of creditworthiness. Our proposed liquidity regulation does not seek to replace the NRSRO rating requirements in existing § 615.5134(a) with a specific alternate standard of creditworthiness. Instead, we propose to require FCS banks to hold investments in the liquidity reserve that are unencumbered under proposed § 615.5134(c), and are marketable under proposed § 615.5134(d). In two other rulemakings, the FCA has invited the public to suggest options for replacing NRSRO credit ratings with other standards to determine the creditworthiness of financial instruments and their issuers.[21] We also solicit your comments and suggestions about the best approach for addressing standards of creditworthiness for investments held in the liquidity reserves of FCS banks.

C. Unencumbered and Marketable Investments in the Liquidity Reserve

Currently, existing § 615.5134(b) states that all investments that an FCS bank holds for the purpose of meeting its regulatory liquidity reserve requirement must be free of lien. Proposed § 615.5134(c) would expand upon this concept by requiring FCS banks to hold only unencumbered investments in their liquidity reserves. Under proposed § 615.5134(c), an asset is unencumbered if it is free of lien and is not explicitly or implicitly pledged to secure, collateralize, or enhance the credit of any transaction.[22] Additionally, proposed § 615.5134(c) also would prohibit any FCS bank from using an investment in the liquidity reserve as a hedge against interest rate risk pursuant to § 615.5135 if liquidation of that particular investment would expose the bank to a material risk of loss. Unencumbered investments are free of the impediments or restrictions that would otherwise curtail the bank's ability to liquidate them to pay its obligations when normal access to the debt market is obstructed. Proposed § 615.5134(c) strengthens the liquidity of FCS banks and improves the safety and soundness of the Farm Credit System as a whole.

Under both proposed § 615.5134(b) and (d), all eligible investments that FCS banks hold in their liquidity reserves must be marketable. Proposed § 615.5134(d) specifies the criteria and attributes that determine whether investments are marketable for the purposes of this regulation. Investments that meet all the marketability criteria in proposed § 615.5134(d) would be deemed to possess the characteristics of high-quality liquid assets that are suitable for the liquidity reserves at FCS banks. Proposed § 615.5134(d) is based on many of the concepts that the Basel Committee articulated in the Basel III Liquidity Framework.[23] The FCA tailored these concepts to the unique structure, needs, and circumstances of the FCS.

Proposed § 615.5134(d)(1) states that an investment is marketable if it can be easily and immediately converted into cash with little or no loss in value. Investments that exhibit this attribute are more likely to generate funds for the bank without incurring steep discounts even if they were liquidated in a ''fire sale'' during turmoil in the markets.[24] The liquidity of an asset depends on its performance during a stress event, and is measured by the amount that the holder can convert into cash within a certain timeframe.[25]

On a related note, proposed § 615.5134(d)(1) complements the definition of ''liquid investments'' in existing § 615.5131(e).[26] The existing regulation defines ''liquid investments'' as ''assets that can be promptly converted into cash without significant loss to the investor.''[27] We do not consider § 615.5131(e) to be redundant or inconsistent with proposed § 615.5134(d)(1). For this reason, we do not propose to repeal or amend § 615.5131(e). However, we invite your comments about whether the final rule should retain, relocate, or modify § 615.5131(e).

Another feature of a marketable investment is that it exhibits low credit and market risks, and we propose to incorporate this criterion into proposed § 615.5134(d)(2). Assets tend to be more liquid if they are less risky. An investment has low credit risk if its issuer has a strong credit standing, is not heavily indebted, and its assets are not heavily leveraged. Low duration[28] and low volatility indicate that an investment is more likely to be liquid because it has low market risk.[29]

Ease and certainty of valuation is also an attribute of marketable investments.[30] We are incorporating this concept into proposed § 615.5134(d)(3). The liquidity of an asset is likely to increase if market participants are able to agree on its valuation. An instrument has ease and certainty of valuation if the components of its pricing formulation are publicly available. The pricing of high-quality liquid assets are usually easy to calculate because they do not depend significantly on numerous assumptions. In practice, proposed § 615.5134(d)(3) effectively excludes structured investments from the liquidity reservesat FCS banks, although banks may hold such assets in their supplemental liquidity buffers if they are eligible investments under § 615.5140. The proposed rule, however, would allow FCS banks to hold mortgage-backed securities issued by the Government National Mortgage Association in their liquidity reserves because they are highly marketable securities backed by the full faith and credit of the United States.

Under proposed § 615.5134(d)(4), the final attribute of a marketable investment is that it can be easily bought or sold. Money market instruments generally qualify as marketable investments under this provision because they are easily bought and sold even though they are not traded on exchanges. Otherwise, marketable investments include assets listed on developed and recognized exchange markets. Listing on a public exchange enhances the transparency of the pricing mechanisms of investments, thus enhancing their marketability and liquidity.[31] Investments would also

[20] *See* Public Law 111–203, sec. 939A, 124 Stat. 1376, 1887 (Jul. 21, 2010).

[21] *See* 76 FR 51289, 51298 (Aug. 18, 2011) and 76 FR 53344 (Aug. 26, 2011). The first cite is to the proposed rule on investment management. The FCA is soliciting comments on how to replace NRSRO credit ratings for eligible investments. The second cite is to an Advance Notice of Proposed Rulemaking concerning the NRSRO credit ratings in our capital regulations.

[22] Basel Committee on Banking Supervision, *Basel III: International framework for liquidity risk measurement, standards, and monitoring,* (Dec. 2010) p. 6.

[23] *Id* at p. 5.

[24] *Id.*

[25] *Id.*

[26] The proposed rule on investment management would change the designation of § 615.5131(e) by omitting the paragraph designations of all definitions in the regulation.

[27] Existing § 615.5131(e) also states, ''In the money market, a security is liquid if the spread between its bid and ask price is narrow and a reasonable amount can be sold at those prices.''

[28] Duration measures the price sensitivity of a fixed income security to interest rate changes.

[29] *See* Basel III Liquidity Framework *supra.* at p. 5.

[30] *Id.*

[31] *Id.*

comply with the requirement of proposed § 615.5134(d)(4) if investors can sell or convert them into cash through repurchase (repo) agreements in active and sizeable markets. For the purpose of this proposed rule, markets are active and sizeable if they have a large number of market participants, high-trading volume, and investors can sell or repo the asset at any time.[32] Another feature of an active and sizeable market is that it historically has market breadth and market depth.[33] Proposed § 615.5134(d)(4) would exclude private placements from the banks' liquidity reserves, but not the supplemental liquidity buffer.

D. Composition of the Liquidity Reserve

Proposed § 615.5134(e) governs the composition of the liquidity reserve. This provision would require each FCS bank to continuously hold cash and the investments identified in the table to proposed § 615.5134(e) to meet the 90-day minimum liquidity reserve requirement of this regulation. Under this proposal, each bank would also apply the discounts in proposed § 615.5134(g) to all cash and investments that it holds in its liquidity reserve.

Although the existing regulation already requires every FCS bank to maintain a sufficient stock of liquid assets to fund its maturing obligations and other borrowings for at least 90 days, the proposed rule would divide the liquidity reserve into two levels. The first level of the liquidity reserve would provide sufficient liquidity for the bank to pay its obligations and continue operations for 30 days, whereas the second level of the reserve would cover the following 60 days. Taken together, the two levels of the liquidity reserve should provide each FCS bank with adequate liquidity for 90 days.

Proposed § 615.5134(e) would require FCS banks to hold a *minimum* of 90 days of cash and liquid investments in their liquidity reserves. In other words, FCS banks may need to exceed 90daysbased on their individual liquidity needs. The FCA expects each bank, in accordance with its policies and procedures, to determine the appropriate level, size, and quality of its liquidity reserve based on its liquidity risk profile. Determining and maintaining an adequate level of liquidity depends on each bank's ability to meet both expected and unexpected cash flows and collateral needs without adversely affecting its daily operations and financial condition.[34] Additionally, the size and level of the liquidity reserve should correlate to the bank's ability to fund its obligations at reasonable cost.[35] Each FCS bank must document and be able to demonstrate to FCA examiners how its liquidity reserve mitigates the liquidity risk posed by the bank's business mix, balance sheet structure, cash flows, and on- and off-balance sheet obligations.[36] Matching the size, level, and composition of the liquidity reserve to obligations that are maturing in a prescribed number of days is a sound banking practice, and is consistent with GSE status.

The proposed rule would require each FCS bank to maintain sufficient quantity of highly liquid assets in the first level of its liquidity reserve so it could continue normal operations for 30 days if a national security emergency, a natural disaster, or intense economic or financial turmoil impedes System access to the markets. As the first item in the left column of the table states, investments in the first level of the liquidity reserve would be available for the bank to sequentially apply to pay obligations that mature starting on day 1 through day 30.

Under the second provision in the left-hand column of the table, cash and instruments with a final maturity of 3 years or less must comprise at least 15 days of the first level of the liquidity reserve. As a result, the proposed rule would mandate that each bank have enough cash and short-term, highly liquid assets on hand so it could pay its obligations and fund its operations for 15 days if the debt markets were closed, or the System's cost of funding became uneconomical. FCS banks would draw first on this 15-day sublevel in the event of significant stress event.

The right side of the table identifies the assets that proposed § 615.5134(e) would require FCS banks to hold in Level 1 of their liquidity reserves. Again, all of these assets are highly liquid because they are cash, or investments that are high quality, close to their maturity, and marketable. All of the assets that banks hold in their liquidity reserve would be subject to the discounts specified in proposed § 615.5134(g).

Under the proposed rule, FCS banks are authorized to hold five classes of assets in the first level of their liquidity reserve. These assets are:

- Cash—

(1) Cash balances on hand,

(2) Cash due from traded but not yet settled debt, and

(3) Insured deposits that FCS banks hold at federally insured depository institutions in the United States;

- United States Treasury securities—

Each FCS bank must select Treasury securities that have final maturities and other characteristics that best enables it to fund operations if market access becomes obstructed;

- Other *marketable* obligations explicitly backed by the full faith and credit of the United States [37]
- Government-sponsored agency senior debt securities that mature within 60 days (debt obligations of the FCS are excluded);[38]
- Diversified investment funds that are comprised exclusively of Level 1 instruments.

As discussed earlier, the second level of the liquidity reserve would provide FCS banks with sufficient liquidity to fund their obligations and continue normal operations starting on day 31 through day 90. Under proposed § 615.5134(e), FCS banks would use the assets in Level 2 during a prolonged stress event to fund obligations that mature during the subsequent 60 days of the 90-day liquidity reserve.

The proposed rule would authorize FCS banks to hold the five following classes of assets in the second level of their liquidity reserves:

- Additional amounts of Level 1 instruments;
- Government-sponsored agency senior debt securities *with maturities that exceed 60 days;*[39]

[32] *Id.* Many securities that System banks hold in their liquidity reserves are traded in high volume. Nevertheless, the FCA cautions that the potential volume that an FCS bank trades or holds in a particular security should not constitute a significant percentage of the overall trading volume in that security.

[33] *Id.* Market breadth refers to the price impact per unit of liquidity, whereas market depth refers to units of the asset that can be traded for a given price impact.

[34] *See* Interagency Policy Statement on Funding and Liquidity Risk Management, *supra*.at 13660.

[35] *Id.*

[36] *Id.*

[37] Obligations that are backed by the full faith credit of the United States are not eligible for the liquidity reserve if they are not marketable under proposed § 615.5134(d).

[38] A Government-sponsored agency means as an agency, instrumentality, or corporation chartered or established to serve public purposes specified by the United States Congress but whose obligations *are not* explicitly insured or guaranteed by the full faith and credit of the United States Government. The FCA proposed to add this definition to § 615.5132 on August 18, 2011. *See* 76 FR 51289 (Aug. 18, 2011). This category would include the Federal Home Loan Banks, Federal National Mortgage Association (Fannie Mae), Federal Home Loan Mortgage Corporation (Freddie Mac), and the Tennessee Valley Authority. Although Fannie Mae and Freddie Mac are currently in conservatorship, their obligations are not explicitly backed by the full faith and credit of the United States.

[39] Once the Government-sponsored agency senior debt securities in Level 2 come within 60 days to maturity, the bank should move them to Level 1 of the liquidity reserve so they can cover maturing obligations.

• Government-sponsored agency mortgage-backed securities;

• Money market instruments that mature in 90 days; and

• Diversified investment funds that are comprised exclusively of Levels 1 and 2 instruments.

Unfunded commitments are another issue that raises concerns for the FCA. FCS banks or their affiliated associations often have outstanding lines of credit to borrowers who may draw funds to meet their seasonal business needs. FCS banks and associations can be legally obligated to fund these commitments. A sudden surge in borrower demand for funds under these lines may impair the bank's liquidity at a time when market access is becoming impeded. For this reason, it is important that FCS banks adequately account for unfunded commitments and other contingencies, including those that are off balance sheet, when they calculate the amount and quality of liquid assets they need in their liquidity reserve to fund all maturing and contingent obligations during a particular time period. Each FCS bank has its own unique circumstances and risk profile and, therefore, exposure to unfunded commitments and other contingent obligations varies within the FCS.

Unfunded commitments and other material contingent obligations, including those off balance sheet, potentially expose both FCS and other financial institutions to significant safety and soundness risks. Accordingly, contingent outflows raise substantial regulatory concerns for the FCA and other financial regulators.[40] Proposed § 615.5134(e) does not specifically require FCS banks to maintain sufficient assets in the liquidity reserve to cover unfunded commitments and other contingent obligations. However, the FCA is contemplating whether to add a specific provision to the final regulation that would require the liquidity reserve to adequately cover unfunded commitments and other contingent obligations. Requiring FCS banks to hold sufficient liquidity to cover these contingencies could mitigate risks that pose a threat to the liquidity, solvency, and ultimate viability of FCS banks. However, such a requirement could also impose significant opportunity costs on FCS banks in that they would be compelled to provide for these contingencies with cash and short-term liquid investments.

The FCA considers the guidance of the Federal banking agencies and the Basel III Liquidity Framework in developing this proposed rule on liquidity, and evaluates whether it is appropriate for System banks. Specifically, the Basel Committee currently suggests that regulated entities account for unfunded commitments and other contingent obligations in their liquidity reserve calculations. We are evaluating to what extent we should incorporate the approach of the Basel III Liquidity Framework into our regulation.

For this reason, we solicit your responses to the following questions:

• Should the final rule explicitly require the liquidity reserve to cover unfunded commitments and other contingent obligations? In your opinion, what would be the advantages and disadvantages of adding this requirement to § 615.5134(e)?

• Should the FCA consider more stringent liquidity reserve requirements based on size and complexity of different FCS banks, or should the liquidity reserve requirements remain the same for all System banks?

• What cash inflows and outflows identified in the Basel III Liquidity Framework are relevant to System banks? For those that are relevant, how should we incorporate them into our regulation?

• Should we incorporate the Basel III Liquidity Framework stress parameters in the liquidity reserve requirement for System banks? If so, which ones? For those, please indicate what percentage of the unfunded commitments and other contingent obligations the FCS bank should cover in its liquidity reserve.

• How should an association's direct loan under the General Financing Agreement and its accompanying contingent commitments factor into the funding bank's liquidity reserve requirement?

Please provide any information or data concerning unfunded commitments and other contingent obligations that support your answers to the above questions.

E. Supplemental Liquidity Buffer

Proposed § 615.5134(f) would introduce a new concept into the FCA's liquidity regulation by requiring all FCS banks to establish and maintain a supplemental liquidity buffer that would provide a longer term, stable source of funding beyond the 90-day minimum liquidity reserve. The supplemental liquidity buffer would complement the 90-day minimum liquidity reserve. Whereas the primary purpose of the 90-day minimum liquidity reserve is to furnish sufficient short-term funding to outlast an immediate crisis, the supplemental liquidity buffer would enable FCS banks to manage and mitigate their liquidity risk over a longer term horizon. Besides providing FCS banks with longer term and stable source of funding, each bank would be able to draw on the supplemental liquidity buffer if a heavy demand for funds strains its 90-day minimum liquidity reserve during a significant stress event. The supplemental liquidity buffer is an additional stock of assets that would provide stable, longer term funding of the bank's operations beyond the first 90 days.

The proposed rule does not specify the length of time that the supplemental liquidity buffer should cover. The Basel Committee on Banking Supervision recommends that a supplemental reserve should provide depository institutions and related banking organizations stable, long-term funding over a 1-year time horizon. We invite your comments about whether our final rule should establish a specific time horizon for the supplemental liquidity buffer at FCS banks. If you believe that we should establish a specific timeframe for the supplemental liquidity buffer, please tell us what you think it should be, and why. If you oppose a specific regulatory time horizon for the supplemental liquidity buffer, please explain your reasoning. We are also interested in hearing your views about how the similarities and differences between FCS banks and financial institutions under the supervision of other Federal and international regulators influence the answers to our questions about potential time horizons for the supplemental liquidity buffers at FCS banks.

The first sentence of proposed § 615.5134(f) would require each Farm Credit bank to hold supplemental liquid assets in excess of the 90-day minimum liquidity reserve. Again, the supplemental liquidity buffer consists of the amount of stable longer term funding that a FCS bank has available, and it should match the amount of stable funding that the bank needs to operate during a prolonged period of time. For the purposes of proposed § 615.5134(f), stable funding means that the instruments in the supplemental liquidity buffer are expected to furnish the bank with a reliable source of funds over a longer term time horizon under conditions of extended stress. The *amount and composition* of the supplemental liquidity buffer at a

[40] *See* Basel III Liquidity Framework *supra.* at p. 21–22. The Basel Committee on Banking Supervision focused on unfunded commitments throughout Basel III.

particular bank ultimately depends on a number of different factors pertaining to its operations, including the funding of its assets and liabilities, off-balance sheet items, and contingent exposure, such as unfunded commitments.

According to the second sentence of proposed § 615.5134(f), the supplemental liquidity buffer must be comprised of cash and qualified eligible investments listed in § 615.5140 of this part. Thus, the proposed rule would allow FCS banks to hold qualified eligible investments (listed in § 615.5140) in their supplemental liquidity buffer that they could not hold in their 90-day liquidity reserve. However, the FCA expects each FCS bank to calibrate the quality and quantity of assets that it selects for the supplemental liquidity buffer to the amount of funding it will need to outlast significant stress scenarios. Each bank should configure its supplemental liquidity buffer so it realistically corresponds to the demands of its liquidity risk profile.

The third sentence of proposed § 615.5134(f) states that each FCS bank must be able to liquidate any qualified investment in its supplemental liquidity buffer within the timeframe established in the bank's liquidity policies at no less than 80 percent of its book value. The fourth sentence of proposed § 615.5134(f) would require an FCS bank to remove from its supplemental liquidity buffer any investment that has, at any time, a market value that is less than 80 percent of its book value. These two provisions are designed to limit loss that the bank might incur on qualified investments that it holds in its supplemental liquidity buffer. From the FCA's perspective, the liquid and marketable characteristics of qualified investments in the supplemental liquidity buffer would be called into question if their market value falls 20 percent or more below their book value. In all probability, an FCS bank could no longer convert such assets easily or immediately into cash at little or no loss in value. Additionally, a qualified investment that has lost 20 percent or more of its book value no longer exhibits low credit or market risks. The proposed rule would instill strong discipline and control by requiring FCS banks to remove from their supplemental liquidity buffer an investment that has depreciated 20 percent or more off its book value. We invite your comments on the maximum percentage that the final rule should allow the market value of an asset to depreciate from its book value before the bank must remove it from the supplemental liquidity buffer.

Finally, proposed § 615.5134(f) would require the amount that each bank holds in its supplemental liquidity buffer, at a minimum, to: (1)Adhere to the requirements of the board's liquidity policies; (2) provide excess liquidity beyond the days covered by the 90-day minimum liquidity reserve; and (3) enable the bank to meet the needs of its CFP. The supplemental liquidity buffer is a stable longer term funding source that enables each bank, based on its business and risk profiles, to match the inflow and outflow of funds from its assets and liabilities.

F. Discounts

Our existing liquidity regulation requires FCS banks to discount assets in their liquidity reserves. Existing § 615.5134(c) specifies the discount percentage that applies to particular classes of assets. We propose to revise the provision in the rule pertaining to discounts so they are more appropriate to the new regulatory structure, which splits the liquidity reserve into two levels, establishes a supplemental liquidity buffer, and greatly strengthens contingency funding planning at FCS banks.

Discounts approximate the cost of liquidating investments over a short period of time during adverse situations. The system of discounting assets is designed to accurately reflect true market conditions. For example, the proposed rule would assign only a minimal discount to investments that are less sensitive to interest rate fluctuations because they are exposed to less price risk. Conversely, the discount for long-term fixed rate instruments is higher because they expose FCS banks to greater market risk.

Accordingly, the FCA proposes the following discounts for the classes of assets that FCS banks hold in their liquidity reserves and supplemental liquidity buffers:

Instrument	Multiply by
Cash and overnight investments.	100 percent.
United States Treasuries.	97 percent of market value.
All other Level 1 instruments including such instruments held in Level 2 to fund obligations maturing on day 31 through day 90.	95 percent of market value.
All Level 2 instruments.	93 percent of market value.
All other qualified investments held for meeting the bank's liquidity policy and contingency plans unless they merit the discount for Level 1 or Level 2 instruments.	85 percent of market value.

G. Contingency Funding Plan

Contingency funding planning is an essential and crucial element of effective liquidity risk management at all financial institutions. The CFP is a blueprint that helps financial institutions respond to contingent liquidity events, which are unexpected events or conditions that may increase liquidity risk.[41] Contingent liquidity events may arise from external factors that adversely affect the financial system, or they may be specific to the conditions at an individual institution.[42]

Since 2005, our regulation has required all FCS banks to have a contingency funding plan that addresses liquidity shortfalls during market disruptions. Existing § 615.5134(d) also requires the board of directors of each FCS bank to review the contingency funding plan every year and make any necessary changes. The crisis in 2008 revealed actual and potential vulnerabilities in contingency planning at FCS banks. As a result, the FCA proposes to strengthen contingency planning at FCS banks by amending the applicable provisions of our liquidity regulation. These amendments should reinforce the wherewithal of FCS banks to withstand future crises.

The first sentence of proposed § 615.5134(h) would require each FCS bank to have a CFP to ensure sources of liquidity are sufficient to fund normal operations under a variety of stress events. Whereas existing § 615.5134(d) only requires the CFP to address liquidity shortfalls caused by market disruptions, proposed § 615.5134(h) would require the CFP to explicitly cover other stress events that threaten the bank's liquidity. In addition to market disruptions, the proposed rule would require the CFP to specifically address:

(1) Rapid increases in loan demand;

(2) Unexpected draws on unfunded commitments;

(3) Difficulties in renewing or replacing funding with desired terms and structures;

[41] *See* Interagency Policy Statement on Funding and Liquidity Risk Management, *supra*. at 13664.

[42] *Id.*

(4) Pledging collateral with counterparties; and

(5) Reduced market access.

Each of these events could weaken the bank's liquidity and impair its access to funding during a crisis.

The second sentence of proposed § 615.5134(h) would require each Farm Credit bank to maintain an adequate level of unencumbered and marketable assets in its liquidity reserve that could be converted into cash to meet its net liquidity needs based on estimated cash inflows and outflows for a 30-day time horizon under an acute stress scenario. As an integral and critical part of contingency planning, each FCS bank should quantitatively project and evaluate its expected funding needs and its available funding sources during likely stress scenarios. More specifically, each FCS bank must realistically assess and analyze its cash inflows, cash outflows, and its access to funding at different phases of a potential, but acute liquidity stress event that continues for 30 days. In addition to a realistic assessment of potential cash-flow mismatches that may occur during different intervals of various stress events, effective contingency planning also requires the bank to evaluate whether it has a sufficient amount of marketable assets that it can convert into cash and continue operations for the duration of any potential crisis.

The next provisions of proposed § 615.5134(h) would require the CFP to address four specific areas that are essential to the bank's efforts to mitigate its liquidity risk. Taken together, these four provisions require each bank to have an emergency preparedness plan in place so it can effectively cope with a full range of contingencies that could endanger its liquidity, solvency, and viability.

First, proposed § 615.5134(h)(1) would require each FCS bank to customize the CFP to its individual financial condition and liquidity risk profile and the board's liquidity risk tolerance policy. The CFP is part of the bank's overall liquidity policies, and as such, it should be commensurate with the complexity, risk profile, and scope of the bank's operations.[43] The CFP should cover a number of plausible scenarios that could adversely affect the bank's liquidity. In this context, the CFP should address contingencies that are both:

- Highly probable, but would have a low impact on the bank's liquidity; and
- Less likely to occur but would have a significant impact on the bank's liquidity.[44]

The CFP should identify stress events that could have a significant impact on the bank's liquidity based on its individual circumstances, such as its balance sheet structure, business model, and organizational configuration.[45] The CFP should also assess how different stress events are likely to affect the bank's liquidity.

Under proposed § 615.5134(h)(2), the CFP must identify funding alternatives that the Farm Credit bank can implement whenever its access to funding is impeded. For the purposes of proposed § 615.5134(h)(2), funding alternatives include, at a minimum, arrangements for pledging collateral to secure funding and possible initiatives to raise additional capital. Each bank must be able to readily access its contingent funding sources during a stress event. The FCA expects every FCS bank to take appropriate measures, including advance planning and periodic testing, so it always has reliable funding alternatives available when normal market access becomes impeded.

Pursuant to proposed § 615.5134(h)(3), the CFP must require the bank to conduct periodic stress testing in order to analyze the possible impacts on the bank's cash inflows and outflows, liquidity position, profitability and solvency under a variety of stress scenarios. Periodic stress testing of its anticipated cash flows would enable the bank to estimate future funding surpluses and shortfalls under several different stress scenarios, which in turn, affects the bank's ability to fund its assets, liabilities, and operations throughout adverse situations.

Proposed § 615.5134(h)(4) would require each bank's CFP to establish a process for managing events that imperil its liquidity. This includes assigning appropriate personnel and having executable action plans to implement the CFP. Under this provision, the CFP would establish a framework for the bank to monitor contingent events that potentially threaten its liquidity. This framework should contain mechanisms, such as early-warning indicators and event triggers,[46] which are tailored to the bank's liquidity profile. These early-warning systems help the, bank to identify potential adverse liquidity events that are looming on the horizon. This enables the bank to position itself and be ready for the various phases of the stress event as it evolves.

The second prong of proposed § 615.5134(h)(4) involves internal controls and management of contingency events. The CFP should establish a reliable crisis management team. Frequent communication and reporting among team members, management, and the board optimize the effectiveness of the CFP during a liquidity crisis by coordinating the bank's response and diminishing liquidity risks to the bank's operations.[47] The CFP should also identify the processes and procedures that the bank will use to manage any evolving crisis.

The final sentence of proposed § 615.5134(h) would require the board of directors of each FCS bank to review and approve the CFP at least once every year, and incorporate adjustments to reflect changes in the bank's risk profile and market conditions. Internal conditions and the external environment in which the FCS operates may shift, either gradually or suddenly, thus affecting the liquidity risk profile of each bank. The FCA expects each FCS bank to constantly monitor fluctuations in its operating environment and react effectively so it can quickly stem potential damage to its liquidity, solvency, and viability. Reviewing the CFP at least once every 12 months and more frequently as conditions warrant, is a necessary tool for FCS banks to manage and mitigate its liquidity risk.

H. The FCA's Reservation of Authority

In addition to capital, asset quality, management, earnings, and interest rate sensitivity, liquidity is a prime barometer of the financial health, vitality, and viability of financial institutions. Illiquidity indicates that a financial institution is in an unsafe and unsound condition. More than the other indicia of safety and soundness, liquidity is often, but not always, determined by external factors that are

[43] *Id.* at 13665.

[44] *Id.*

[45] *Id.*

[46] Early warning signals and event triggers encompass events that are both global and bank specific. Examples of global warning signals and event triggers include: (1) Concerns over the credit quality of particular classes of assets widely held by financial institutions; (2) widening spreads between different types of securities, or derivatives; (3) macro-economic factors adversely affecting agriculture; and (4) debt market stagnation and constrictions. Warning signals and event triggers that are specific to individual FCS banks include: (1) Draws on unfunded commitments or letters of credit; (2) a rapid and substantial increase in loan demand; (3) actual and projected increases in collateral pledged; and (4) unrealized losses in its liquidity reserve. Events such as reduced market access and the downgrading of credit ratings could be either a global or bank-specific signal or trigger.

[47] *See* Interagency Policy Statement on Funding and Liquidity Risk Management, *supra*. at 13665.

beyond the control of FCS banks and other financial institutions. For example, a national defense emergency (such as terrorist attacks), a catastrophic natural disaster, or a macroeconomic or financial crisis could suddenly and without warning close or impede access to the debt markets that FCS banks depend on to fund their normal operations.

Congress designated the FCA as the Federal agency that is responsible for ensuring that all FCS institutions: (1) Comply with all applicable laws; (2) fulfill their public policy mission of extending credit to agriculture, rural utilities, and rural homeowners; and (3) operate safely and soundly. As a result, the Act grants the FCA comprehensive examination, enforcement, and regulatory powers to carry out these duties. The System's liquidity could come under sudden strain when economic uncertainty sparks financial turmoil and, therefore, the FCA must be able to act decisively so all FCS banks meet their obligations and continue operations until the crisis subsides. The FCA has various tools at its disposal to lessen the damage that a liquidity crisis could inflict on the FCS. These tools include exercising its enforcement powers under subtitle C of title V of the Act, and invoking its authority under § 615.5136 to increase the amount of liquid investments that FCS banks may hold in their liquidity reserve during an emergency.

The FCA now proposes to strengthen its supervisory and regulatory oversight of liquidity management at FCS banks. Under proposed § 615.5134(i), the FCA expressly reserves its right to require Farm Credit banks, either individually or jointly, to adjust their treatment of instruments (assets) in their liquidity reserves so they have liquidity that is sufficient and commensurate for the risks they face. This reservation of authority would enable the FCA to respond to adverse financial, economic, or market conditions by requiring any, some, or all Farm Credit bank(s) to take certain prescribed actions to protect FCS liquidity.

More specifically, the FCA reserves the authority under proposed § 615.5134(i) to require one or more FCS bank(s) to:

(1) Apply a greater discount to any individual security or any class of securities;

(2) Shift individual or multiple securities from one level of the liquidity reserve to another, or between one of the levels of the liquidity reserve and the supplemental liquidity buffer based on the performance of such asset(s), or based on financial, economic, or market conditions affecting the liquidity and solvency of the bank;

(3) Spread out or otherwise change concentrations in the allocation of securities in any level of the bank's liquidity reserve and its supplemental liquidity buffer;

(4) Perform additional stress tests using other or different stress criteria or scenarios;

(5) Hold additional liquid assets to cover unfunded commitments and other contingent outflows; or

(6) Take any other action that the Farm Credit Administration deems necessary to ensure that the bank has sufficient liquidity to meet its financial obligations as they fall due.

We invite your comments about any specific scenario that you think we should include in our reservation of authority. We also ask whether you think that there are other actions that the FCA could or should take during a significant stress event so it can act rapidly and decisively to staunch or prevent deterioration in the liquidity position of FCS banks on an individual or collective basis.

IV. Regulatory Flexibility Act

Pursuant to section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the FCA hereby certifies that the proposed rule will not have a significant economic impact on a substantial number of small entities. Each of the banks in the System, considered together with its affiliated associations, has assets and annual income in excess of the amounts that would qualify them as small entities. Therefore, System institutions are not ''small entities'' as defined in the Regulatory Flexibility Act.

List of Subjects in 12 CFR Part 615

Accounting, Agriculture, Banks, Banking, Government securities, Investments, Rural areas.

For the reasons stated in the preamble, part 615 of chapter VI, title 12 of the Code of Federal Regulations is proposed to be amended as follows:

PART 615—FUNDING AND FISCAL AFFAIRS, LOAN POLICIES AND OPERATIONS, AND FUNDING OPERATIONS

1. The authority citation for part 615 is revised to read as follows:

Authority: Secs. 1.5, 1.7, 1.10, 1.11, 1.12, 2.2, 2.3, 2.4, 2.5, 2.12, 3.1, 3.7, 3.11, 3.25, 4.3, 4.3A, 4.9, 4.14B, 4.25, 5.9, 5.17, 6.20, 6.26, 8.0, 8.3, 8.4, 8.6, 8.7, 8.8, 8.10, 8.12 of the Farm Credit Act (12 U.S.C. 2013, 2015, 2018, 2019, 2020, 2073, 2074, 2075, 2076, 2093, 2122, 2128, 2132, 2146, 2154, 2154a, 2160, 2202b, 2211, 2243, 2252, 2278b, 2278b–6, 2279aa, 2279aa–3, 2279aa–4, 2279aa–6, 2279aa–7, 2279aa–8, 2279aa–10, 2279aa–12); sec. 301(a) of Pub. L. 100–233, 101 Stat. 1568, 1608; sec. 939A of Pub. L. 111–203, 124 Stat 1326, 1887.

2. Revise § 615.5134 to read as follows:

§ 615.5134 Liquidity reserve.

(a) *Liquidity policy.*(1) *Board responsibility.* The board of each Farm Credit bank must adopt a written liquidity policy. The liquidity policy must be compatible with the investment management policies that the bank's board adopts pursuant to § 615.5133 of this part. At least once every year, the bank's board must review its liquidity policy, affirmatively validate the sufficiency of its liquidity policy, and make any revisions it deems necessary. The board of each Farm Credit bank must ensure that adequate internal controls are in place so that management complies with and carries out this liquidity policy.

(2) *Policy content.* At a minimum, the liquidity policy of each Farm Credit bank must address:

(i) The purpose and objectives of the liquidity reserve;

(ii) Diversification requirements for the liquidity reserve portfolio;

(iii) Maturity limits and credit quality standards for investments that the bank is holding to meet the minimum liquidity reserve requirements of paragraphs (b) and (e) of this section;

(iv) The target amount of days of liquidity that the bank needs based on its business model and risk profile;

(v) The Contingency Funding Plan (CFP) required by paragraph (h) of this section;

(vi) Delegations of authority pertaining to the liquidity reserve; and

(vii) Reporting requirements, which at a minimum must require management to report to the board at least once every quarter about compliance with the bank's liquidity policy and the performance of the liquidity reserve portfolio. Management must report any deviation from the bank's liquidity policy, or failure to meet the board's liquidity targets immediately to the board.

(b) *Liquidity reserve requirement.* Each Farm Credit bank must maintain a liquidity reserve, in accordance with paragraph (e) of this section, sufficient to fund at least 90 days of the principal portion of maturing obligations and other borrowings of the bank at all times. Each Farm Credit bank must also maintain a supplemental liquidity buffer in accordance with paragraph (f) of this section. Each Farm Credit bank must discount the liquid assets in its

liquidity reserve and its supplemental liquidity buffer in accordance with paragraph (g) of this section. The liquidity reserve must be comprised only of cash, including cash due from traded but not yet settled debt, and qualified eligible investments under § 615.5140 of this part that are unencumbered and marketable under paragraphs (c) and (d) of this section, respectively.

(c) *Unencumbered.* All investments that a Farm Credit bank holds in its liquidity reserve in accordance with this section must be unencumbered. For the purpose of this section, an investment is unencumbered if it is free of lien, and it is not explicitly or implicitly pledged to secure, collateralize, or enhance the credit of any transaction. Additionally, an unencumbered investment held in the liquidity reserve cannot be used as a hedge against interest rate risk if liquidation of that particular investment would expose the bank to a material risk of loss.

(d) *Marketable.* All investments that a Farm Credit bank holds in its liquidity reserve in accordance with this section must be marketable. For the purposes of this section, an investment is marketable if it:

(1) Can be easily and immediately converted into cash with little or no loss in value;

(2) Exhibits low credit and market risks;

(3) Has ease and certainty of valuation; and

(4) Except for money market instruments, is listed on a developed and recognized exchange market, and can be sold or converted to cash through repurchase agreements in active and sizable markets.

(e) *Composition of liquidity reserve.* Each Farm Credit bank must continuously hold cash and the investments in the table below to meet the 90-day minimum liquidity reserve requirement in paragraph (b) of this section. A Farm Credit bank must apply the discounts in paragraph (g) of this section to all cash and investments in its liquidity reserve:

Level 1 Instruments: Each Farm Credit bank must sequentially apply Level 1 instruments to fund obligations that mature starting on day 1 through day 30. Cash and instruments with a final remaining maturity of 3 years or less must comprise at least 15 days of the liquidity reserve at Level 1.	• Cash; • Treasury securities; • Other marketable obligations that are explicitly backed by the full faith and credit of the United States; • Mortgage-backed securities issued by the Government National Mortgage Association; • Government-sponsored Agency senior debt securities that mature within 60 days, excluding senior debt securities of the Farm Credit System; and • Diversified investment Funds that are comprised exclusively of Level 1 instruments.
Level 2 Instruments: Each Farm Credit bank must sequentially apply Level 2 instruments to fund obligations that mature starting on day 31 through day 90.	• Additional amounts of Level 1 instruments; • Government-sponsored Agency senior debt securities with maturities that exceed 60 days, excluding senior debt securities of the Farm Credit System; • Government-sponsored Agency mortgage-backed securities; • Money market instruments maturing within 90 days; and • Diversified Investment Funds that are comprised exclusively of Levels 1 and 2 instruments.

(f) *Supplemental liquidity buffer.* Each Farm Credit bank must hold supplemental liquid assets in excess of the 90-day minimum liquidity reserve. The supplemental liquidity buffer must be comprised of cash and qualified eligible investments listed in § 615.5140 of this part. A Farm Credit bank must be able to liquidate any qualified eligible investment in its supplemental liquidity buffer within the liquidity policy timeframe established in the bank's liquidity policy at no less than 80 percent of its book value. A Farm Credit bank must remove from its supplemental liquidity buffer any investment that has, at any time, a market value that is less than 80 percent of its book value. The amount of supplemental liquidity that each Farm Credit bank holds, at minimum, must meet the requirements of its board's liquidity policy, provide excess liquidity beyond the days covered by the liquidity reserve, and satisfy the applicable portions of the bank's CFP in accordance with paragraph (h) of this section.

(g) *Discounts.* Each Farm Credit bank must discount the liquid assets in its liquidity reserve under paragraph (d) of this section and in its supplemental liquidity buffer under paragraph (e) of this section as follows:

(1) Multiply cash and overnight investments by 100 percent.

(2) Multiply Treasury securities by 97 percent of the market value.

(3) Multiply all other Level 1 instruments by 95 percent of their market value, even if the bank holds them in Level 2 to fund obligations maturing starting on day 31 through day 90.

(4) Multiply all Level 2 instruments by 93 percent of the market value.

(5) Multiply all other qualified investments held for meeting the bank's liquidity policy and contingency plans by 85 percent of market value unless they merit Level 1 or Level 2 instrument discounts.

(h) *Contingency Funding Plan (CFP).* The board of each Farm Credit bank must adopt a CFP to ensure sources of liquidity are sufficient to fund normal operations under a variety of stress events including market disruptions, rapid increase in loan demand, unexpected draws on unfunded commitments, difficulties in renewing or replacing funding with desired terms and structures, requirements to pledge collateral with counterparties, and reduced market access. Each Farm Credit bank must maintain an adequate level of unencumbered and marketable assets in its liquidity reserve that can be converted into cash to meet its net liquidity needs based on estimated cash inflows and outflows for a 30-day time horizon under an acute stress scenario. The board of directors must review and approve the CFP at least once every year and make adjustments to reflect changes in the bank's risk profile and market conditions. The CFP must:

(1) Be customized to the financial condition and liquidity risk profile of the bank and the board's liquidity risk tolerance policy.

(2) Identify funding alternatives that the Farm Credit bank can implement whenever access to funding is impeded,

which must include, at a minimum, arrangements for pledging collateral to secure funding and possible initiatives to raise additional capital.

(3) Require periodic stress testing, which analyzes the possible impacts on the bank's cash inflows and outflows, liquidity position, profitability and solvency under a variety of stress scenarios.

(4) Establish a process for managing events that imperil the bank's liquidity, and assign appropriate personnel and implement executable action plans that carry out the CFP.

(i) *Reservation of Authority.* The Farm Credit Administration reserves the right to require a Farm Credit bank to adjust the treatment of assets in its liquidity reserve so that it has liquidity that is sufficient and commensurate for the risks it faces. The Farm Credit Administration reserves the right to use this authority in response to adverse financial, economic, or market conditions by requiring any Farm Credit bank, on a case-by-case basis, to:

(1) Apply a greater discount to any individual security or any class of securities;

(2) Shift individual or multiple securities from one level of the liquidity reserve to another, or between one of the levels of the liquidity reserve and the supplemental liquidity buffer based on the performance of such asset(s), or based on financial, economic, or market conditions affecting the liquidity and solvency of the bank;

(3) Spread out or otherwise change concentrations in the allocation of securities in any level of the bank's liquidity reserve and its supplemental liquidity buffer;

(4) Perform additional stress tests using other or different stress criteria or scenarios;

(5) Hold additional liquid assets to cover unfunded commitments and other contingent outflows; or

(6) Take any other action that the Farm Credit Administration deems necessary to ensure that the bank has sufficient liquidity to meet its financial obligations as they fall due.

Dated: December 15, 2011.

Dale L. Aultman,

Secretary, Farm Credit Administration Board.

[FR Doc. 2011–32698 Filed 12–23–11; 8:45 am]

BILLING CODE 6705–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 23

[Docket No.FAA–2011–1387; Notice No. 23–11–02–SC]

Special Conditions: XtremeAir GmbH, XA42; Acrobatic Category Aerodynamic Stability

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed special conditions.

SUMMARY: This action proposes special conditions for the XtremeAir GmbH XA42 airplane. The XA42 airplane has a novel or unusual design feature associated with its static stability. This airplane can perform at the highest level of aerobatic competition. To be competitive, the aircraft was designed with positive and, at some points, neutral stability within its flight envelope. Its lateral and directional axes are also decoupled from each other providing more precise maneuvering. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for these design features. These proposed special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards. These special conditions are only applicable to aircraft certified solely in the acrobatic category.

DATES: Send your comments on or before January 26, 2012.

ADDRESSES: Send comments identified by docket number FAA–2011–1387 using any of the following methods:

- *Federal eRegulations Portal:* Go to *http://www.regulations.gov* and follow the online instructions for sending your comments electronically.
- *Mail:* Send comments to Docket Operations, M–30, U.S. Department of Transportation (DOT), 1200 New Jersey Avenue SE., Room W12–140, West Building Ground Floor, Washington, DC 20590–0001.
- *Hand Delivery of Courier:* Take comments to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 8 a.m., and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* Fax comments to Docket Operations at (202) 493–2251.

Privacy: The FAA will post all comments it receives, without change, to *http://regulations.gov,* including any personal information the commenter provides. Using the search function of the docket web site, anyone can find and read the electronic form of all comments received into any FAA docket, including the name of the individual sending the comment (or signing the comment for an association, business, labor union, etc.). DOT's complete Privacy Act Statement can be found in the **Federal Register** published on April 11, 2000 (65 FR 19477–19478), as well as at *http://DocketsInfo.dot.gov.*

Docket: Background documents or comments received may be read at *http://www.regulations.gov* at any time. Follow the online instructions for accessing the docket or go to the Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m., and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Mr. Ross Schaller, Federal Aviation Administration, Small Airplane Directorate, Aircraft Certification Service, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone (816) 329–4162; facsimile (816) 329–4090.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite interested people to take part in this rulemaking by sending written comments, data, or views. The most helpful comments reference a specific portion of the special conditions, explain the reason for any recommended change, and include supporting data.

We will consider all comments we receive on or before the closing date for comments. We will consider comments filed late if it is possible to do so without incurring expense or delay. We may change these special conditions based on the comments we receive.

Background

On May 3, 2011, XtremeAir GmbH applied for a type certificate for their new XA42. The XA42 is certified under EASA authority as a dual category (acrobatic/utility) airplane. It has a two-place tandem canopy cockpit, and a single-engine. It also features a conventional landing gear, conventional low-wing planform and is of composite construction. The engine is a Lycoming AEIO–580–B1A with a rated power of 315 Hp at 2,700 rpm. The airplane is proposed to be approved for Day-VFR operations with no icing approval.

The maximum takeoff weight is 2,200 pounds in utility category, 1,874 pounds in acrobatic category. V_{NE} is 225 knots,

V_{NO} is 185 knots and V_A is 174 knots, indicated airspeed. Maximum altitude is 15,000 feet.

Acrobatic airplanes previously type certificated by the FAA did comply with the stability provisions of Subpart B of 14 CFR part 23. However, airplanes like the XA42 are considered as ''unlimited'' acrobatic aircraft because they can perform at the highest level of aerobatic competition and can perform any of the maneuvers listed in the Aresti Catalog. Generally, the evolution of the ''unlimited'' types of acrobatic airplanes, with very low mass, exceptional roll rates and very high G capabilities, in addition to power to mass ratios that are unique to this type of airplane, have led to airplanes that cannot comply with the stability provisions of the regulations. These airplanes can still be type-certificated, but in the acrobatic category only and with an appropriate set of special conditions and associated limitations.

The FAA will only consider certifying the XA42 in the acrobatic category. XtremeAir GmbH will not be able to offer a utility category operating envelope to accommodate the increased fuel load designed for cross-country operations. The FAA does recognize that fuel exhaustion is one of the top accident causes associated with this class of aircraft. For this reason, the FAA proposes to allow XtremeAir to seek certification of a limited acrobatic envelope at a higher weight that will still meet the minimum load requirements of +6/−3 g associated with 14 CFR, part 23, § 23.337. The XA42 airplane would be approved for unlimited maneuvers at or below its designed unlimited acrobatic weight. The airplane would also be approved, at some higher weight (for fuel), that would still meet the requirements of § 23.337 for acrobatic category and may have restrictions on the maneuvers allowed.

Type Certification Basis

Under the provisions of 14 CFR, part 21, § 21.17, XtremeAir GmbH must show that the XA42 meets the applicable provisions of part 23, as amended by Amendments 23–1 through 23–59 thereto.

Part 36 of Title 14 of the Code of Federal Regulations, effective December 1, 1969, as amended by Amendments 36–1 through 36–28.

Not approved for ditching; compliance with provisions for ditching equipment in accordance with 14 CFR 23.1415(a)(b) has not been demonstrated.

Approved for VFR-day only. Flight in known icing prohibited.

If the Administrator finds that the applicable airworthiness regulations (*i.e.,* 14 CFR part 23) do not contain adequate or appropriate safety standards for the XA42 because of a novel or unusual design feature, special conditions are prescribed under the provisions of § 21.16.

Special conditions are initially applicable to the model for which they are issued. Should the type certificate for that model be amended later to include any other model that incorporates the same or a similar novel or unusual design feature, the special conditions would also apply to the other model under § 21.101.

In addition to the applicable airworthiness regulations and special conditions, the XA42 must comply with the fuel vent and exhaust emission requirements of 14 CFR part 34 and the noise certification requirements of 14 CFR part 36 and the FAA must issue a finding of regulatory adequacy under § 611 of Public Law 92–574, the ''Noise Control Act of 1972.''

The FAA issues special conditions, as defined in 14 CFR, part 11, § 11.19, in accordance with § 11.38, and they become part of the type-certification basis under § 21.17(a)(2).

Novel or Unusual Design Features

The XtremeAir GmbH XA42 will incorporate the following novel or unusual design features:

For acrobatic category airplanes with unlimited acrobatic capability:

Neutral longitudinal and lateral static stability characteristics.

Discussion

The Code of Federal Regulations states static stability criteria for longitudinal, lateral, and directional axes of an airplane. However, none of these criteria are adequate to address the specific issues raised in the flight characteristics of an unlimited aerobatic airplane. Therefore, the FAA has determined after a flight test evaluation that, in addition to the requirements of part 21 and part 23, special conditions are needed to address these static stability characteristics.

Accordingly, these special conditions are for the XtremeAir GmbH XA42 static stability characteristics to be certified solely as an acrobatic category airplane. Other conditions may be developed, as needed, based on further FAA review and discussions with the manufacturer and civil aviation authorities.

Applicability

As discussed above, these special conditions are applicable to the XA42. Should XtremeAir GmbH apply at a later date for a change to the type certificate to include another model incorporating the same novel or unusual design feature, the special conditions would apply to that model as well.

Conclusion

This action affects only certain novel or unusual design features on one model of airplanes. It is not a rule of general applicability and affects only the applicant who applied to the FAA for approval of these flight characteristics on the airplane.

List of Subjects in 14 CFR Part 23

Aircraft, Aviation safety, Signs and symbols.

Citation

The authority citation for these special conditions is as follows:

Authority: 49 U.S.C. 106(g), 40113, and 44701; 14 CFR 21.16 and 21.17; and 14 CFR 11.38 and 11.19.

The Proposed Special Conditions

Accordingly, the Federal Aviation Administration (FAA) proposes the following special conditions as part of the type certification basis for XtremeAir GmbH XA42 airplanes.

1. Unlimited Acrobatic-Only Category Static Stability Requirements

For unlimited, acrobatic-only category aircraft, the FAA proposes that the XtremeAir GmbH XA42 comply with the following stability special conditions in lieu of the existing §§ 23.171, 23.173, 23.175, and 23.177:

A. In place of 14 CFR part 23, § 23.171 Flight—General (stability) requirement, comply with the following:

SC23.171 Flight—General: The airplane must be neutrally or positively stable in the longitudinal, directional, and lateral axes under sections SC23.173 through SC23.181. In addition, the airplane must show suitable stability and control ''feel'' (static stability) in any condition normally encountered in service, if flight tests show it is necessary for safe operation.

B. In place of 14 CFR part 23, § 23.173, Static longitudinal stability requirement, comply with the following:

SC23.173 Static longitudinal stability: Under the conditions specified in SC23.175 and with the airplane trimmed as indicated, the characteristics of the elevator control forces and the friction within the control system must be as follows:

(a) A pull must be required to obtain and maintain speeds below the specified trim speed and a push required to obtain and maintain speeds

above the specified trim speed. This must be shown at any speed that can be obtained, except that speeds requiring a control force in excess of 40 pounds or speeds above the maximum allowable speed or below the minimum speed for steady unstalled flight need not be considered.

(b) The stick force or position must vary with speed so that any substantial speed change results in a stick force or position clearly perceptible to the pilot.

C. In place of 14 CFR part 23, § 23.175, Demonstration of static longitudinal stability requirement, comply with the following:

SC23.175 Demonstration of static longitudinal stability:

(a) Climb. The stick force curve must have, at a minimum, a neutrally stable to stable slope at speeds between 85 and 115 percent of the trim speed, with—

(1) Maximum continuous power; and

(2) The airplane trimmed at the speed used in determining the climb performance required by section 23.69(a).

(b) Cruise. With the airplane in trim with power for level flight at representative cruising speeds at high and low altitudes, including speeds up to V_{NO}, except that the speed need not exceed V_H—

(1) The stick force curve must, at a minimum, have a neutrally stable to stable slope at all speeds within a range that is the greater of 15 percent of the trim speed plus the resulting free return speed range, or 40 knots plus the resulting free return speed range, above and below the trim speed, except that the slope need not be stable—

(i) At speeds less than 1.3 V_{S1}; or

(ii) For airplanes with V_{NE} established under section 23.1505(a), at speeds greater than V_{NE}.

(c) Landing. The stick force curve must, at a minimum, have a neutrally stable to stable slope at speeds between 1.1 V_{S1} and 1.8 V_{S1} with—

(1) Landing gear extended; and

(2) The airplane trimmed at—

(i) V_{REF}, or the minimum trim speed if higher, with power off; and

(ii) V_{REF} with enough power to maintain a 3 degree angle of descent.

D. In place of 14 CFR part 23, § 23.177, Static directional and lateral stability requirement, comply with the following:

SC23.177 Static directional and lateral stability:

(a) The static directional stability, as shown by the tendency to recover from a wings level sideslip with the rudder free, must be positive for any landing gear and flap position appropriate to the takeoff, climb, cruise, approach, and landing configurations. This must be shown with symmetrical power up to maximum continuous power, and at speeds from 1.2 V_{S1} up to the maximum allowable speed for the condition being investigated. The angle of sideslip for these tests must be appropriate to the type of airplane. At larger angles of sideslip, up to that at which full rudder is used or a control force limit in section 23.143 is reached, whichever occurs first, and at speeds from 1.2 V_{S1} to V_O, the rudder pedal force must not reverse.

(b) In straight, steady slips at 1.2 V_{S1} for any landing gear and flap positions, and for any symmetrical power conditions up to 50 percent of maximum continuous power, the rudder control movements and forces must increase steadily, but not necessarily in constant proportion, as the angle of sideslip is increased up to the maximum appropriate to the type of airplane. The aileron control movements and forces may increase steadily, but not necessarily in constant proportion, as the angle of sideslip is increased up to the maximum appropriate to the type of airplane. At larger slip angles, up to the angle at which the full rudder or aileron control is used or a control force limit contained in section 23.143 is reached, the aileron and rudder control movements and forces must not reverse as the angle of sideslip is increased. Rapid entry into, and recovery from, a maximum sideslip considered appropriate for the airplane must not result in uncontrollable flight characteristics.

Issued in Kansas City, Missouri, on December 16, 2011.

Earl Lawrence,

Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2011–33049 Filed 12–23–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 135

[Docket No. FAA–2011–1397]

Clarification of Policy Regarding Approved Training Programs

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Notice of availability; request for comment.

SUMMARY: This document announces the availability of an FAA Notice that would require FAA inspectors to review 14 CFR part 135 approved training programs to identify and correct those programs which erroneously issued credit for previous training or checking. The document also provides guidance on constructing reduced hour training programs based on previous experience. Upon review of the comments and any necessary revision, this document would cancel and replace FAA Order 8900.1, Volume 3, Chapter 19, Paragraph 3–1111.

DATES: Written comments must be received on or before February 27, 2012.

ADDRESSES: Send comments identified by docket number FAA–2011–1397 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and follow the online instructions for sending your comments electronically.
- *Mail:* Send comments to Docket Operations, M–30; U.S. Department of Transportation (DOT), 1200 New Jersey Avenue SE., Room W12–140, West Building Ground Floor, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* Take comments to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* Fax comments to Docket Operations at (202) 493–2251.

Privacy: The FAA will post all comments it receives, without change, to *http://www.regulations.gov,* including any personal information the commenter provides. Using the search function of the docket web site, anyone can find and read the electronic form of all comments received into any FAA dockets, including the name of the individual sending the comment (or signing the comment for an association, business, labor union, *etc.*). DOT's complete Privacy Act Statement can be found in the **Federal Register** published on April 11, 2000 (65 FR 19477–19478), as well as at *http://DocketsInfo.dot.gov.*

Docket: Background documents or comments received may be read at *http://www.regulations.gov* at any time. Follow the online instructions for accessing the docket or Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Robert Burke, Air Carrier Training Branch, Air Transportation Division, Flight Standards Service, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone: (202)

267–8262; facsimile: (202) 267–5229; email: *robert.burke@faa.gov.*

SUPPLEMENTARY INFORMATION: FAA Order 8900.1, Flight Standards Information Management System, was issued on September 13, 2007. This order consolidated and replaced FAA Orders 8300.1, 8400.1, and 8700.1, the FAA's guidance to inspectors. There have been numerous inquiries by part 135 certificate holders regarding the acceptance of training/evaluations previously completed by a crewmember while in the employment of another certificate holder. Regulations do not permit the crediting of such training (with the specific exception of CRM and DRM training).

Additionally, some training centers have distributed a training program template that provides credit for training/evaluations conducted by another operator. Such provisions are contrary to the intent as well as the technical provisions of part 135 and are not appropriate for inclusion in a certificate holder's approved training program.

Part 135 certificate holders may develop and submit for approval multiple curriculums for a particular crewmember position and aircraft make/model/variant. For example, a part 135 certificate holder may have a an initial new-hire curriculum designed to meet the requirements of new hire crewmembers that have minimal flight time, no previous part 135 experience, or do not have qualifications related to the certificate holder's operational environment. The certificate holder may then also apply for a reduced new hire curriculum for pilots that have previous experience as a crewmember in part 135 operations and/or the particular aircraft and duty position. The second curriculum in this example may have less training hours due to the crewmember's extensive experience. Each of these curriculums would also have detailed prerequisites to define the level of experience required to enter into either of these new hire programs. There are no hour requirements which need to be defined on a reduced training program, however all the training elements of the certificate holder's full initial training program must be accomplished as well as the qualification module.

While the FAA generally does not request comment on internal Notices and orders, the agency has established a docket for public comments regarding this guidance for inspectors in recognition of the interest of current 14 CFR part 135 certificate holders. The agency will consider all comments received by January 26, 2012. Comments received after that date may be considered if consideration will not delay agency action on the review. A copy of the proposed order is available for review in the assigned docket for the Order at *http://www.regulations.gov.*

Issued in Washington, DC on December 13, 2011.

John S. Duncan,

Acting Deputy Director, FAA Flight Standards Service.

[FR Doc. 2011–33091 Filed 12–23–11; 8:45 am]

BILLING CODE 4910–13–P

CONSUMER PRODUCT SAFETY COMMISSION

16 CFR Part Chapter II

Fire Pots and Gel Fuel; Advance Notice of Proposed Rulemaking; Request for Comments and Information

AGENCY: Consumer Product Safety Commission.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: The Consumer Product Safety Commission (''the Commission,'' ''CPSC,'' or ''we'') has reason to believe that firepots and gel fuel used together may present an unreasonable risk of injury. As of September 30, 2011, the Commission is aware of 76 incidents that resulted in 2 deaths and 86 injuries involving firepots used with gel fuel. All of these incidents occurred between April 3, 2010 and September 1, 2011. Many of the injuries were severe; over half of the victims reportedly required hospitalization. This advance notice of proposed rulemaking (''ANPR'') initiates a rulemaking proceeding under the Consumer Product Safety Act (''CPSA''). We invite comments concerning the risk of injury associated with firepots, gel fuel and gel fuel containers, the regulatory alternatives discussed in this notice, and other possible ways to address this risk. We also invite interested persons to submit an existing standard or a statement of intent to modify or develop a voluntary standard to address the risk of injury described in this notice.

DATES: Written comments in response to this notice must be received by February 27, 2012.

ADDRESSES: You may submit comments, identified by Docket No. CPSC–2011–0095, by any of the following methods:

Electronic Submissions

Submit electronic comments in the following way:

Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.

To ensure timely processing of comments, the Commission is no longer accepting comments submitted by electronic mail (email), except through *www.regulations.gov.*

Written Submissions

Submit written submissions in the following way:

Mail/Hand delivery/Courier (for paper, disk, or CD–ROM submissions), preferably in five copies, to: Office of the Secretary, Consumer Product Safety Commission, Room 820, 4330 East West Highway, Bethesda, MD 20814; telephone (301) 504–7923.

Instructions: All submissions received must include the agency name and docket number for this rulemaking. All comments received may be posted without change, including any personal identifiers, contact information, or other personal information provided, to *http://www.regulations.gov.* Do not submit confidential business information, trade secret information, or other sensitive or protected information electronically. Such information should be submitted in writing.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Rohit Khanna, Fire Program Area Team Leader, Office of Hazard Identification and Reduction, Consumer Product Safety Commission, National Product Testing and Evaluation Center, 5 Research Place Rockville, MD 20850; telephone (301) 987–2508, or email *rkhanna@cpsc.gov.*

SUPPLEMENTARY INFORMATION:

A. Background

CPSC staff identified firepots used with gel fuel as an emerging hazard in June 2011, after a severe injury was reported to the CPSC. We pursued investigations and conducted analyses of these incidents. As of September 30, 2011, we are aware of 76 incidents involving firepots used with gel fuel that resulted in 2 deaths and 86 injuries. In an effort to address this emerging hazard, the CPSC's Office of Compliance and Field Operations initiated several recalls of pourable alcohol gel fuel. To date, 12 voluntary recalls have been announced recalling more than 2 million bottles of gel fuel. The products involved in the recalls were alcohol-based gel fuel in containers intended to be used with firepots. Each recalled product was marketed for use with

firepots. We seek to establish a more permanent means to reduce or eliminate the hazard posed by firepots using gel fuel.

B. The Products

The incidents discussed in this ANPR all involve firepots used with alcohol-based gel fuel. When firepots and gel fuel are used together, they can present serious burn and fire hazards. Firepots and gel fuel are usually sold as separate products, but they are often marketed for use together, and some companies manufacture both products.

1. Firepots

This ANPR covers firepots that are designed and intended to be used with gel fuel. Firepots are portable, decorative lighting accents marketed for indoor and outdoor use. Their purpose is decorative. They provide some illumination and are not intended to provide heat. Many are made of ceramic material and look like vases or decorative pots, but some have different features and materials, such as a partial enclosure made of glass. Firepots are also sometimes called personal fireplaces, personal fire pits, firelights, or fire bowls. These products have the following characteristics in common. They: (1) Are portable; (2) are open on at least one side; (3) have an open cup, usually made of stainless steel, to hold the gel fuel; and (4) are used with alcohol-based gel fuel. This ANPR does not cover stationary fireplaces or lighting products that have a wick or use a type of fuel other than alcohol-based gel fuel.

Firepots are relatively new products. They were not prominently marketed until late 2009. Firepots range in price from under $20 to more than $100. Based on a review of online retailers' product offerings, most models are priced at $20 to $40. Based on information relating unit sales of gel fuel by a leading manufacturer to its sales of firepots, we estimate that nearly 2.5 million firepots could have been sold to consumers since the product was introduced. Most units likely were purchased in 2010, and during the first six months of 2011. We have identified at least 10 companies that have manufactured firepots or have been wholesalers/private labelers of firepots. These firepots have been sold online or through retail outlets that market home and garden products. Most of the leading marketers of firepots also have marketed their own brands of gel fuel. The leading firms in the firepot market have fewer than 20 employees, and they are categorized primarily as wholesalers. Under size standards issued by the U.S. Small Business Administration (''SBA''), wholesalers with fewer than 100 employees could be considered small businesses. Barriers to market entry are minimal, and additional firms could market firepots that they manufacture or import.

2. Gel Fuel

This ANPR also covers gel fuel that is designed and intended to be used as fuel for firepots. Gel fuel is composed primarily of alcohol, and it produces a clean-burning flame with no visible smoke or ash. CPSC staff analyzed 18 samples of firepot gel fuels to determine chemical composition, flash point, and viscosity. The analyses showed that firepot gel fuel is primarily alcohol-based (containing approximately 80 percent alcohol). The types of alcohol most commonly included were ethanol, isopropanol (''IPA''), and ethanol and IPA mixtures. The remaining components in the gel fuel samples were water, gelling agents, and additives, including citronella and eucalyptus. The analysis determined that the flashpoint for these samples was less than or equal to 74 °F (''F''), with the lowest measure being 32 °F. Gel fuel has a higher viscosity than liquid fuels. The analysis found that gel fuel viscosities ranged from 5,000 to 25,000 CentiPoise (''cP''). These viscosities are similar to those of molasses (5,000 cP) or chocolate syrup (10,000 to 25,000 cP).

Gel fuel intended for use with firepots has been sold in sizes ranging from one pint to one gallon, with one-quart containers apparently the most common size. Individual containers of gel fuel generally have sold at retail for $5 to $20 per unit. Although firepots have had a significant presence in the consumer market for the last two years only, at least one firm has marketed gel fuel similar to what is used in firepots for approximately the last 10 years to be used as fuel for gel fuel fireplaces. Gel fuel for fireplaces has been available in single-use cans since at least the middle 1980s. These products continue to be marketed by some firms, including firms that had been active in the market for firepots. Gel fuel also is available in single-use cans that can be placed in the firepot. Single-use cans of gel fuel intended for use with firepots are covered by this ANPR. Most manufacturers and private labelers identified by CPSC staff who offer gel fuel in bottle containers did not offer it for sale until 2009 or later.

Information on unit sales of gel fuels was provided by 11 of the firms that agreed to voluntary recalls of their products during 2011. These firms had combined shipments of about 2.5 million units since 2008. One firm accounted for nearly two-thirds of the total reported unit sales. A twelfth firm also agreed to a recall of its products, but information on its unit sales is not available. Available information indicates that the firms would be considered small businesses under SBA guidelines.

C. The Risk of Injury

1. Incident Data Overview

As of September 30, 2011, we are aware of 76 incidents involving firepots that were using gel fuel. These incidents resulted in 2 deaths and 86 injuries, a majority of which resulted in severe burns that reportedly required hospitalization. The incidents occurred between April 3, 2010 and September 1, 2011. A majority of the reported incidents (as well as a majority of the injuries and both fatalities) occurred when a consumer was pouring more fuel into a firepot (referred to as ''refueling''), resulting in an explosion. This and other hazard scenarios are discussed in section C.2 of this preamble. Many injuries were severe. Of the 86 injury victims, 48 of them (56%) were hospitalized. Many victims who were not hospitalized received treatment in emergency rooms for their burn injuries. Most (53) of the incidents involved 1 victim, but 9 had no victims, and 14 had multiple victims.

The two fatalities were a 51-year-old man and an 84-year-old woman. Of the 86 nonfatal injury victims, 19 were victims of unknown age. Among the 67 injury victims whose age is known, 1 was under 5 years of age, 7 were between ages 5 and 14, 12 were between ages 15 and 29, 39 were between ages 30 and 49, 7 were between 50 and 64, and 1 was older than 64.

2. Hazard Scenarios

From the reported incidents, we identified eight hazard scenarios associated with firepots using gel fuel. The most common hazard scenario involves refilling the firepot with gel fuel. The eight identified hazard scenarios are discussed below.

Refueling firepot. The majority of incidents, the majority of high severity injuries, and both deaths reported to date, occurred when consumers were attempting to refill a firepot that had just recently been in use. In 49 incidents (64 percent of all reported incidents), consumers were reportedly in the process of, or had just finished, refilling a firepot when the flame in the firepot ignited the vapors in the fuel container and an explosion resulted. These 49

incidents caused 2 fatalities and 61 injuries, 35 of which were high severity burns needing hospitalization. In 36 of the 49 refueling incidents, the most seriously injured person was not the person who was refilling the firepot. Details on the extent of the burns frequently are missing for the hospitalized cases, but at least nine victims of this scenario reportedly sustained between 20 to 70 percent total body surface area (''TBSA'') burns. In 26 of these 49 incidents, consumers reported that they believed the firepot had run out of fuel because they did not see any flames in the firepot. In 6 of these 49 incidents, consumers reported that a low flame was present in a nearly empty firepot.

For example, in one incident, a 51-year-old man sustained 60 percent TBSA burns and died after being hospitalized for 33 days. His wife also was hospitalized with serious burns. According to the incident report, ''His wife was sitting at the table as he was pouring the fuel. Suddenly there was an explosion and the husband, wife, lanai, plants, clothing. *etc.,* were all on fire.'' Flaming gel fuel was dripping from the top of the lanai onto the victims and patio.

According to another refueling incident report, a firepot was at the center of a patio table and had been burning for nearly two hours. The four people present believed that the flame had gone out. One began to pour more gel fuel into the burn cup. According to the incident report, ''Once the bottle was tilted in a direction to pour the gel fuel, a fireball erupted. The fireball appeared to come from outside the bottle and above the gel burner. The 'explosion' knocked the victim backwards out of her chair where she laid with parts of her upper body on fire.'' The victim was hospitalized (including three nights in the intensive care unit) and released with second-degree burns on 10 percent of her body—on her face, arms, chest, stomach, and back. The person pouring the gel fuel suffered minor burn injuries.

Explosion while lighting firepot. In five incidents (about 7 percent) an explosion occurred in the firepot, which already had fuel in it, when the consumer attempted to light the firepot with an open-flame ignition source (such as a match or lighter). These incidents resulted in nine injuries, four of which were high severity burn injuries needing hospitalization. According to the incident reports, in three cases the firepot had already been in use that day and was being relit having just been refilled. In two cases, it was not clear whether the firepot had previously been in use that day.

Fuel container explosion. In two incidents (about 3 percent), the gel fuel container was a short distance away from a lit firepot when the container exploded. In both incidents, the victims were hospitalized, one with high severity burn injuries. In one incident, the consumer reportedly poured the fuel from a gallon jug into a ceramic firepot, lit it with a long BBQ lighter, and placed the jug of fuel a foot away when the jug of fuel ignited and exploded. A 50-year-old female was injured and hospitalized. In the other incident, the 25-year-old victim reported: ''We poured (brand X) fuel gel into our fire pot and lit it. We sat the bottle of gel about a foot away from the pot. (We don't remember if the top was on or off the bottle.) All of the sudden, the bottle exploded. The gel that passed over the open flame of the pot ignited and landed on me. (It sounded like a gunshot.) The flash sunburned my face, synged (*sic*) my eyelashes, and burned my left ear. It caught my left arm, back, hair and shirt on fire.'' Engineering analysis of these incidents suggests that it was likely that a small flame was present on the bottle after refueling of the firepot, which could have ignited the flammable vapors in the fuel container.

Burn cup ejection. In six incidents (about 8 percent), reports stated that the burn cup ejected spontaneously from the firepot during use. These incidents resulted in three injuries, one of which required hospitalization. Although we could not replicate this scenario in laboratory testing, we believe that the burn cup ejections may be caused by excessive pressure that builds up due to inadequate venting in the interior of the firepot.

Explosion during use. In four incidents (about 5 percent), reports stated that fuel in the burn cup exploded spontaneously while the firepot was in use. Single victims were injured in three of these cases, with one victim, a 5-year-old boy, reportedly hospitalized for four days for burn injuries to his face, eyes, and chest. In another incident, a dog was set on fire; it ran into the house, causing a fire and substantial property damage. We could not replicate this scenario in laboratory testing, but we believe that fuel explosions may be due to exposure to contaminants.

Tip over of firepot. In three incidents (about 4 percent), lit firepots tipped over, causing burning gel fuel to spill. These incidents resulted in six injuries, four of which were high severity burn injuries requiring hospitalization. Two of the victims were young children. In these scenarios, the firepot was placed on a surface, such as a table or stool, when a person bumped into the supporting surface or accidentally knocked over the firepot, causing the burning gel fuel to fall onto the victims.

Firepot breakage. In three incidents (about 4 percent), the firepot reportedly broke while it was in use. In one incident it was reported that when the firepot broke, ceramic shards went flying. These incidents did not result in injury. We did not observe this scenario in our laboratory testing. However, it is possible that the temperature and internal pressure generated during use of the firepot could cause the ceramic firepot to break.

Explosion while extinguishing flame. In one incident, a consumer reported that when she attempted to extinguish a firepot using the snuffer device that was supplied with the firepot, a flame erupted and flaming gel spurted up to five feet away. The burning gel ignited furniture and carpeting, causing property damage but no injuries. This scenario also was not observed in laboratory testing.

Not enough information. In three incidents, not enough information was available to classify the hazard pattern. These incidents resulted in three injuries, one requiring hospitalization.

3. Details Concerning Injuries

Injuries resulting from these incidents can be extensive and life-threatening, requiring lengthy, costly, and painful treatment. Burn injuries are classified by the depth of tissue that is burned, which is expressed as the degree of burn (first-, second-, or third- degree). Burn severity is a function of the victim's age, the depth of burn, the extent of burn (generally expressed as the percentage of total body surface area that has second- or third-degree burns), and by the specific location of the burned area(s). Certain areas of the body are considered to be critical areas (face, ears, hands, feet, joints, genitals, and perineum). As a general rule, any injuries involving second- or third-degree burns in critical areas, and/or >20 percent TBSA, are considered high severity and require hospitalization.

The reported injuries range from minor to high severity, and two victims are known to have died from their severe burns. Surviving victims of firepot incidents may require life-support and medical treatment in intensive care units. Detailed information is not available for all hospitalization cases involving high severity injuries, but we are aware of at least 15 hospitalized victims who were

admitted for extensive periods (from 10 to 76 days based on the most recent update of each specific case). Eleven cases specifically noted that between 20 to 70 percent of the total body surface area was burned. Victims may require multiple surgeries, including skin grafts, and they may be at risk from complications, such as shock, fluid loss, and infection. In addition, victims may be left with extensive deep scarring, permanent disfigurement and functional impairment, and severe psychological trauma, especially if the face is involved.

D. Analysis of Hazards Posed by Firepots and Gel Fuel

Firepots used together with gel fuel create a serious hazard that consumers may not perceive accurately. Various characteristics of both firepots and gel fuels may be responsible for this. We have analyzed the incidents and samples of the products to understand these hazards better.

1. Firepots

a. Physical Characteristics

Firepots have certain physical characteristics that our analysis indicates could contribute to the hazard reported in these incidents. All firepots subject to this ANPR have an open receptacle, referred to as a ''burn cup,'' to hold gel fuel. The burn cup is usually made of stainless steel or ceramic material. It has no covering. If the firepot falls or is knocked over, the burning gel fuel can spread onto people or combustible items. Unlike candles, oil lamps, or other outdoor lighting accessories that require a wick to produce a flame, firepots do not need a wick to sustain a flame; so when a firepot is knocked over, the fuel and fire will spread readily.

Firepots are available in a variety of shapes and sizes. The geometry of some may make them more likely to tip over if the firepot, or the surface on which it sits, is bumped accidentally. We conducted tests of several tip-over scenarios. In these tests, when firepots placed on a flat surface were tipped, fuel was ejected up to 5 feet. When firepots were positioned on heights simulating placement on a table or bar, as reported in the incident data, a firepot falling from a 31-inch height splattered fuel approximately 5 feet, and falls from a 42-inch height splattered fuel about 9 feet. Consumers are not likely to anticipate the significant distance that gel fuel can spatter. We are aware of three firepot tip-over incidents injuring six victims in which four victims were hospitalized.

The burn cup sits within the firepot and is not secured to the base of the firepot by any means. We are aware of six incidents in which the burn cup ejected from the firepot. Staff did not observe this scenario in laboratory testing. One possible explanation for this scenario is that while the firepot is in use with the gel fuel, it reaches very high temperatures, which produces increased pressure within the firepot. This build up of pressure, without adequate venting, may cause the burn cup to eject.

b. Warnings and Use

We examined 11 samples of firepots to assess the warnings provided with the products and to consider hazards related to how consumers are likely to use firepots. Most of the firepots that we examined have a warning directing the consumer not to leave a burning firepot unattended and to keep it away from children and pets. Some firepots instruct the user to place the firepot on a flat and level surface only. Most of the firepots that we examined had a warning directing the user not to add fuel to an open flame and to check that the flame is out before refueling.

These warnings were usually on the package or in the instructions enclosed in the package. One sample had the warning on the product, but it was not affixed permanently and would be removed by the consumer before using the firepot because the warning blocks the burn cup. None of the samples had permanent warnings about refilling that could be noticed each time the product is used. We believe that the warnings we examined are not likely to be effective. They were not conspicuous due to their placement, lack of visual differentiation, and lack of pictorial symbols. Moreover, only one warning label clearly stated that the consequence of not following the warning was severe burns.

Consumers may not observe and follow warning labels on or accompanying firepots, even if the warnings are present. In general, the safer a product is perceived to be, the less likely people are to read the instructions and warnings that accompany it. Also, the more familiar people are with a product, the less likely they are to read instructions and warnings. Firepots appear to be simple and familiar decorative accessories that are easy to use. They may resemble familiar and less hazardous products, such as candle holders. In addition, it may be difficult for consumers to comply with a warning not to refill the firepot while it is still hot or burning. As discussed in section D.2.a. of this preamble, gel fuel produces a nearly invisible flame that consumers may not detect. In 26 of the 49 incidents that reportedly occurred while a consumer was refilling a firepot, consumers reported that the flame was out, that there were no visible flames, or that no gel fuel was left in the firepot. In 10 of the refilling incidents, consumers acknowledged that the flame was low, the pot was hot, or that there was a small amount of gel fuel left in the pot before they refilled it. In these situations, consumers may be refilling the firepots because they are not sufficiently knowledgeable about the behavior of alcohol-based fuels, and they identify firepots with familiar and less hazardous products.

2. Gel Fuel

a. Physical and Chemical Characteristics

We examined the physical and chemical properties of 18 samples of gel fuel to evaluate how these characteristics may contribute to the firepot incidents that have been reported. The gel fuel samples that we analyzed were composed primarily of alcohol (approximately 80 percent alcohol with the balance being water, gelling agent, and additives like citronella). Most contained ethanol and/or IPA. Gel fuel is flammable. According to regulations under the Federal Hazardous Substances Act (''FHSA''), a substance is considered flammable if it has a flashpoint above 20 °F and below 100 °F. 16 CFR 1500.3(c)(6)(ii). The flashpoint for the samples that we examined was less than or equal to 74 °F. (Two samples that contained butane had flashpoints of 32 °F and 36 °F.) Under a widely recognized classification system, gel fuel would also be considered a Class 1 Flammable Liquid. See National Fire Protection Association (''NFPA'') 30, *Flammable and Combustible Liquids Code,* Chapter 4.

Gel fuel produces a clean-burning flame and generates very little smoke or soot. This makes the flame less visible than flames produced by other types of fuel, particularly if it is burning during daylight. Moreover, as the gel fuel in the burn cup burns, the flames become more obscured in the bottom of the cup. A small flame or smoldering combustion of the spent gel fuel may remain in the base of the burn cup when the fuel is almost exhausted. This can mislead consumers into thinking that the firepot's flame is out and needs more fuel. If the consumer adds fuel to the firepot when there is a small flame or smoldering combustion in the burn cup, the gel fuel can easily ignite.

Gel fuel has a higher viscosity than liquid fuels, such as gasoline or kerosene. Its consistency is similar to molasses or honey. This higher viscosity means that a pool of spilled gel fuel will not spread as widely as a less viscous liquid. However, the higher viscosity increases the risk of injury with these burning fuels. Most incidents involved burning gel fuel that contacted victims when the fuel exploded, was ejected, or spilled. Due to its viscosity, burning gel fuel, when it contacts skin or clothing, sticks to that surface more than liquid fuel. Burning gel fuel is difficult to extinguish with the usual methods used to put out a fire. The reaction that most individuals would have when they are on fire would be to ''stop, drop, and roll.'' However, this maneuver is ineffective because patting the flaming gel fuel actually spreads the burning surface. Using water to extinguish a gel fuel fire also is not likely to be effective because, to be successful, a significant amount of water would be needed, and initially pouring water on the fire is likely to spread the burning gel fuel over a larger surface area.

b. Characteristics of Gel Fuel Containers

Most of the reported incidents occurred when a consumer was in the process of pouring more gel fuel into a firepot that was, or recently had been, in use. We examined the gel fuel containers and assessed how the combination of the properties of the gel fuel and characteristics of the gel fuel containers may contribute to the risk of injury in these incidents.

In the majority of incidents, consumers reported ''explosions'' and/or ejecting of burning alcohol fuel during refilling, or bottles ''exploding'' after refilling. These phenomena can be explained by understanding the chemistry within the vapor space (also called the ''headspace'') of the bottle. (See Figure 1.) The headspace is the area inside the container that is above the level of the fuel in the container. With alcohol-based gel fuel at room temperature, the concentration of the alcohol vapors in the headspace is above the lower flammable limit (''LFL'') and below the upper flammable limit (''UFL''). This means that, at room temperatures, there is an explosive concentration within the alcohol fuel bottle headspace. When exposed to an open flame, this atmosphere will cause an explosion and eject burning fuel. For this to happen, the bottle must have a sufficient amount of gaseous headspace but still have a substantial amount of fuel remaining. The amount of gaseous headspace governs the energy of the explosion, which then ejects the remaining gel fuel. If the bottle is in an orientation where fuel is near the bottle throat and a flame is able to penetrate into the headspace igniting the explosive atmosphere, an explosion can occur, which rapidly increases the pressure inside the bottle and ejects the remaining liquid or gel fuel, igniting it as it exits. Testing at CPSC has confirmed this scenario.

Most gel fuel containers are open-mouth containers that resemble water bottles or containers used for storing cleaning liquids. They do not have safety features, such as venting, grounding, or flame arrestors to prevent ignition of flammable vapors. Furthermore, while a majority of the incidents involved refueling, there are incidents, such as tipovers, can ejections, and explosions, which would not be addressed by requiring safety features on the gel fuel containers.

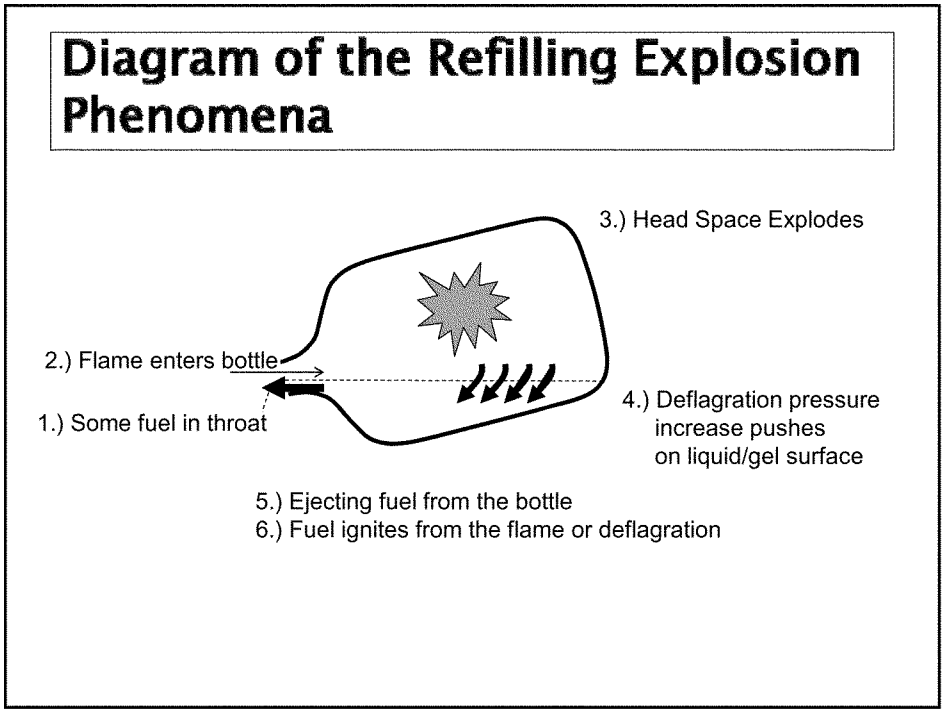

Figure 1. Diagram of the most likely cause of flaming gel fuel ejecting while refilling in the presence of a flame.

c. Warnings and Use of Gel Fuel

As noted, gel fuel is flammable. Under the FHSA, it is required to have labeling that warns of the flammability hazard. 15 U.S.C. 1261(p). Almost all of the gel fuel samples we examined complied with the warning label requirements of the FHSA. However, we found that these warnings do not effectively address the hazards posed by gel fuel. As with the firepot warnings, the gel fuel warnings are not conspicuous. The majority of gel fuel bottles that we examined warn against refilling a firepot. However, this warning is only one element in a long list of directions for use or that is included in the list of generic warnings, such as: ''keep away from children'' or ''never leave a burning fire pot unattended.'' The refilling warnings are not differentiated from other statements on the containers, and they do not have any pictorial symbols. None of the warnings state the consequence of refilling a firepot while it is hot or burning.

As with firepots, consumers are not likely to perceive the hazard posed by gel fuel. Gel fuel containers often are packaged in containers that look familiar, resembling water bottles. They do not have any special closures, such as child-resistant packaging, that might alert a consumer to the potential hazard. The containers may have phrases such as ''environmentally friendly,'' ''eco-friendly,'' ''live safe, burn safe,'' and ''non-toxic'' that may reduce the likelihood that a consumer would consider the substance to be hazardous. This may lead consumers to ignore warnings on the product.

E. Relevant Statutory Provisions

We are conducting this proceeding under the Consumer Product Safety Act (''CPSA''). 15 U.S.C. 2051 *et seq.* Firepots and gel fuel are consumer products. *Id.* 2052(a)(5). Under section 7 of the CPSA, the Commission can issue a consumer product safety standard if the requirements of such a standard are ''reasonably necessary to prevent or reduce an unreasonable risk of injury associated with [a consumer product].'' *Id.* 2056(a). Such a standard must be expressed in terms of performance requirements or requirements for warnings or instructions. *Id.* Under section 8 of the CPSA, the Commission can issue a rule declaring a product to be a banned hazardous product when the Commission finds that a consumer product is being, or will be, distributed in commerce and there is no feasible consumer product safety standard that would adequately protect the public from the unreasonable risk associated with the product. *Id.* 2057.

Section 9 of the CPSA sets out the procedure that the Commission must follow in order to issue a standard or a banning rule. The rulemaking may begin with an ANPR that identifies the product and the nature of the risk of injury associated with the product, summarizes the regulatory alternatives being considered by the Commission, and provides information about any relevant existing standards and a summary of the reasons the Commission believes they would not eliminate or adequately reduce the risk of injury. The ANPR also must invite comments concerning the risk of injury and regulatory alternatives and invite submission of an existing standard or a statement of intent to modify or develop a voluntary standard to address the risk of injury. *Id.* 2058(a). The next step in the rulemaking would be for us to review comments submitted in response to the ANPR and decide whether to issue a proposed rule along with a preliminary regulatory analysis. The preliminary regulatory analysis would describe potential benefits and costs of the proposal, discuss reasonable alternatives, and summarize the potential benefits and costs of the alternatives. *Id.* 2058(c). We would then review comments on the proposed rule and decide whether to issue a final rule along with a final regulatory analysis. *Id.* 2058(d)–(g).

F. Relevant Existing Standards

We are not aware of any existing mandatory or voluntary standards that would address the risk of injury associated with firepots and gel fuel. Other federal agencies have regulations concerning Class I flammable liquids. For example, the U.S. Department of Transportation (''DOT'') sets out certain requirements for storage and transportation of these substances. *See, e.g.,* 49 CFR parts 172 through 177. The Occupational Safety and Health Administration (''OSHA'') regulates these substances in the workplace. 29 CFR 1910.106. These regulations do not establish any requirements related to the risk of injury identified in the reported incidents. NFPA 30, *Flammable and Combustible Liquids Code,* is a voluntary standard concerning classification, storage, and handling of flammable and combustible liquids. It does not directly address the firepot gel fuel incidents. However, some of the provisions concerning containers for storing flammable liquids could provide guidance for requirements for gel fuel containers.

G. Regulatory Alternatives

We are considering the following alternatives to address the risk of injury associated with firepots and gel fuel:

1. *Mandatory standard.* We could issue a rule establishing performance requirements for firepots and/or gel fuel to prevent or reduce an unreasonable risk of injury associated with these products. For example, possible performance requirements for firepots might include stability requirements to address the tip-over hazard. Possible requirements for gel fuel might include performance requirements for flame visibility to increase consumers' awareness of the presence of a flame. To address the refueling hazard, one option may be requirements for gel fuel containers to prevent ignition of the flammable headspace or to require venting of the container.

2. *Mandatory labeling rule.* We could issue a rule setting requirements for labeling and/or instructions for firepots and/or gel fuel if we found that such warnings and instructions could sufficiently reduce the risk of injury identified in the reported incidents.

3. *Voluntary standard.* If we determined that a voluntary standard was adequate to address the risk of injury associated with firepots and gel fuel, we could defer to the voluntary standard in lieu of issuing a mandatory rule.

4. *Banning rule.* We could issue a rule declaring firepots and/or gel fuel to be banned hazardous products if we found that no feasible consumer product safety standard would adequately protect the public from the unreasonable risk of injury associated with these products.

5. *No regulatory action.* We could take no regulatory action, but continue to rely on corrective actions under section 15 of the CPSA to address the risk of injury associated with firepots and gel fuel.

H. Solicitation of Information and Comments

This ANPR is the first step of a proceeding that could result in a mandatory rule for firepots and gel fuel. We invite interested persons to submit comments on any aspect of the alternatives discussed above.

In accordance with section 9(a) of the CPSA, we also invite comments on:

1. The risk of injury identified by the Commission, the regulatory alternatives being considered, and other possible alternatives for addressing the risk.

2. Any existing standard or portion of a standard that could be issued as a proposed regulation.

3. A statement of intention to modify or develop a voluntary standard to

address the risk of injury discussed in this notice, along with a description of a plan (including a schedule) to do so.

In addition, we invite comments and information concerning the following:

1. What products should we include in or exclude from the rulemaking? For example, gel fuels tend to use ethanol, isopropanol, and ethanol and isopropanol mixtures. Specifying the type of alcohol used in gel fuel would provide clarity as to the scope of any rule on gel fuel. However, if a gel fuel manufacturer could substitute a different alcohol or chemical for ethanol or isopropanol, a rule that was specific with respect to the type of alcohol used might then be inapplicable.

2. What possible warnings or instructions for firepots and/or gel fuel could address the risk of injury?

3. What possible performance requirements for firepots, gel fuel, and/or gel fuel containers could address the risk of injury? Examples of possible performance requirements are a stability test for firepots making them less likely to tip over or a flame visibility test for gel fuel so that the flame would be more apparent.

4. What are the potential costs to manufacturers of labeling or performance requirements?

5. What are the potential benefits of a rule that would require warnings or instructions?

6. What are the potential benefits of a rule that would establish performance requirements for firepots, gel fuel, and/or gel fuel containers?

7. What is the potential economic impact of banning firepots and/or gel fuel? What alternative products would remain available?

8. What is the potential impact of a rule on small entities?

9. What other uses exist for pourable gel fuels other than the firepots covered by the ANPR and the fireplaces that are expressly not covered by this ANPR? What is the potential impact on gel fuel sold for stationary fireplaces of any rule?

10. Should pourable gel fuels ever be allowed to be used in open containers or open flame applications that might allow for spillage or splattering of gel fuels?

11. Do single-use cans of gel fuel present the same hazard as pourable gel fuels? Should single-use cans be treated differently under a rule?

Dated: December 20, 2011.

Todd A. Stevenson,

Secretary, Consumer Product Safety Commission.

[FR Doc. 2011–32908 Filed 12–23–11; 8:45 am]

BILLING CODE 6355–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Parts 4, 5, 16, 33, 35, 157, 348, 375, 380, 385 and 388

[Docket No. RM12–2–000]

Filing of Privileged Materials and Answers to Motions

AGENCY: Federal Energy Regulatory Commission, Energy.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Commission proposes changes in its rules and regulations relating to the filing of privileged material, in keeping with the Commission's efforts to comply with the Paperwork Reduction Act, the Government Paperwork Elimination Act, and the E-Government Act of 2002. First, the Commission will establish for filing purposes two categories of privileged material: Privileged material and Critical Energy Infrastructure Information. This revision will expand the ability to file electronically by permitting electronic filing of materials subject to Administrative Law Judge protective orders. Second, the Commission proposes to revise its regulations to provide a single set of uniform procedures for filing privileged materials. This effort is being undertaken as part of the Commission's effort to reassess and streamline its regulations to ensure that they are efficient, effective and up to date.

Also, the Commission proposes to revise Rule 213(d) of its Rules of Practice and Procedure, which establishes the timeline for filing answers to motions, to clarify that the standard fifteen day reply time will not apply to motions requesting an extension of time or a shortened time period for action. Instead, the Commission proposes to set the time for responding to such motions at five days, unless another time period is established by notice based on the circumstances.

DATES: Comments are due February 27, 2012.

ADDRESSES: Comments, identified by docket number, may be filed in the following ways:

- Electronic Filing through *http://www.ferc.gov.* Documents created electronically using word processing software should be filed in native applications or print-to-PDF format and not in a scanned format.
- *Mail/Hand Delivery:* Those unable to file electronically may mail or hand-deliver comments to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street NE., Washington, DC 20426.
- *Instructions:* For detailed instructions on submitting comments and additional information on the rulemaking process, see the Comment Procedures Section of this document.

FOR FURTHER INFORMATION CONTACT:

Christopher Cook (Technology/Procedural Information), Office of the Executive Director, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, Telephone: (202) 502–8102.

Richard M. Wartchow (Legal Information), Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, Telephone: (202) 502–8744.

SUPPLEMENTARY INFORMATION:

Before Commissioners: Jon Wellinghoff, Chairman; Philip D. Moeller, John R. Norris, and Cheryl A. LaFleur.

Notice of Proposed Rulemaking

(Issued December 16, 2011.)

1. The Commission proposes changes in its rules and regulations relating to the filing of privileged material,[1] in keeping with the Commission's efforts to comply with the Paperwork Reduction Act,[2] the Government Paperwork Elimination Act[3] and E–Government Act of 2002.[4] First, the Commission proposes to establish only two categories for filing privileged material: Privileged and Critical Energy Infrastructure Information (CEII). This change will expand the ability to file electronically by permitting electronic filing of material subject to protective orders in proceedings set for hearing before Administrative Law Judges (ALJ).

2. Second, the Commission proposes to revise section 388.112 of its

[1] The revised regulations explain that, for the purposes of the Commission's filing requirements, information subject to an outstanding claim of exemption from disclosure under the Freedom of Information Act (FOIA) will be referred to as privileged. *See* proposed section 388.112(a)(1). Thus, material that is filed pursuant to any claim that it is privileged, confidential, commercially sensitive or Critical Energy Infrastructure Information (CEII), or otherwise constitutes material for which an exemption may be asserted under the Freedom of Information Act will be referred to as privileged. 5 U.S.C. 552; 18 CFR 388.107. One distinction outside of the proposed section 388.112 context between materials claimed to be privileged and those claimed to be CEII is that materials designated privileged may be accessed in accordance with 18 CFR 388.108, and those designated CEII in accordance with 18 CFR 388.113.

[2] Public Law 104–13, 109 Stat. 163 (1995).

[3] Title XVII, Public Law 105–277, 112 Stat. 2681 (1998).

[4] Public Law 107–347, 116 Stat. 2899 (2002).

regulations to provide a single set of uniform procedures for filing materials for which privilege is claimed in initial filings before the Commission. Under this revision, filers claiming privileged treatment will be required to include a protective agreement along with the filing and must provide the material for which privilege is claimed to intervening parties who sign the agreement. This revision will expedite the process by which privileged material is exchanged in administrative proceedings and will help facilitate the Commission's ability to review and process such filings. This effort is being undertaken as part of the Commission's effort to reassess and streamline its regulations to ensure that they are efficient, effective and up to date.[5]

3. Third, the Commission proposes conforming revisions to several sections of its regulations to ensure that privileged materials are treated consistently and to bring the regulations up to date. These proposals will remove a significant paper filing requirement in the regulations (subject to the exceptions discussed below) and permit electronic filing of privileged documents in uniform formats using software that is readily available and easy to use.[6]

4. Also, the Commission proposes to revise Rule 213(d) of its Rules of Practice and Procedure, which establishes the timeline for filing answers to motions, to clarify that the standard fifteen day reply time will not apply to motions requesting an extension of time for a person to take action (for which the existing time for compliance may fall fifteen days or fewer from the date of filing) or a shortened time period for action.[7] Instead, the time for responding to such motions will be set at five days, unless the Commission establishes another time period by notice based on the circumstances.

5. The Commission seeks comment on these proposals, which are described more fully below.[8]

I. Background

6. In 2000, the Commission first permitted filers to use the Internet for submission of documents to the Commission.[9] Such submissions were limited to categories of documents specified by the Secretary of the Commission (Secretary), with the intention of gradually expanding the range of eligible documents.[10] In 2007, the Commission implemented eFiling 7.0 which permitted a much broader range of documents to be submitted through the eFiling interface.[11] In 2008, the Commission, in collaboration with the wholesale electric and gas quadrants of the North American Energy Standards Board and representatives from the Association of Oil Pipelines, implemented a set of standards to be used by companies in electronically filing tariff and tariff related documents at the Commission.[12] Under the Commission's regulations, only ''qualified documents'' may be filed via the Internet, and the Secretary is authorized to specify which documents are qualified.[13] A list of qualified documents is published on the Commission's web site.[14] The Secretary also is authorized to issue filing instructions.[15]

7. The eFiling system plays an important role in the Commission's efforts to comply with the Government Paperwork Elimination Act, which requires that agencies provide the option to submit information electronically, when practicable, as a substitute for paper.[16] The Commission's eRegistration system for electronic registration is required for users of its eFiling system and other specified activities.[17] Filing via the Internet is optional for eligible documents.[18] The eFiling system now is receiving a substantial majority of all documents filed at the Commission. The system is accessible through the Commission's web site at *http://www.ferc.gov/docs-filing/efiling.asp.*

8. Currently, the Commission accepts through electronic filing all documents, including privileged and CEII material,[19] except for documents submitted pursuant to an ALJ's protective order and some forms.[20] The Commission's current procedures for submitting materials subject to ALJ protective orders require filers to submit an original copy of the document in hard copy or on electronic media, along with the requisite number of copies, pursuant to section 388.112 of the Commission's regulations. While the Commission permits electronic filing of documents subject to a claim of privilege not subject to an ALJ protective order, the Commission currently does not have a standard set of procedures for submitting such documents.

9. The Commission's complaint and notice regulations (sections 385.206 and 385.213) also contain detailed requirements for submission of privileged materials. Under these regulations, a party filing a complaint or an answer with privileged and/or confidential material is required to submit a request for privileged treatment of documents, a public redacted document, a privileged unredacted document, and a proposed form of protective agreement.[21] The filer must serve the public, redacted copy on appropriate parties and other entities required to be served and must provide a copy of the non-public, unredacted material to any participant or entity whose name is on the official service list (compiled by the Secretary) and who has signed the protective agreement.

10. In recent years, the Commission has been receiving a larger number of requests for privileged treatment of documents not associated with

[5] *See* Chairman J. Wellinghoff's July 11, 2011 News Release, ''FERC to Institute Public Review of Regulations.''

[6] See Rule 2004, 18 CFR 385.2004, providing that filings conform to the requirements posted on the Commission's web site at *http://www.ferc.gov.*

[7] 18 CFR 385.213(d) (providing for answers to motions to be filed in 15 days unless otherwise ordered).

[8] In addition to the proposed amendments provided following this preamble, an informational comparison has been prepared showing proposed changes to the current regulations in redline and strikeout format. This informational comparison will be provided separately in this docket.

[9] *Electronic Filing of Documents,* Order No. 619, 65 FR 57088 (Sept. 21, 2000), FERC Stats. & Regs. ¶ 31,107 (2000).

[10] *See* Rule 2003(c) of the Commission's Rules of Practice and Procedure, 18 CFR 385.2003(c).

[11] *Filing Via the Internet,* Order No. 703, FERC Stats. & Regs. ¶ 31,259 (2007) (amending Rule 2003(c)).

[12] *Electronic Tariff Filings,* Order No. 714, FERC Stats. & Regs. ¶ 31,276 (2008).

[13] Rule 2003(c), 18 CFR 385.2003(c).

[14] *See http://www.ferc.gov/docs-filing/efiling/docs-efiled.asp.*

[15] Rule 2003(c)(1)(ii), 18 CFR 385.2003(c)(1)(ii); see *http://www.ferc.gov/docs-filing/efiling/user-guide.asp.*

[16] Public Law 105–277, Sec. 1702–1704 (1998); see OMB Circular A–130 Paragraph 8.a.1(k).

[17] 18 CFR 390.1 and 18 CFR 390.2.

[18] Rule 2001(a) of the Commission's Rules of Practice and Procedure, 18 CFR 385.2001(a).

[19] *See Critical Energy Infrastructure Information,* Order No. 630, FERC Stats. & Regs. ¶ 31,140, *order on reh'g,* Order No. 630–A, FERC Stats. & Regs. ¶ 31,147, at P 65 (2003) (providing that privileged and CEII material may be filed under 18 CFR 388.112 on electronic media—including compact discs, computer diskettes, and tapes—and noting that the Commission would accept non-public documents through its electronic filing process at some point in the future).

[20] Order No. 703, FERC Stats. & Regs. ¶ 31,259 at P 9. The following are submitted through eForms: FERC Form No. 1, FERC Form No. 2, FERC Form No. 2–A, FERC Form No. 3–Q, FERC Form No. 6, FERC Form No. 6–Q, FERC Form No. 60, FERC Form No. 714, and Electric Quarterly Reports. FERC Form 1–F is currently not included in eForms.

[21] *See Astoria Generating Co., L.P.* v. *New York Independent System Operator, Inc.,* 136 FERC ¶ 61,155, at P 25 (2011) (*Astoria*). The Commission's filing requirements for CEII and privileged material are provided in the ''Submission Guidelines'' available via the eFiling link on the Commission's web site at *http://www.ferc.gov.*

complaints or answers.[22] The request for privileged treatment has in some cases delayed the ability of the Commission to process such filings because the Commission was required to issue special orders or notices to ensure that parties could obtain access to the privileged material they needed in order to be able to participate in the proceeding.[23] Particularly, in cases involving statutory deadlines, such delays affect the ability of parties to submit timely, well informed comments, as well as the Commission's ability to process those comments.

II. Discussion

A. Proposed Regulations for Filing Privileged Materials

11. The Commission is proposing to revise its regulations to (1) provide two categories of privileged material for filing purposes, namely categories for privileged and CEII materials, (2) set up a uniform process (based upon the current complaint/answer process in Rules 206 and 213) [24] for filing and accessing privileged materials in most proceedings with a right to intervene, and (3) consolidate the Commission's regulations for submitting privileged materials in proposed section 388.112.

12. Under current regulations and procedures, material filed pursuant to protective orders in hearings before Administrative Law Judges must be filed on paper.[25] The Commission is proposing to eliminate the protected category of material and establish only two categories of non-public material: privileged or CEII. This revision will permit material filed pursuant to ALJ protective orders to be treated the same as any other privileged information; that is, this material should be filed as either privileged or CEII material. This proposal is in keeping with this Commission's intent to continue decreasing our reliance on paper documents, as far as practicable, and to continue to upgrade eFiling capabilities in furtherance of the Commission's responsibilities under the Government Paperwork Elimination Act.[26]

13. The Commission also proposes to revise section 388.112 of its regulations to establish standardized procedures for handling the filing of privileged materials in initial filings.[27] In particular, for complaints and proceedings where a right to intervention exists, the Commission is proposing to utilize the same process for filing privileged information that is currently found in the Commission's complaint and answer rules (sections 385.206 and 385.213).[28] The complaint process is the model for the procedures under proposed section 388.112, which, upon adoption, may be used to file and access privileged and CEII material in all types of proceedings where a right to intervene exists. Under this process (subject to the exceptions discussed below), the participant requesting privileged or CEII treatment will submit a public request for privileged or CEII treatment of documents, a public document with privileged and CEII information redacted, a privileged unredacted document, and a proposed form of protective agreement. The filer must serve the public, redacted copy on appropriate persons and must provide a copy of the unredacted document to participants and persons who have filed a notice of intervention or motion to intervene and signed the protective agreement.[29]

14. Filers that have specific reasons for not providing privileged or CEII material to a person or persons may file with the Commission an objection with a justification for not providing such information. In statutory proceedings with statutory deadlines, such as rate filings under section 4 of the Natural Gas Act or section 205 of the Federal Power Act, filers that choose not to provide privileged or CEII information to all or certain persons should be aware that a failure to provide the privileged information pursuant to a protective agreement may result in a suspension of the filing, rejection or other delays in the processing of the application.[30]

15. We discuss below the specific changes to section 388.112, as well as the procedures that will apply to requests for privileged or CEII treatment. The Commission seeks comment on its proposal, as described more fully below.

1. Proposed Revisions to Section 388.112

16. In this rulemaking, the Commission proposes to revise and expand section 388.112 of its regulations, which governs requests for privileged treatment, to establish a uniform set of procedures to file all requests for privileged and CEII treatment, privileged materials and accompanying public versions of documents. In addition, the proposed revisions incorporate procedures for releasing privileged information to participants to Commission proceedings, modeled after the filing procedures contained in the Commission's existing complaint procedures.[31] The proposed revisions are as follows:

a. Proposed section 388.112(a)(1) clarifies that the term privileged materials refers to information subject to an outstanding claim of exemption from disclosure under FOIA, including CEII.[32] The proposed changes retain the disclaimer that by treating the documents for which a privilege is claimed as nonpublic, the Commission is not making a determination on the merits as to any claim of privileged or CEII status.[33]

b. The procedures for filing privileged and CEII material in proposed section 388.112(b) retain the requirement that a filer include a justification for privileged treatment in its filing, following the procedures posted on the Commission's Web site at *http://www.ferc.gov*.[34]

c. Following the model in the Commission's complaint rule, proposed section 388.112(b)(1) requires a person requesting privileged or CEII treatment to designate the material as privileged or CEII in an electronic filing, or clearly indicate a request for privileged treatment on a paper filing, using privilege and CEII headings.

d. When requesting privileged treatment of such materials, the proposed regulations require a person filing materials in a complaint

[22] *See ANR Pipeline Co.,* 129 FERC ¶ 61,080 (2009); *PPL Montana, LLC,* 113 FERC ¶ 61,231 (2005).

[23] *See West Deptford Energy, LLC,* 134 FERC ¶ 61,189 (2011) (denying request to limit parties' rights to see documents). *See also PPL Montana, LLC,* 113 FERC ¶ 61,231 (2005); *PJM Interconnection, L.L.C.,* Notice of Filing, Docket No. ER05–10–000 (May 6, 2005), *http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=10542333; PJM Interconnection, L.L.C.,* Notice of Filing, Docket No. ER04–539–002 (April 30, 2004), *http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=10131785*.

[24] 18 CFR 385.206, –.213.

[25] Order No. 703, FERC Stats. & Regs. ¶ 31,259 at P 2, 9, 16; Federal Energy Regulatory Commission eFiling v7.0 User Guide, at 2 (*http://www.ferc.gov/docs-filing/efiling-user-guide.pdf*).

[26] Public Law 105–277, § 1704, 112 Stat. 2681, 2681–750 (1998).

[27] The Commission is not changing procedures or provisions that apply to submission of documents pursuant to an investigation conducted under Part 1b of the Commission's regulations. 18 CFR part 1b; *see also* 18 CFR 385.101(b)(1).

[28] For rulemaking proceedings, interested persons may continue to seek privileged or CEII information through the Commission's existing procedures in 18 CFR 388.108 and 18 CFR 388.113.

[29] *See* proposed section 388.112(b)(2) (ii).

[30] *See* the Commission's Guidelines for Filing Critical Energy Infrastructure Information, noting the potential for rejection of applications in which information is mislabeled as CEII.

[31] 18 CFR 385.206(e).

[32] *See also* 18 CFR 388.107(g); 18 CFR 388.113 (defining CEII materials as exempt from mandatory disclosure under FOIA, providing that CEII be filed under section 388.112(b), and establishing alternative procedures for making CEII available).

[33] *See* proposed section 388.112(c)(i).

[34] *See* the ''Submission Guidelines'' on the eFiling link at *http://www.ferc.gov*.

proceeding or other proceeding in which a right to intervene exists to include a public, redacted copy of the filing and a proposed form of protective agreement [35] to be filed with public status (as denoted in eLibrary). The public version should be prepared with the privileged information redacted to the extent practicable. If a document or filing contains both public and privileged material, the Commission expects filers to prepare and file a public version in which the privileged material has been removed or redacted thereby making the non-privileged portion of a document available for use by the Commission and participants in the proceeding.[36]

e. The proposed regulations provide that a filer must serve the public, redacted version of the filing on the appropriate persons, that is, those required by Commission rule or order, or by law.[37] For materials filed in a complaint proceeding or any proceeding for which a right of intervention exists, the filer must serve the public, redacted materials and proposed form of protective agreement on the entities required to be served.[38]

f. The proposed regulations provide that persons may obtain access to the privileged materials by making a written request to the filer for a copy of the complete unredacted document, including an executed copy of the protective agreement and a statement of its right to party or participant status or a copy of its intervention.[39] The filer is obligated to provide a complete, unredacted copy of the document to a person submitting such a request within 5 days after receipt or file an objection with the Commission.[40]

g. The proposed regulations establish exceptions for landowner lists, certain cultural resources and liquefied natural gas facility (LNG) information, and proceedings set for hearing or settlement procedures in accordance with the Commission's Rules of Practice and Procedure. Thus, filers are not automatically required to provide intervenors with such material.[41] The proposed regulations retain procedures to address practical and confidentiality concerns with the submission of these materials, due to difficulty in copying and manipulating the material (*i.e.,* maps or spreadsheets presenting voluminous data). To that end, the proposed regulations retain provisions permitting the Commission to request full size maps in licensing applications under section 4.32(d) of its rules and regulations.[42]

h. Landowner lists, cultural resource information required in sections 380.12(f) and 380.16(f), LNG information filed under sections 380.12(m) and (o), forms filed with the Commission and other documents not covered under proposed section 388.112 disclosure provisions may be sought pursuant to a FOIA or CEII request, in accordance with section 388.108 or section 388.113, as applicable.

i. Under proposed section 388.112(b)(2)(v), a participant's access to privileged material submitted in a trial-type hearing or for settlement purposes continues to be governed by the presiding official's protective order, according to policies established by the Commission's Office of Administrative Law Judges.[43]

j. For convenience, other regulations containing procedures for filing privileged materials will be revised to reference section 388.112 as the regulation governing all filings containing privileged or CEII material.[44] Consequently, we propose to remove duplicate provisions for filing privileged materials, and consolidate provisions relating to submittal of and access to privileged material in section 388.112.[45] Conforming changes are proposed throughout the Commission's regulations.

2. eFiling Procedures

17. Under the eFiling procedures, when a user accesses the File Upload screen, the user will see tabs for three submission categories: Public, Privileged, and CEII. The current eFiling procedures are not being changed and are consistent with the proposed revisions for filing privileged materials.[46] Filers can upload multiple files under each security class or they may upload .zip files containing numerous files if the files all have the same security class.[47] If a user submits both a redacted and a privileged form of a document, the latter should be submitted as privileged and the former as public. The form of protective agreement should be included with the public version.

18. In some instances, a document may contain portions that are privileged and other portions that constitute CEII. In such an instance, the public, privileged, and the CEII portions should be separated. The CEII portions would be filed as CEII and the privileged portions would be filed separately and designated as privileged.

19. Parties retain the ability to file privileged or CEII material in paper-only format (with the exception of materials subject to our electronic tariff filing requirements), unless otherwise required.[48] With the exception of filings

[35] Proposed section 388.112(b)(2). We intend that the proposed protective agreement will be self implementing and not require action or approval by the Commission. That is, following the proposed procedures discussed below, once a person signs the proposed protective agreement and returns it to the party submitting privileged material, including CEII, the submitter is expected to provide the material promptly to a requester, consistent with proposed section 388.112(b)(2). The Commission's Model Protective Order may be used as a guide for protective agreements, as *available at http://www.ferc.gov/legal/admin-lit/model-protective-order.doc. See also Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities,* Order No. 697, FERC Stats. & Regs. ¶ 31,252, at P 393 (2007).

[36] *Astoria,* 136 FERC ¶ 61,155 at P 25 (requiring the submission of a public redacted copy of documents that contain both privileged and public information).

[37] *See* proposed section 388.112(b)(2)(ii).

[38] *E.g.,* persons to be served under Rule 206(c), 18 CFR 385.206(c) (complaints) or Rule 213, 18 CFR 385.213(c)(5) (answers), or otherwise as appropriate.

[39] Trial Staff, as identified in 18 CFR 385.102(b)(2), should be treated similarly to other persons making a request.

[40] Proposed section 388.112(b)(2)(iv). The Commission uses the term ''privileged'' to refer to items that are claimed to be exempt from disclosure under FOIA. Use of this term is not intended to detract from any person's right to assert a common law privilege, *e.g.,* attorney-client or attorney work product privilege.

[41] *See* proposed section 388.112(b)(2)(vi); *see also Columbia Gas Transmission Corp.,* 128 FERC ¶ 61,050, at P 32 (2009) (finding insufficient need to disclose storage field maps and landowner lists).

[42] 18 CFR 4.32(d).

[43] *See* Part 385 of the Commission's Rules of Practice and Procedure, Subpart D, 18 CFR 385.401, *et seq.* (hearing procedures), and 18 CFR 385.602, *et seq.*

[44] Changes to consolidate and supersede current procedures for filing privileged material are proposed to 18 CFR 33.8(a) and 33.9 (merger procedures), 18 CFR 35.37(f) (market based rate applications), 348.2(a) (oil pipeline market power application procedures), 380.12(f)(4) and 380.16(f)(4) (environmental reports for Natural Gas Act and Federal Power Act section 216 applications), Rule 206, 18 CFR 385.206(e) (complaint procedures), and Rule 213, 18 CFR 385.213(c)(5) (answers). In addition, changes for clarity and to reflect the consolidation of privileged filing procedures are proposed to 18 CFR 4.39(e), 5.29(c), 16.8(g), 157.21(h), 157.34(d)(4), and 385.606(f) and (j), and changes are proposed to 18 CFR 388.113(d) (1) and (2) to reference procedures in paragraph (d)(4).

[45] In certain instances, we have kept the reference as a guide to practitioners in a particular Commission program.

[46] *See* Order No. 703, FERC Stats. & Regs. ¶ 31,259 at P 12–14 (discussing procedures).

[47] A .zip file cannot contain other embedded .zip files or .exe files. For ease of access, all components of a document (public, privileged, and/or CEII) are linked and made available under the Document Components tab in eLibrary, with each component assigned an accession number and appropriate security designation.

[48] Filers submitting paper filings should conform their filings to the requirements for paper filing posted on the Commission's Web site, *http://www.ferc.gov,* pursuant to Rule 2004. 18 CFR 385.2004.

by regulated entities subject to our eTariff requirements,[49] filers who do not wish to use eFiling need not do so. Filers are not permitted to split their filings into an electronic component and a paper component, as the Commission cannot assume the responsibility for merging paper and electronic components of a single filing.

3. Miscellaneous Revisions and Merger Application Requirements

20. The Commission has reviewed its existing regulations and proposes to revise various provisions to bring them up to date with the Commission's practices and ensure clarity and consistency with the revisions proposed herein. Generally, we are proposing revisions to reflect the fact that there will be only one regulation for submission of privileged materials, proposed section 388.112.

21. Accordingly, the Commission proposes to revise its requirements for filing merger applications to likewise make these regulations dovetail with the proposed filing requirements for privileged materials. We propose to remove from section 33.8 provisions specific to the merger program that relate to privileged materials, including provisions providing for the number of non-public copies to be filed when applicants file privileged material. These merger specific provisions will be superseded by proposed section 388.112.

22. Furthermore, we propose to remove the requirement in section 33.8 establishing the number of copies to be submitted and propose that applicants be required to submit their application or petition in accordance with filing procedures posted on the Commission's Web site at *http://www.ferc.gov*.[50] These procedures were recently updated to include a requirement that 3 courtesy copies of an application be delivered to the Office of Energy Market Regulation (OEMR) for the use of the merger analysts (including public and non-public format, if applicable, and copies of CDs or other digital media containing the studies and competitive analyses required by 18 CFR 33.3 and 33.4).[51] Once section 33.8 is revised, applicants will only need to file the number of copies specified in the filing procedures posted on the Web site, and provide the courtesy copies to OEMR.

B. Rule 213(d)—Proposed Timeline for Responding to Motions Requesting Extensions of Time

23. Another procedural issue recently has arisen which highlights the need to revise the Commission's regulations regarding the time period for filing answers to motions seeking extensions of time. Under Commission regulations, the standard time for filing an answer to a motion is 15 days, including motions requesting procedural relief such as an extension of time.[52] In many cases, filers do not make such filings until less than 15 days remains before the substantive filing is due, and the Commission, therefore, frequently has less than 15 days on which to act on such motions.[53] There also may be cases in which filers make the request outside of the 15 day period, but, for planning purposes, need to know whether their request will be granted. In most cases, such procedural filings are not controversial or complex, so any issues that might arise can be addressed with a shorter answer period. The Commission therefore proposes to revise Rule 213(d) to provide that answers to motions requesting an extension of time as well as motions seeking to expedite a deadline, that is, shorten the period of time in which action is to occur, will be due five days[54] from the date on which the motion was filed, unless otherwise ordered.[55]

24. Given the lack of complexity attendant to such motion filings, the five-day shortened notice period appears to strike a reasonable balance between the interests of those needing to request relief on short notice and those having to respond to such motions. The Commission, however, seeks comment on whether additional or less time would effect a better balance of interests.

25. In addition, a related change is being proposed to the Secretary's delegation authority under 18 CFR 375.302(b) to revise the regulation to make clear the delegated authority of the Secretary of the Commission to address shortened answer periods for requests for extension of time. The delegated authority of other office directors also permits them to respond to such requests.[56] Exercise of such authority will help expedite requests for extension of time.

III. Information Collection Statement

26. Office of Management and Budget (OMB) regulations require OMB to approve certain information collection requirements imposed by agency rule.[57] This proposed rule does not contain any information collection requirements and compliance with the OMB regulations is thus not required. For those filers of certain privileged material that now choose to file electronically there should be a reduction in burden due to the efficiencies and ease associated with electronic submission. The Commission is submitting a copy of this proposed rulemaking to OMB for informational purposes.

IV. Environmental Analysis

27. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant adverse effect on the human environment.[58] This proposed rule would not represent a major federal action having a significant adverse effect on the quality of the human environment under the Commission's regulations implementing the National Environmental Policy Act. Part 380 of the Commission's regulations lists exemptions to the requirement to draft an Environmental Analysis or Environmental Impact Statement. Included is an exemption for procedural, ministerial or internal administrative actions.[59] This proposed rulemaking is exempt under that provision.

[49] Under the Commission eTariff procedures, every attachment must have an Attachment Security Level code for three submission categories: Public, Privileged, and CEII. The current Attachment Security Level codes are not being changed and are consistent with the proposed revisions for filing privileged materials. *Implementation Guide for Electronic Filing of Parts 35, 154, 284, 300, and 341 Tariff Filings,* found on the Commission's Web site: *http://www.ferc.gov/docsfiling/etariff/implementation-guide.pdf.*

[50] *See also* proposed section 33.8. The ''Quick Reference Guide for Paper Submissions'' (revised Oct. 1, 2011) adopted the courtesy copy requirement for merger applications and is available via the Documents and Filing section of *http://www.ferc.gov.*

[51] 18 CFR 385.2004. This is a reduction of the requirement to file 7 copies.

[52] Authority to act on motions for extensions of time is delegated to the Secretary of the Commission and to Office Directors. 18 CFR 375.302(f); 375.303(b)(1)(ii); 375.307(b)(1)(ii); 375.308(c)(4).

[53] *See Black Oak Energy, L.L.C.* v. *PJM Interconnection, L.L.C.,* 131 FERC ¶ 61,024, at P 29, 43 (2010) (denying rehearing of Commission's grant of extension of time for failure to provide 15 days for answer).

[54] Pursuant to Rule 2007, if the day for responding falls on a weekend or other day on which the Commission is closed, the response is due by the close of the next day on which the Commission remains open. *See* 18 CFR 385.2007(a)(2). The Commission intends that, subject to Rule 2007, answers would be filed in five calendar days.

[55] The Commission ordinarily will not issue a notice of the request for extension or expedited treatment, since parties will be served with such requests.

[56] *See* 18 CFR 375.307(b)(1)(ii).

[57] 5 CFR 1320.12.

[58] *Regulations Implementing the National Environmental Policy Act of 1969,* Order No. 486, 52 FR 47897 (Dec. 17, 1987), FERC Stats. & Regs. ¶ 30,783 (1987).

[59] 18 CFR 380.4(1) and (5).

V. Regulatory Flexibility Act Certification

28. The Regulatory Flexibility Act of 1980 (RFA) [60] generally requires a description and analysis of proposed rules that will have significant economic impact on a substantial number of small entities. The RFA mandates consideration of regulatory alternatives that accomplish the stated objectives of a proposed rulemaking while minimizing any significant economic impact on a substantial number of small entities. The Small Business Administration's (SBA) Office of Size Standards develops the numerical definition of a small business.[61] The SBA has established a size standard for electrical utilities, stating that a firm is small if, including its affiliates, it is primarily engaged in the transmission, generation, and/or distribution of electric energy for sale and its total electric output for the preceding twelve months did not exceed four million MWh.[62]

29. This proposed rule concerns procedural matters and is expected to increase the ease and convenience of filing.[63] The Commission certifies that it will not have a significant economic impact upon participants in Commission proceedings. An analysis under the RFA is not required.

VI. Comment Procedures

30. The Commission invites interested persons to submit comments on the matters and issues proposed in this notice to be adopted, including any related matters or alternative proposals that commenters may wish to discuss. Comments are due February 27, 2012. Comments must refer to Docket No. RM12–2–000, and must include the commenter's name, the organization they represent, if applicable, and their address in their comments.

31. The Commission encourages comments to be filed electronically via the eFiling link on the Commission's Web site at *http://www.ferc.gov.* The Commission accepts most standard word processing formats. Documents created electronically using word processing software should be filed in native applications or print-to-PDF format and not in a scanned format. Commenters filing electronically do not need to make a paper filing.

32. Commenters that are not able to file comments electronically must send an original of their comments to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street NE., Washington, DC 20426.

33. All comments will be placed in the Commission's public files and may be viewed, printed, or downloaded remotely as described in the Document Availability section below. Commenters on this proposal are not required to serve copies of their comments on other commenters.

VII. Document Availability

34. In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through the Commission's Home Page (*http://www.ferc.gov*) and in the Commission's Public Reference Room during normal business hours (8:30 a.m. to 5 p.m. Eastern time) at 888 First Street NE., Room 2A, Washington, DC 20426.

35. From the Commission's Home Page on the Internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

36. User assistance is available for eLibrary and the Commission's Web site during normal business hours from FERC Online Support at (202) 502–6652 (toll free at 1–(866) 208–3676) or email at *ferconlinesupport@ferc.gov,* or the Public Reference Room at (202) 502–8371, TTY (202) 502–8659. Email the Public Reference Room at *public.referenceroom@ferc.gov.*

List of Subjects

18 CFR Part 4

Administrative practice and procedure, Electric power, Reporting and recordkeeping requirements.

18 CFR Part 5

Administrative practice and procedure, Electric power, Reporting and recordkeeping requirements.

18 CFR Part 16

Administrative practice and procedure, Electric power, Reporting and recordkeeping requirements.

18 CFR Part 33

Electric utilities, Reporting and recordkeeping requirements, Securities.

18 CFR Part 35

Electric power rates, Electric utilities, Reporting and recordkeeping requirements.

18 CFR Part 157

Administrative practice and procedure, Natural gas, Reporting and recordkeeping requirements, Uniform System of Accounts.

18 CFR Part 348

Pipelines, Reporting and recordkeeping requirements.

18 CFR Part 375

Authority delegations (Government agencies), Seals and insignia, Sunshine Act.

18 CFR Part 380

Environmental impact statements, Reporting and recordkeeping requirements.

18 CFR Part 385

Administrative practice and procedure, Electric power, Penalties, Pipelines, Reporting and recordkeeping requirements.

18 CFR Part 388

Confidential business information; Freedom of information.

By direction of the Commission.

Kimberly D. Bose,

Secretary.

In consideration of the foregoing, the Commission proposes to amend Parts 4, 5, 16, 33, 35, 157, 348, 375, 380, 385, and 388, Chapter I, Title 18, of the Code of Federal Regulations, as follows.

PART 4—LICENSES, PERMITS, EXEMPTIONS, AND DETERMINATIONS OF PROJECT COSTS

1. The authority citation for Part 4 is revised to read as follows:

Authority: 16 U.S.C. 791a–825v, 2601–2645; 42 U.S.C. 7101–7352.

§ 4.39 [Amended]

2. In § 4.39, paragraph (e), remove the phrase ''Critical Energy Infrastructure Information in §§ 388.112 and 388.113 of subchapter X of this chapter'' and add the phrase ''privileged materials and Critical Energy Infrastructure Information in §§ 388.112 and 388.113 of this chapter.'' in its place.

[60] 5 U.S.C. 601–612.

[61] 13 CFR 121.101 (2011).

[62] 13 CFR 121.201, Sector 22 Utilities & n.1.

[63] *See* Order No. 703, FERC Stats. & Regs. ¶ 31,259 at P 39. The Commission does not believe that an RFA analysis similar to that provided in Order No. 714, FERC Stats. & Regs. ¶ 31,276 at P 113, is required or would be useful, because persons making filings with the Commission would not need new software, systems or training, and would not be required to convert existing materials to the new format, as was the case in that proceeding.

PART 5—INTEGRATED LICENSE APPLICATION PROCESS

3. The authority citation for Part 5 is revised to read as follows:

Authority: 16 U.S.C. 791a–825v, 2601–2645; 42 U.S.C. 7101–7352.

4. Revise paragraph (c) of § 5.29 as set forth below:

§ 5.29 Other provisions.

* * * * *

(c) *Requests for privileged or Critical Energy Infrastructure Information treatment of pre-filing submission.* If a potential Applicant requests privileged or critical energy infrastructure information treatment of any information submitted to the Commission during pre-filing consultation (except for the information specified in § 5.4), the Commission will treat the request in accordance with the provisions in § 388.112 of this chapter until the date the application is filed with the Commission.

* * * * *

PART 16—PROCEDURES RELATING TO TAKEOVER AND RELICENSING OF LICENSED PROJECTS

5. The authority citation for Part 16 is revised to read as follows:

Authority: 16 U.S.C. 791a–825v, 2601–2645; 42 U.S.C. 7101–7352.

§ 16.8 [Amended]

6. In § 16.8, paragraph (g), add the phrase ''or Critical Energy Infrastructure Information'' after the word ''privileged'' in the introductory text.

PART 33—APPLICATIONS UNDER FEDERAL POWER ACT SECTION 203

7. The authority citation for Part 33 is revised to read as follows:

Authority: 16 U.S.C. 791a–825v, 2601–2645; 31 U.S.C. 9701; 42 U.S.C. 7101–7352; Pub. L. 109–58, 119 Stat. 594.

8. Revise § 33.8 to read as follows:

§ 33.8 Requirements for Filing Applications.

The applicant must submit the application or petition to the Secretary of the Commission in accordance with filing procedures posted on the Commission's Web site at *http://www.ferc.gov.*

(a) If the applicant seeks to protect any portion of the application, or any attachment thereto, from public disclosure, the applicant must make its filing in accordance with the Commission's instructions for submission of privileged materials and Critical Energy Infrastructure Information in § 388.112 of this chapter.

(b) If required, the applicant must submit information specified in paragraphs (b), (c), (d), (e) and (f) of § 33.3 or paragraphs (b), (c), (d) and (e) of § 33.4 on electronic recorded media (*i.e.,* CD/DVD) in accordance with § 385.2011 of the Commission's regulations, along with a printed description and summary. The printed portion of the applicant's submission must include documentation for the electronic information, including all file names and a summary of the data contained in each file. Each column (or data item) in each separate data table or chart must be clearly labeled in accordance with the requirements of §§ 33.3 and 33.4. Any units of measurement associated with numeric entries must also be included.

§ 33.9 [Removed and Reserved].

9. Remove and reserve § 33.9.

PART 35—FILING OF RATE SCHEDULES AND TARIFFS

10. The authority citation for Part 35 is revised to read as follows:

Authority: 16 U.S.C. 791a–825v, 2601–2645; 31 U.S.C. 9701; 42 U.S.C. 7101–7352.

11. Revise § 35.37, paragraph (f) to read as follows.

§ 35.37 Market power analysis required.

* * * * *

(f) If the Seller seeks to protect any portion of a filing from public disclosure, the Seller must make its filing in accordance with the Commission's instructions for filing privileged materials and critical energy infrastructure information in § 388.112 of this chapter.

PART 157— APPLICATIONS FOR CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY AND FOR ORDERS PERMITTING AND APPROVING ABANDONMENT UNDER SECTION 7 OF THE NATURAL GAS ACT

12. The authority citation for Part 157 continues to read as follows:

Authority: 15 U.S.C. 717–717w.

§ 157.21 [Amended]

13. In § 157.21, paragraph (h), remove the phrase ''for the submission of documents containing critical energy infrastructure information, as defined in § 388.113.'' and add the phrase ''of this chapter for the submission of documents containing privileged materials or critical energy infrastructure information.'' in its place.

§ 157.34 [Amended]

14. In § 157.34, paragraph (d)(4), remove the phrase ''under confidential treatment pursuant to § 388.112 of this chapter if desired.'' and add the phrase ''seeking privileged treatment pursuant to § 388.112 of this chapter.'' in its place.

PART 348—OIL PIPELINE APPLICATIONS FOR MARKET POWER DETERMINATIONS

15. The authority citation for Part 348 is revised to read as follows:

Authority: 42 U.S.C. 7101–7352, 49 U.S.C. 60502; 49 App. U.S.C. 1–85 (1988).

16. Revise § 348.2, paragraph (a) to read as follows:

§ 348.2 Procedures.

(a) All filings under this Part must be made electronically pursuant to the requirements of §§ 341.1 and 341.2 of this chapter. A carrier seeking privileged treatment for all or any part of its filing must submit a request for privileged treatment in accordance with § 388.112 of this chapter.

* * * * *

PART 375—THE COMMISSION

17. The authority citation for Part 375 is revised to read as follows:

Authority: 5 U.S.C. 551–557; 15 U.S.C. 717–717w, 3301–3432; 16 U.S.C. 791–825v, 2601–2645; 42 U.S.C. 7101–7352.

18. Revise § 375.302, paragraph (b) to read as follows:

§ 375.302 Delegations to the Secretary.

* * * * *

(b) Prescribe, for good cause, a different time than that required by the Commission's Rules of Practice and Procedure or Commission order for filing by public utilities, licensees, natural gas companies, and other persons of answers to complaints, petitions, motions, and other documents.

PART 380—REGULATIONS IMPLEMENTING THE NATIONAL ENVIRONMENTAL POLICY ACT

17. The authority citation for Part 380 continues to read as follows:

Authority: 42 U.S.C. 4321–4370a, 7101–7352; E.O. 12009, 3 CFR 1978 Comp., p. 142.

§ 380.12 [Amended]

18a. In § 380.12, paragraph (f)(4), remove the second sentence.

§ 380.16 [Amended]

18b. In § 380.16, paragraph (f)(4), remove the second sentence.

PART 385—RULES OF PRACTICE AND PROCEDURE

19. The authority citation for Part 385 continues to read as follows:

Authority: 5 U.S.C. 551–557; 15 U.S.C. 717–717z, 3301–3432; 16 U.S.C. 791a–825v, 2601–2645; 28 U.S.C. 2461; 31 U.S.C. 3701, 9701; 42 U.S.C. 7101–7352, 16441, 16451–16463; 49 U.S.C. 60502; 49 App. U.S.C. 1–85 (1988).

§ 385.206 [Amended]

20. Remove and reserve § 385.206, paragraph (e).

21. Revise § 385.213, paragraph (c)(5) to read as follows:

§ 385.213 Answers (Rule 213).

* * * * *

(c) *Contents.* * * *

(5) When submitting with its answer any request for privileged treatment of documents and information in accordance with this chapter, a respondent must provide a public version of its answer without the information for which privileged treatment is claimed and its proposed form of protective agreement to each entity that has either been served pursuant to § 385.206 (c) or whose name is on the official service list for the proceeding compiled by the Secretary.

22. Revise § 385.213, paragraph (d)(1) to read as follows:

§ 385.213 Answers (Rule 213).

* * * * *

(d) Time limitations. (1) Any answer to a motion or to an amendment to a motion must be made within 15 days after the motion or amendment is filed, except as described below or unless otherwise ordered.

(i) If a motion requests an extension of time or a shortened time period for action, then answers to the motion to extend or shorten the time period shall be made within 5 days after the motion is filed, unless otherwise ordered.

(ii) [Reserved]

* * * * *

§ 385.606 [Amended]

23. In § 385.606, paragraph (f), remove the sentence ''See sections 385.410 and 388.112 of this chapter.'' and in paragraph (j), remove the phrase ''section 388.112 of''.

PART 388—INFORMATION AND REQUESTS

24. The authority citation for part 388 continues to read as follows:

Authority: 5 U.S.C. 301–305, 551, 552 (as amended), 553–557; 42 U.S.C. 7101–7352.

25. Revise § 388.112 to read as follows:

§ 388.112 Requests for privileged treatment and Critical Energy Infrastructure Information (CEII) treatment for documents submitted to the Commission.

(a) *Scope.* (1) By following the procedures specified in this section, any person submitting a document to the Commission may request privileged treatment for some or all of the information contained in a particular document that it claims is exempt from the mandatory public disclosure requirements of the Freedom of Information Act, 5 U.S.C. 552 (FOIA), and should be withheld from public disclosure. For the purposes of the Commission's filing requirements, information subject to an outstanding claim of exemption from disclosure under FOIA, including critical energy infrastructure information (CEII), will be referred to as privileged material.

(2) Any person submitting documents containing CEII as defined in § 388.113, or seeking access to such information should follow the procedures in this chapter.

(b) *Procedures for filing and obtaining privileged or CEII material.* (1) *General Procedures.* A person requesting that material be treated as privileged information or CEII must include in its filing a justification for such treatment in accordance with filing procedures posted on the Commission's Web site at *http://www.ferc.gov.* A person requesting that a document filed with the Commission be treated as privileged or CEII must designate the document as privileged or CEII in making an electronic filing or clearly indicate a request for such treatment on a paper filing. The cover page and pages or portions of the document containing material for which privileged treatment is claimed should be clearly labeled in bold, capital lettering, indicating that it contains privileged, confidential and/or Critical Energy Infrastructure Information, as appropriate, and marked ''DO NOT RELEASE.'' The filer also must submit to the Commission a public version with the information that is claimed to be privileged redacted, to the extent practicable.

(2) *Procedures for Proceedings with a Right to Intervene.* The following procedures set forth the methods for filing and obtaining access to material that is filed as privileged in complaint proceedings and in any proceeding to which a right to intervention exists:

(i) If material is filed as privileged or CEII in a complaint proceeding or other proceeding to which a right to intervention exists, a proposed form of protective agreement must be included with the filing. This requirement does not apply to material submitted in hearing or settlement proceedings, or if the only material for which privileged treatment is claimed consists of landowner lists or privileged information filed under §§ 380.12(f), (m), (o) and 380.16(f) of this chapter.

(ii) The filer must provide the public version of the document and its proposed form of protective agreement to each entity that is required to be served with the filing.

(iii) Any person who is a participant in the proceeding or has filed a motion to intervene or notice of intervention in the proceeding may make a written request to the filer for a copy of the complete, non-public version of the document. The request must include an executed copy of the protective agreement and a statement of the person's right to party or participant status or a copy of their motion to intervene or notice of intervention. Any person may file an objection to the proposed form of protective agreement. A filer, or any other person, may file an objection to disclosure, generally or to a particular person or persons who have sought intervention.

(iv) If no objection to disclosure is filed, the filer must provide a copy of the complete, non-public document to the requesting person within 5 days after receipt of the written request that is accompanied by an executed copy of the protective agreement. If an objection to disclosure is filed, the filer shall not provide the non-public document to the person or class of persons identified in the objection until ordered by the Commission or a decisional authority.

(v) For material filed in proceedings set for trial-type hearing or settlement judge proceedings, a participant's access to material for which privileged treatment is claimed is governed by the presiding official's protective order.

(vi) For landowner lists, information filed as privileged under §§ 380.12(f), (m), (o) and 380.16(f), forms filed with the Commission, and other documents not covered above, access to this material can be sought pursuant to a FOIA request under § 388.108 or a CEII request under § 388.113 of this chapter. Applicants are not required under paragraph (b)(2)(iv) of this section to provide intervenors with landowner lists and the other materials identified in the previous sentence.

(c) *Effect of privilege or CEII claim.* (1) *For documents filed with the Commission:*

(i) The documents for which privileged or CEII treatment is claimed will be maintained in the Commission's document repositories as non-public until such time as the Commission may determine that the document is not

entitled to the treatment sought and is subject to disclosure consistent with §§ 388.108 or 388.113 of this chapter. By treating the documents as nonpublic, the Commission is not making a determination on any claim of privilege or CEII status. The Commission retains the right to make determinations with regard to any claim of privilege or CEII status, and the discretion to release information as necessary to carry out its jurisdictional responsibilities.

(ii) The request for privileged or CEII treatment and the public version of the document will be made available while the request is pending.

(2) *For documents submitted to Commission staff.* The notification procedures of paragraphs (d), (e), and (f) of this section will be followed before making a document public.

(d) *Notification of request and opportunity to comment.* When a FOIA or CEII requester seeks a document for which privilege or CEII status has been claimed, or when the Commission itself is considering release of such information, the Commission official who will decide whether to release the information or any other appropriate Commission official will notify the person who submitted the document and give the person an opportunity (at least five calendar days) in which to comment in writing on the request. A copy of this notice will be sent to the requester.

(e) *Notification before release.* Notice of a decision by the Commission, the Chairman of the Commission, the Director, Office of External Affairs, the General Counsel or General Counsel's designee, a presiding officer in a proceeding under part 385 of this chapter, or any other appropriate official to deny a claim of privilege, in whole or in part, or to make a limited release of CEII, will be given to any person claiming that the information is privileged or CEII no less than 5 calendar days before disclosure. The notice will briefly explain why the person's objections to disclosure are not sustained by the Commission. A copy of this notice will be sent to the FOIA or CEII requester.

(f) *Notification of suit in Federal courts.* When a FOIA requester brings suit to compel disclosure of information for which a person has claimed privileged treatment, the Commission will notify the person who submitted the documents of the suit.

§ 388.113 [Amended]

26. In § 388.113, paragraph (d)(1) and paragraph (d)(2), remove the phrase ''paragraph (d)(3)'' and add the phrase ''paragraph (d)(4)'' in its place.

[FR Doc. 2011–32744 Filed 12–23–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF THE INTERIOR

National Indian Gaming Commission

25 CFR Part 502

RIN 3141–AA43

Definition of Enforcement Action

AGENCY: National Indian Gaming Commission, Interior.

ACTION: Notice of proposed rulemaking.

SUMMARY: This action proposes to amend NIGC regulations to include definitions for ''enforcement action''. The Indian Gaming Regulatory Act authorizes the NIGC to take certain actions in regard to violations of the Act, NIGC regulations, and tribal gaming ordinances. However, current NIGC regulations do not provide a definition for such actions. The Commission believes that providing a definition for these actions will provide clarity to persons subject to them. Therefore, a definition of ''enforcement action'' is proposed in this notice.

DATES: The agency must receive comments on or before February 27, 2012.

ADDRESSES: You may submit comments by any one of the following methods, however, please note that comments sent by electronic mail are strongly encouraged.

- *Email comments to: reg.review@nigc.gov.*
- *Mail comments to:* National Indian Gaming Commission, 1441 L Street NW., Suite 9100, Washington, DC 20005.
- *Hand deliver comments to:* National Indian Gaming Commission, 1441 L Street NW., Suite 9100, Washington, DC 20005.
- *Fax comments to:* National Indian Gaming Commission at (202) 632–0045.

FOR FURTHER INFORMATION CONTACT: National Indian Gaming Commission, 1441 L Street NW., Suite 9100 Washington, DC 20005. Telephone: (202) 632–7009; email: *reg.review@nigc.gov.*

SUPPLEMENTARY INFORMATION:

I. Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal.

II. Background

The Indian Gaming Regulatory Act (IGRA or Act), Public Law 100–497, 25 U.S.C. 2701 *et seq.,* was signed into law on October 17, 1988. The Act establishes the National Indian Gaming Commission (''Commission'') and sets out a comprehensive framework for the regulation of gaming on Indian lands. The purposes of IGRA include providing a statutory basis for the operation of gaming by Indian Tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments; ensuring that the Indian tribe is the primary beneficiary of the gaming operation; and declaring that the establishment of independent federal regulatory authority for gaming on Indian lands, the establishment of federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue. 25 U.S.C. 2702.

On November 18, 2010, the National Indian Gaming Commission (NIGC) issued a Notice of Inquiry and Notice of Consultation (NOI) advising the public that the NIGC was conducting a comprehensive review of its regulations and requesting public comment on which of its regulations were most in need of revision, in what order the Commission should review its regulations, and the process NIGC should utilize to make revisions. 75 FR 70680 (Nov. 18, 2010). On April 4, 2011, after holding eight consultations and reviewing all comments, NIGC published a Notice of Regulatory Review Schedule (NRR) setting out a consultation schedule and process for review. 76 FR 18457. The Commission's regulatory review process established a tribal consultation schedule with a description of the regulation groups to be covered at each consultation. Part 573 was included in this regulatory review.

III. Development of the Proposed Rule

The Commission conducted a total of 10 tribal consultations as part of its review of Part 573. Tribal consultations were held in every region of the country and were attended by over 176 tribes and 463 tribal leaders or their representatives. In addition to tribal consultations, on June 28, 2011, the

Commission requested public comment on a Preliminary Draft of amendments to Part 573. After considering the comments received from the public and through tribal consultations, the Commission realized that to supplement the amendments made to Part 573, a definition of ''enforcement action'' needed to be added to Part 502.

A. ''Enforcement Action''

The current NIGC regulations do not provide a definition for ''enforcement action.'' The Commission believes that providing a definition for ''enforcement action'' will provide clarity to persons subject to enforcement actions by the NIGC.

Regulatory Matters

Regulatory Flexibility Act

The proposed rule will not have a significant impact on a substantial number of small entities as defined under the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* Moreover, Indian Tribes are not considered to be small entities for the purposes of the Regulatory Flexibility Act.

Small Business Regulatory Enforcement Fairness Act

The proposed rule is not a major rule under the Small Business Regulatory Enforcement Fairness Act, 5 U.S.C. 804(2). This rule does not have an annual effect on the economy of $100 million or more. This rule will not cause a major increase in costs or prices for consumers, individual industries, federal, state or local government agencies or geographic regions and does not have a significant adverse effect on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

Unfunded Mandate Reform Act

The Commission, as an independent regulatory agency, is exempt from compliance with the Unfunded Mandates Reform Act, 2 U.S.C. 1502(1); 2 U.S.C. 658(1).

Takings

In accordance with Executive Order 12630, the Commission has determined that the proposed rule does not have significant takings implications. A takings implication assessment is not required.

Civil Justice Reform

In accordance with Executive Order 12988, the Commission has determined that the proposed rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Executive Order.

National Environmental Policy Act

The Commission has determined that the proposed rule does not constitute a major federal action significantly affecting the quality of the human environment and that no detailed statement is required pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. 4321, *et seq.*

Paperwork Reduction Act

This proposed rule does not require information collection under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501, *et seq.,* and is therefore not subject to review by the Office of Management and Budget.

List of Subject in 25 CFR Part 502

Enforcement Actions.

For the reasons stated in the preamble, the National Indian Gaming Commission proposes to amend 15 CFR part 502 as follows:

1. The authority citation for part 502 is revised to read as follows:

Authority: 25 U.S.C. 2706(b)(10); 2713.

2. Add § 502.24 to read as follows:

§ 502.24 Enforcement action

Enforcement action means any action taken by the Chair under 25 U.S.C. 2713 against any person engaged in gaming, for a violation of any provision of IGRA, the regulations of this chapter, or tribal regulations, ordinances, or resolutions approved under 25 U.S.C. 2710 or 2712 of IGRA, including, but not limited to, the following: a notice of violation; a civil fine assessment; or an order for temporary closure.

Dated: December 16, 2011, Washington, DC.

Tracie L. Stevens,

Chairwoman.

Steffani A. Cochran,

Vice-Chairwoman.

Daniel J. Little,

Associate Commissioner.

[FR Doc. 2011–33028 Filed 12–23–11; 8:45 am]

BILLING CODE 7565–02–P

DEPARTMENT OF THE INTERIOR

National Indian Gaming Commission

25 CFR Part 573

RIN 3141–AA50

Enforcement Actions

AGENCY: National Indian Gaming Commission, Interior.

ACTION: Notice of proposed rulemaking.

SUMMARY: This action proposes to amend NIGC regulations to include a graduated pre-enforcement process through which a tribe may come into compliance before an enforcement action is taken by the Chair. Voluntary compliance is the goal of the Commission. This amendment sets forth how Commission staff and tribes may address potential or existing compliance issues. The amendment retains the Chair's authority to issue an enforcement action at the Chair's discretion.

The amendment also modifies this Part to allow a temporary closure order when there is clear and convincing evidence that a gaming operation defrauds a tribe. The current regulation provides for the issuance of a temporary closure order when there is clear and convincing evidence that a gaming operation defrauds a tribe or a customer. The Commission believes this issue has been adequately addressed by ordinance requirements of the IGRA and NIGC regulations, because tribes must include in their ordinances a dispute resolution procedure to address issues where a customer believes she or he has been defrauded. If the tribe fails to follow their ordinance, enforcement action may be taken.

Finally, current regulations do not provide specificity for when an enforcement action becomes final, such as when a notice of violation is issued and there is no appeal filed or settlement agreement reached. The proposed amendment clarifies that an enforcement action becomes final agency action and a final order of the Commission if no appeal is filed or a settlement agreement reached.

DATES: Submit comments on or before February 27, 2012.

ADDRESSES: You may submit comments by any one of the following methods, however, please note that comments sent by electronic mail are strongly encouraged.

1. *Email comments to: reg.review@nigc.gov.*

2. *Mail comments to:* National Indian Gaming Commission, 1441 L Street NW., Suite 9100, Washington, DC 20005.

3. *Hand deliver comments to:* 1441 L St. NW., Suite 9100, Washington, DC 20005.

4. *Fax Comments to:* National Indian Gaming Commission at (202) 632–0045.

FOR FURTHER INFORMATION CONTACT: National Indian Gaming Commission, 1441 L Street NW., Suite 9100, Washington, DC 20005. Telephone: (202) 632–7009; email: *reg.review@nigc.gov.*

SUPPLEMENTARY INFORMATION:

I. Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal.

II. Background

The Indian Gaming Regulatory Act (IGRA or Act), Public Law 100–497, 25 U.S.C. 2701 *et seq.,* was signed into law on October 17, 1988. The Act establishes the National Indian Gaming Commission (''Commission'') and sets out a comprehensive framework for the regulation of gaming on Indian lands. The purposes of IGRA include providing a statutory basis for the operation of gaming by Indian Tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments; ensuring that the Indian tribe is the primary beneficiary of the gaming operation; and declaring that the establishment of independent federal regulatory authority for gaming on Indian lands, the establishment of federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue. 25 U.S.C. 2702.

On November 18, 2010, the National Indian Gaming Commission (NIGC) issued a Notice of Inquiry and Notice of Consultation (NOI) advising the public that the NIGC was conducting a comprehensive review of its regulations and requesting public comment on which of its regulations were most in need of revision, in what order the Commission should review its regulations, and the process NIGC should utilize to make revisions. 75 FR 70680 (Nov. 18, 2010). On April 4, 2011, after holding eight consultations and reviewing all comments, NIGC published a Notice of Regulatory Review Schedule (NRR) setting out a consultation schedule and process for review. 76 FR 18457. The Commission's regulatory review process established a tribal consultation schedule with a description of the regulation groups to be covered at each consultation. Part 573 was included in this regulatory review.

III. Development of the Proposed Rule

The Commission conducted a total of 9 tribal consultations as part of its review of Part 573. Tribal consultations were held in every region of the country and were attended by over 160 tribes and 443 tribal leaders or their representatives. In addition to tribal consultations, on June 28, 2011, the Commission requested public comment on a Preliminary Draft of amendments to Part 573. After considering the comments received from the public and through tribal consultations, the Commission proposes one amendment to Part 573: inclusion of a graduated pre-enforcement process whereby a gaming operation has the opportunity to come into compliance with IGRA, Commission regulations, or tribal ordinances and resolutions approved by the Chair before an enforcement action is taken. This process would not restrict the Chair from initiating enforcement action if circumstances require.

A. Voluntary Compliance is a Goal of the Commission

The proposed draft sets out voluntary compliance as a goal of the Commission and identifies how voluntary compliance can be achieved. Comments in response to the NOI and NRR consistently stated that the NIGC and tribes should be in closer communication prior to the issuance of an enforcement action. While the Commission believes it is necessary for the Chair to retain the discretion to issue an enforcement action whenever the circumstances require it, the Commission also firmly believes that communicating with tribes before taking an enforcement action can only lead to improved relationships and continued compliance. With these two goals in mind, the Commission published a Preliminary draft of the proposed rule creating a graduated process which can be used by NIGC staff to inform a tribe of potential compliance issues. While there are two measures that can be taken as part of this process, either may be taken independent of the other.

The first and lowest level of notification to the tribe of a possible compliance issue is a ''letter of concern.'' A letter of concern would be issued when NIGC staff believes there could be a possible violation of IGRA, NIGC regulations, or the tribe's approved gaming ordinance. The second level of notification to the tribe is a ''warning letter.'' A warning letter provides notice to the tribe that NIGC staff believes an actual violation of IGRA, NIGC regulations, or the tribe's approved gaming ordinance has occurred, or is occurring. The letters would provide the factual basis for the potential violation, inform the tribe of any corrective action that may be taken to cure the violation, and provide a timeframe for responding to the letter or coming into compliance. In the Preliminary draft, the second action was called a ''non-compliance notice.'' Commentors suggested either doing away with the non-compliance notice entirely, or finding a different title for it. The Commission believes having two potential options for action that may be taken by NIGC staff prior to the issuance of an enforcement action is positive for both the NIGC and tribes. However, the Commission did change the name of the second action to a ''warning letter.''

The goal of this proposed amendment is to start with the lowest possible action and move forward only if compliance is not achieved. However, under certain circumstances, the NIGC staff may be required to issue a warning letter without first issuing a letter of concern. Alternatively, a letter of concern could be issued and the tribe may fully address the concern without any further action required by the NIGC. This would achieve the goal of voluntary compliance.

Many comments to the Preliminary draft stated that the regulation should require both actions to include a deadline for the tribe to respond if it disagrees with the NIGC's conclusions and a deadline for the tribe to come into compliance. The Commission agrees with this recommendation and incorporated those requirements into this proposed amendment. Some comments to the Preliminary draft questioned whether these letters were final agency action. It is important to note that these actions would be issued by NIGC staff, not the Chair, and are therefore not final agency action.

Other comments acknowledged that certain circumstances will warrant immediate issuance of an NOV and requested that the regulation specify circumstances or criteria that should be present before the Chair can bypass this process and take immediate enforcement action. One commentor stated that while they are confident in this Commission to positively utilize this process, they are concerned future Commissions may disregard the general process. The intent of this proposed amendment is to achieve voluntary compliance before an enforcement action is issued. Presumably, a Chair will not initiate an enforcement action without NIGC staff first having taken appropriate pre-enforcement action unless, in the Chair's judgment, the circumstances require immediate action

or it is impracticable to issue one or both of these pre-enforcement actions. However, if the Chair takes enforcement action before a letter of concern and/or warning letter is issued, the enforcement action will likely explain the reason for moving directly to an enforcement action without pre-enforcement action.

B. Temporary Closure Order will be Issued When There is Clear and Convincing Evidence that a Gaming Operation Defrauds a Tribe

The proposed rule amends this Part to allow a temporary closure order only when there is clear and convincing evidence that a gaming operation defrauds a tribe, not a customer. A commentor pointed out that the current regulation provides for the issuance of a temporary closure order when there is clear and convincing evidence that a gaming operation defrauds a customer. The Commission believes this issue has been adequately addressed by ordinance requirements of the IGRA and NIGC regulations. Tribes must include in their ordinances a dispute resolution procedure to address issues where a customer believes she or he has been defrauded. If the tribe fails to follow their ordinance, enforcement action may be taken.

C. Final Agency Action

The current regulations do not provide specificity for when an enforcement action such as a notice of violation is issued and there is no appeal filed or settlement agreement reached. The proposed amendment clarifies that an enforcement action becomes final agency action and a final order of the Commission if no appeal is filed or a settlement agreement reached.

Regulatory Matters

Regulatory Flexibility Act

The proposed rule will not have a significant impact on a substantial number of small entities as defined under the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* Moreover, Indian Tribes are not considered to be small entities for the purposes of the Regulatory Flexibility Act.

Small Business Regulatory Enforcement Fairness Act

The proposed rule is not a major rule under the Small Business Regulatory Enforcement Fairness Act, 5 U.S.C. 804(2). This rule does not have an annual effect on the economy of $100 million or more. This rule will not cause a major increase in costs or prices for consumers, individual industries, federal, state or local government agencies or geographic regions and does not have a significant adverse effect on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

Unfunded Mandate Reform Act

The Commission, as an independent regulatory agency, is exempt from compliance with the Unfunded Mandates Reform Act, 2 U.S.C. 1502(1); 2 U.S.C. 658(1).

Takings

In accordance with Executive Order 12630, the Commission has determined that the proposed rule does not have significant takings implications. A takings implication assessment is not required.

Civil Justice Reform

In accordance with Executive Order 12988, the Commission has determined that the proposed rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Executive Order.

National Environmental Policy Act

The Commission has determined that the proposed rule does not constitute a major federal action significantly affecting the quality of the human environment and that no detailed statement is required pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. 4321, *et seq.*

Paperwork Reduction Act

This proposed rule does not require information collection under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501, *et seq.,* and is therefore not subject to review by the Office of Management and Budget.

List of Subjects in 25 CFR 573

Enforcement, Enforcement Actions, Gambling, Gaming, Indians, Indian Gaming.

For the reasons stated in the preamble, the National Indian Gaming Commission proposes to amends 25 CFR part 573 as follows:

PART 573—COMPLIANCE AND ENFORCEMENT

1. The authority citation for part 573 is revised to read as follows:

Authority: 25 U.S.C. 2706(b)(10); 25 U.S.C. 2713; E.O. 13175.

2. Revise the part 573 heading to read as set forth above.

3. Revise § 573.1 to read as follows:

§ 573.1 What is the purpose of this part?

Voluntary compliance is the goal of the Commission. Voluntary compliance is achieved when a tribe and the NIGC staff are able to resolve any potential enforcement issues prior to the Chair issuing an enforcement action. This part sets forth efforts for achieving voluntary compliance and enforcement action when voluntary compliance is not forthcoming. While this part is intended to garner voluntary compliance through a graduated enforcement process, there may be circumstances under which a graduated enforcement process is omitted and an enforcement action must be taken. This part also sets forth general rules governing the Commission's enforcement of the Act, this chapter, and tribal ordinances and resolutions approved by the Chair under part 522 of this chapter. Civil fines in connection with notice of violation issued under this part are addressed in part 575 of this chapter.

4. Add § 573.2 to read as follows:

§ 573.2 When may a letter of concern and/or warning letter be issued?

(a) Prior to the Chair taking an enforcement action, a letter of concern and/or a warning letter may be provided to the respondent by NIGC staff, detailing concerns regarding the respondent's compliance with the Act, this chapter, or any tribal ordinance or resolution approved by the Chair under part 522 of this chapter.

(b) Action under this section does not constitute agency action and may be taken by NIGC staff issuing the respondent, either one or both of the following:

(1) A ''letter of concern'' which recites available facts and information about the incident or condition and indicates that it may be a violation; and/or

(2) A ''warning letter'' which confirms an assessment of the matter and states the necessary corrective action the respondent needs to take, agrees to take, or has taken.

(c) The letters referenced in paragraph (b) of this section may be issued consecutively, but NIGC staff may issue a warning letter without first issuing a letter of concern.

(d) Either action under paragraph (b) of this section shall provide a time period for the respondent to respond, and shall also provide a time period for the respondent to come into compliance. If voluntary compliance efforts are unsuccessful, enforcement action may be taken. If voluntary compliance efforts are successful, NIGC staff will send an investigation completion letter pursuant to § 571.4.

(e) The Chair's discretion to take an enforcement action is not limited or constrained in any way by this section. When the Chair takes enforcement action before a letter of concern and/or warning letter is issued, the enforcement action will state the reasons moving directly to an enforcement action without first issuing a letter of concern and/or warning letter.

5. In § 573.3, revise paragraph (a) to read as follows:

§ 573.3 When may the Chair issue a notice of violation?

(a) The Chair may issue a notice of violation to any person for violations of any provision of the Act or this chapter, or of any tribal ordinance or resolution approved by the Chair under part 522 of this chapter.

* * * * *

§ 573.6 [Redesignated as § 573.4]

6. Redesignate § 573.6 as § 573.4

7. In newly redesignated § 573.4, revise the section heading and paragraphs (a) introductory text, (a)(3), (6), (7), (8), (9), (12), (c) introductory text, (c)(1), (c)(2) introductory text, and (c)(3) to read as follows:

§ 573.4 When may the Chair issue an order of temporary closure?

(a) *When an order of temporary closure may issue.* Simultaneously with or subsequently to the issuance of a notice of violation under § 573.3 of this part, the Chair may issue an order of temporary closure of all or part of an Indian gaming operation if one or more of the following substantial violations are present:

* * * * *

(3) A gaming operation operates for business without a tribal ordinance or resolution that the Chair has approved under part 522 of this chapter.

* * * * *

(6) There is clear and convincing evidence that a gaming operation defrauds a tribe.

(7) A management contractor operates for business without a contract that the Chair has approved under part 533 of this chapter.

(8) Any person knowingly submits false or misleading information to the Commission or a tribe in response to any provision of the Act, this chapter, or a tribal ordinance or resolution that the Chair has approved under part 522 of this chapter.

(9) A gaming operation refuses to allow an authorized representative of the Commission or an authorized tribal official to enter or inspect a gaming operation, in violation of § 571.5 or § 571.6 of this chapter, or of a tribal ordinance or resolution approved by the Chair under part 522 of this chapter.

* * * * *

(12) A gaming operation's facility is constructed, maintained, or operated in a manner that threatens the environment or the public health and safety, in violation of a tribal ordinance or resolution approved by the Chair under part 522 of this chapter.

* * * * *

(c) *Informal expedited review.* Within seven (7) days after service of an order of temporary closure, the respondent may request, orally or in writing, informal expedited review by the Chair.

(1) The Chair shall complete the expedited review provided for by this paragraph within two (2) days after his or her receipt of a timely request.

(2) The Chair shall, within two (2) days after the expedited review provided for by this paragraph:

* * *

(3) Whether or not a respondent seeks informal expedited review under this paragraph, within thirty (30) days after the Chair serves an order of temporary closure the respondent may appeal the order to the Commission under part 577 of this chapter. Otherwise, the order shall remain in effect unless rescinded by the Chair for good cause.

8. Add § 573.5 to read as follows:

§ 573.5 When does an enforcement action become final agency action?

An enforcement action shall become final agency action and a final order of the Commission when:

(a) A respondent fails to appeal the enforcement action as provided for in part 577 of this chapter and does not enter into a settlement agreement resolving the matter in its entirety; or

(b) A respondent enters into a settlement agreement resolving the matter in its entirety at any time after the issuance of the enforcement action.

Dated: December 16, 2011, Washington, DC.

Tracie L. Stevens,

Chairwoman.

Steffani A. Cochran,

Vice-Chairwoman.

Daniel J. Little,

Associate Commissioner.

[FR Doc. 2011–32757 Filed 12–23–11; 8:45 am]

BILLING CODE 7565–02–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Parts 100 and 165

[Docket No. USCG–2011–1023]

RIN 1625–AA08; 1625–AA00

Special Local Regulations and Safety Zones; Recurring Events in Northern New England

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to update recurring special local regulations and safety zones in the Coast Guard Captain of the Port (COTP) Northern New England Zone for annual recurring marine events. When these special local regulations or safety zones are subject to enforcement, this rule would restrict vessels from portions of water areas during these annual recurring events. The revised special local regulations and safety zones would expedite public notification of events, and ensure the protection of the maritime public and event participants from the hazards associated with these annual recurring events.

DATES: Comments and related material must be received by the Coast Guard on or before February 27, 2012. Requests for public meetings must be received by the Coast Guard on or before January 17, 2012.

ADDRESSES: You may submit comments identified by docket number USCG–2011–1023 using any one of the following methods:

(1) *Federal eRulemaking Portal: http://www.regulations.gov.*

(2) *Fax:* (202) 493–2251.

(3) *Mail:* Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590–0001.

(4) *Hand delivery:* Same as mail address above, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is (202) 366–9329.

To avoid duplication, please use only one of these four methods. See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section below for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions on this proposed rule, call or email Lieutenant Junior

Grade Terence Leahy, Waterways Management Division at Coast Guard Sector Northern New England, telephone (207) 767–0398, email *Terence.O.Leahy@uscg.mil*. If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone (202) 366–9826.

SUPPLEMENTARY INFORMATION:

Public Participation and Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related materials. All comments received will be posted without change to *http://www.regulations.gov* and will include any personal information you have provided.

Submitting Comments

If you submit a comment, please include the docket number for this rulemaking (USCG–2011–1023), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online (via *http://www.regulations.gov*) or by fax, mail, or hand delivery, but please use only one of these means. If you submit a comment online via *www.regulations.gov*, it will be considered received by the Coast Guard when you successfully transmit the comment. If you fax, hand deliver, or mail your comment, it will be considered as having been received by the Coast Guard when it is received at the Docket Management Facility. We recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov*, click on the ''submit a comment'' box, which will then become highlighted in blue. In the ''Document Type'' drop down menu select ''Proposed Rule'' and insert ''USCG–2011–1023'' in the ''Keyword'' box. Click ''Search'' then click on the balloon shape in the ''Actions'' column. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period and may change the rule based on your comments.

Viewing Comments and Documents

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov*, click on the ''read comments'' box, which will then become highlighted in blue. In the ''Keyword'' box insert ''USCG–2011–1023'' and click ''Search.'' Click the ''Open Docket Folder'' in the ''Actions'' column. You may also visit the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. We have an agreement with the Department of Transportation to use the Docket Management Facility.

Privacy Act

Anyone can search the electronic form of comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, *etc.*). You may review a Privacy Act notice regarding our public dockets in the January 17, 2008, issue of the **Federal Register** (73 FR 3316).

Public Meeting

We do not now plan to hold a public meeting. But you may submit a request for one using one of the four methods specified under **ADDRESSES**. Please explain why you believe a public meeting would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place announced by a later notice in the **Federal Register**.

For information on facilities or services for individuals with disabilities or to request special assistance at the public meeting, contact Lieutenant Junior Grade Terence Leahy at the telephone number or email address indicated under the **FOR FURTHER INFORMATION CONTACT** section of this notice.

Basis and Purpose

The legal basis for the proposed rule is 33 U.S.C. 1226, 1231, 1233; 46 U.S.C. chapter 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05–1, and 160.5; Public Law 107–295, 116 Stat. 2064; and Department of Homeland Security Delegation No. 0170.1, which collectively authorize the Coast Guard to define regulatory safety zones and special local regulations.

Swim events, fireworks displays, and marine events are held on an annual recurring basis on the navigable waters within the Coast Guard COTP Northern New England Zone. In the past, the Coast Guard has established special local regulations, regulated areas and safety zones for these annual recurring events on a case by case basis to ensure the protection of the maritime public and event participants from the hazards associated with these events. The Coast Guard has not received public comments or concerns regarding the impact to waterway traffic from these annually recurring events.

This proposed rule will consistently apprise the public in a timely manner through permanent publication in Title 33 of the Code of Federal Regulations. The TABLES in this proposed regulation list each annual recurring event requiring a regulated area as administered by the Coast Guard.

By establishing permanent regulations containing these events, the Coast Guard would eliminate the need to establish temporary rules for events that occur on an annual basis and thereby limit the costs associated with cumulative regulations.

This rulemaking will remove, add, and consolidate regulations to better meet the Coast Guard's intended purpose of ensuring safety during these events.

Discussion of Proposed Rule

The Coast Guard proposes to amend 33 CFR 100.120 (Special Local Regulations) and 33 CFR 165.171 (Safety Zones).

The proposed rule would apply to the annual recurring events listed in the attached TABLES in the Coast Guard COTP Northern New England Zone. The TABLES provide the event name, sponsor, and type, as well as approximate dates and locations of the events. The specific times, dates, regulated areas, and enforcement period for each event will be provided through the Local Notice to Mariners, Broadcast Notice to Mariners or through a Notice of Enforcement published in the **Federal Register**.

The particular size of the safety zones established for each event will be reevaluated on an annual basis in accordance with Navigational and Vessel Inspection Circular (NVIC) 07–02, Marine Safety at Firework Displays, the National Fire Protection Association Standard 1123, Code for Fireworks Displays (100-foot distance per inch of diameter of the fireworks mortars), and other pertinent regulations and publications.

This proposed regulation would prevent vessels from transiting areas specifically designated as special local regulations or safety zones during the periods of enforcement to ensure the protection of the maritime public and event participants from the hazards associated with the listed annual recurring events. Only event sponsors, designated participants, and official patrol vessels will be allowed to enter regulated areas. Spectators and other vessels not registered as event participants may not enter the regulated areas without the permission of the COTP or the designated representative.

Regulatory Analyses

We developed this proposed rule after considering numerous statutes and executive orders related to rulemaking. Below we summarize our analyses based on 13 of these statutes or executive orders.

Regulatory Evaluation

This proposed rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, as supplemented by Executive Order 13563, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order.

We expect the economic impact of this proposed rule to be minimal. Although this regulation may have some impact on the public, the potential impact will be minimized for the following reasons: The Coast Guard has previously promulgated safety zones or special local regulations in accordance with 33 CFR Parts 100 and 165 for approximately 85% of the event areas contained within this proposed regulation and has not received notice of any negative impact caused by any of the safety zones or special local regulations. By establishing a permanent regulation containing all of these events, the Coast Guard will eliminate the need to establish individual temporary rules for each separate event that occurs on an annual basis, thereby limiting the cost of cumulative regulations.

Vessels will only be restricted from safety zones and special local regulation areas for a short duration of time. Vessels may transit in portions of the affected waterway except for those areas covered by the proposed regulated areas. Notifications will also be made to the local maritime community through the Local Notice to Mariners and Broadcast Notice to Mariners well in advance of the events. If the event does not have a date listed, then the exact dates and times of the enforcement period will be announced through a Notice of Enforcement in the **Federal Register**. No new or additional restrictions will be imposed on vessel traffic.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this proposed rule would have a significant economic impact on a substantial number of small entities. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities. This proposed rule would affect the following entities, some of which might be small entities: owners or operators of vessels intending to transit, fish, or anchor in the areas where the listed annual recurring events are being held.

The proposed rule would not have a significant economic impact on a substantial number of small entities for the following reasons: vessels will only be restricted from safety zones and special local regulation areas for a short duration of time; vessels may transit in portions of the affected waterway except for those areas covered by the proposed regulated areas; the Coast Guard has promulgated safety zones or special local regulations in accordance with 33 CFR Parts 100 and 165 for approximately 85% of the event areas in the past and has not received notice of any negative impact caused by any of the safety zones or special local regulations; and notifications will be made to the local maritime community through the Local Notice to Mariners and Broadcast Notice to Mariners well in advance of the events. If the event does not have a date listed, then exact dates and times of the enforcement period will be announced through a Notice of Enforcement in the **Federal Register**. No new or additional restrictions would be imposed on vessel traffic.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule so that they can better evaluate its effects on them and participate in the rulemaking. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**. The Coast Guard will not retaliate against small entities that question or complain about this proposed rule or any policy or action of the Coast Guard.

Collection of Information

This proposed rule would call for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this proposed rule under that Order and have determined that it does not have implications for federalism.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 (adjusted for inflation) or more in any one year. Though this proposed rule would not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

Taking of Private Property

This proposed rule would not cause a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Civil Justice Reform

This proposed rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation,

eliminate ambiguity, and reduce burden.

Protection of Children

We have analyzed this proposed rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and would not create an environmental risk to health or risk to safety that might disproportionately affect children.

Indian Tribal Governments

This proposed rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it would not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Energy Effects

We have analyzed this proposed rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a ''significant energy action'' under that order because it is not a ''significant regulatory action'' under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

This proposed rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

Environment

We have analyzed this proposed rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have made a preliminary determination that this action appears to be one of a category of actions that do not individually or cumulatively have a significant effect on the human environment.

A preliminary environmental analysis checklist supporting this determination will be available in the docket where indicated under **ADDRESSES**. This proposed rule involves water activities including swimming events and fireworks displays. This rule appears to be categorically excluded, under figure 2–1, paragraph (34)(g) [Safety Zones] and (34)(h) [Special Local Regulations] of the Instruction.

We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

List of Subjects

33 CFR Part 100

Marine safety, Navigation (water), Reporting and record-keeping requirements, Waterways.

33 CFR Part 165

Harbors, Marine Safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, and Waterways.

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR parts 100 and 165 as follows:

PART 100—SAFETY OF LIFE ON NAVIGABLE WATERS

1. The authority citation for Part 100 continues to read as follows:

Authority: 33 U.S.C. 1233.

2. Revise § 100.120 as follows:

§ 100.120 Special local regulations; marine events held in the Coast Guard Sector Northern New England Captain of the Port Zone.

This section applies to the marine events listed in its table (Table to § 100.120). This section will be enforced for the duration of each event, on the dates indicated. Mariners should consult their Local Notice to Mariners to remain apprised of the specific calendar date upon which the listed event falls for each calendar year and other specific information concerning the event. First Coast Guard District Local Notice to Mariners can be found at: *http://www.navcen.uscg.gov/*. The Sector Northern New England Marine Events schedule can also be viewed electronically at *www.homeport.uscg.mil*. Although listed in the Code of Federal Regulations, sponsors of events listed in the Table to § 100.120 are still required to submit marine event applications in accordance with 33 CFR 100.15.

(a) The Coast Guard may patrol each event area under the direction of a designated Coast Guard Patrol Commander. The Patrol Commander may be contacted on Channel 16 VHF–FM (156.8 MHz) by the call sign ''PATCOM.'' Official patrol vessels may consist of any Coast Guard, Coast Guard Auxiliary, State, or local law enforcement vessels assigned or approved by the Captain of the Port, Sector Northern New England.

(b) Vessels may not transit the regulated areas without the Patrol Commander's approval. Vessels permitted to transit must operate at a no wake speed and in a manner which will not endanger participants or other crafts in the event.

(c) Spectators or other vessels shall not anchor, block, loiter, or impede the transit of event participants or official patrol vessels in the regulated areas during the effective dates and times, unless authorized by an official patrol vessel.

(d) The Patrol Commander may control the movement of all vessels in the regulated area. When hailed or signaled by an official patrol vessel, a vessel shall come to an immediate stop and comply with the lawful directions issued. Failure to comply with a lawful direction may result in expulsion from the area, citation for failure to comply, or both.

(e) The Patrol Commander may delay or terminate any marine event in this subpart at any time it is deemed necessary to ensure the safety of life or property.

(f) For all power boat races listed, vessels operating within the regulated area must be at anchor within a designated spectator area or moored to a waterfront facility in a way that will not interfere with the progress of the event.

(g) For all regattas and boat parades listed, spectator vessels operating within the regulated area shall maintain a separation of at least 50 yards from the participants.

(h) For all rowing and paddling boat races listed, vessels not associated with

the event shall maintain a separation of at least 50 yards from the participants.

TABLE TO § 100.120

5.0	MAY
5.1 Champlain Bridge Celebration Flotilla Parade	• Event Type: Regatta and Boat Parade. • Sponsor: Lake Champlain Maritime Museum. • Date: A two day event on Saturday and Sunday during the third weekend in May. The specific calendar date upon which the listed event falls for each calendar year will be specified in the USCG District 1 Local Notice to Mariners. • Time: 12:00 pm to 2:00 pm each day. • Location: The regulated area includes all waters of Lake Champlain in the vicinity of the new bridge between Crown Point, New York and Chimney Point, Vermont within the following points (NAD 83): 44°02′29″ N, 073°26′26″ W. 44°02′38″ N, 073°25′58″ W. 44°01′18″ N, 073°24′08″ W. 44°01′04″ N, 073°24′31″ W.
5.2 Tall Ships Visiting Portsmouth	• Event Type: Regatta and Boat Parade. • Sponsor: Portsmouth Maritime Commission, Inc. • Date: A four day event from Friday through Monday during the last weekend in May. The specific calendar date upon which the listed event falls for each calendar year will be specified in the USCG District 1 Local Notice to Mariners. • Time: 9:00 am to 8:00 pm each day. • Location: The regulated area includes all waters of Portsmouth Harbor, New Hampshire in the vicinity of Castle Island within the following points (NAD 83): 43°03′11″ N, 070°42′26″ W. 43°03′18″ N, 070°41′51″ W. 43°04′42″ N, 070°42′11″ W. 43°04′28″ N, 070°44′12″ W. 43°05′36″ N, 070°45′56″ W. 43°05′29″ N, 070°46′09″ W. 43°04′19″ N, 070°44′16″ W. 43°04′22″ N, 070°42′33″ W.
6.0	JUNE
6.1 Bar Harbor Blessing of the Fleet	• Event Type: Regatta and Boat Parade. • Sponsor: Town of Bar Harbor, Maine. • Date: A one day event on Sunday during the first weekend of June. The specific calendar date upon which the listed event falls for each calendar year will be specified in the USCG District 1 Local Notice to Mariners. • Time: 12:00 pm to 1:30 pm. • Location: The regulated area includes all waters of Bar Harbor, Maine within the following points (NAD 83): 44°23′32″ N, 068°12′19″ W. 44°23′30″ N, 068°12′00″ W. 44°23′37″ N, 068°12′00″ W. 44°23′35″ N, 068°12′19″ W.
6.2 Charlie Begin Memorial Lobster Boat Races	• Event Type: Power Boat Race. • Sponsor: Boothbay Harbor Lobster Boat Race Committee. • Date: A one day event on Saturday during the third weekend of June. The specific calendar date upon which the listed event falls for each calendar year will be specified in the USCG District 1 Local Notice to Mariners. • Time: 10:00 am to 3:00 pm. • Location: The regulated area includes all waters of Boothbay Harbor, Maine in the vicinity of within John′s Island the following points (NAD 83): 43°50′04″ N, 069°38′37″ W. 43°50′54″ N, 069°38′06″ W. 43°50′49″ N, 069°37′50″ W. 43°50′00″ N, 069°38′20″ W.
6.3 Rockland Harbor Lobster Boat Races	• Event Type: Power Boat Race. • Sponsor: Rockland Harbor Lobster Boat Race Committee.

TABLE TO § 100.120—Continued

	• Date: A one day event on Sunday during the third weekend of June. The specific calendar date upon which the listed event falls for each calendar year will be specified in the USCG District 1 Local Notice to Mariners. • Time: 9:00 am to 5:00 pm. • Location: The regulated area includes all waters of Rockland Harbor, Maine in the vicinity of the Rockland Breakwater Light within the following points (NAD 83): 44°05′59″ N, 069°04′53″ W. 44°06′43″ N, 069°05′25″ W. 44°06′50″ N, 069°05′05″ W. 44°06′05″ N, 069°04′34″ W.
6.4 Windjammer Days Parade of Ships	• Event Type: Tall Ship Parade. • Sponsor: Boothbay Region Chamber of Commerce. • Date: A one day event on Wednesday during the last week of June. The specific calendar date upon which the listed event falls for each calendar year will be specified in the USCG District 1 Local Notice to Mariners. • Time: 12:00 pm to 5:00 pm. • Location: The regulated area includes all waters of Boothbay Harbor, Maine in the vicinity of Tumbler's Island within the following points (NAD 83): 43°51′02″ N, 069°37′33″ W. 43°50′47″ N, 069°37′31″ W. 43°50′23″ N, 069°37′57″ W. 43°50′01″ N, 069°37′45″ W. 43°50′01″ N, 069°38′31″ W. 43°50′25″ N, 069°38′25″ W. 43°50′49″ N, 069°37′45″ W.
7.0	JULY
7.1 Moosabec Lobster Boat Races	• Event Type: Power Boat Race. • Sponsor: Moosabec Boat Race Committee. • Date: A one day event held on July 4th. The specific calendar date upon which the listed event falls for each calendar year will be specified in the USCG District 1 Local Notice to Mariners. • Time: 10:00 am to 12:30 pm. • Location: The regulated area includes all waters of Jonesport, Maine within the following points (NAD 83): 44°31′21″ N, 067°36′44″ W. 44°31′36″ N, 067°36′47″ W. 44°31′44″ N, 067°35′36″ W. 44°31′29″ N, 067°35′33″ W.
7.2 The Great Race	• Event Type: Rowing and Paddling Boat Race. • Sponsor: Franklin County Chamber of Commerce. • Date: A one day event on Sunday during the first week of September. The specific calendar date upon which the listed event falls for each calendar year will be specified in the USCG District 1 Local Notice to Mariners. • Time: 10:00 am to 12:30 pm. • Location: The regulated area includes all waters of Lake Champlain in the vicinity of Saint Albans Bay within the following points (NAD 83): 44°47′18″ N, 073°10′27″ W. 44°47′10″ N, 073°08′51″ W.
7.3 Searsport Lobster Boat Races	• Event Type: Power Boat Race. • Sponsor: Searsport Lobster Boat Race Committee. • Date: A one day event on Saturday during the second week of July. The specific calendar date upon which the listed event falls for each calendar year will be specified in the USCG District 1 Local Notice to Mariners. • Time: 9:00 am to 4:00 pm. • Location: The regulated area includes all waters of Searsport Harbor, Maine within the following points (NAD 83): 44°26′50″ N, 068°55′20″ W. 44°27′04″ N, 068°55′26″ W. 44°27′12″ N, 068°54′35″ W. 44°26′59″ N, 068°54′29″ W.
7.4 Stonington Lobster Boat Races	• Event Type: Power Boat Race. • Sponsor: Stonington Lobster Boat Race Committee.

TABLE TO § 100.120—Continued

	• Date: A one day event on Saturday during the second week of July. The specific calendar date upon which the listed event falls for each calendar year will be specified in the USCG District 1 Local Notice to Mariners. • Time: 8:00 am to 3:30 pm. • Location: The regulated area includes all waters of Stonington, Maine within the following points (NAD 83): 44°08′55″ N, 068°40′12″ W. 44°09′00″ N, 068°40′15″ W. 44°09′11″ N, 068°39′42″ W. 44°09′07″ N, 068°39′39″ W.
7.5 Mayor's Cup Regatta	• Event Type: Sailboat Parade. • Sponsor: Plattsburgh Sunrise Rotary. • Date: A one day event on Saturday during the second week of July. The specific calendar date upon which the listed event falls for each calendar year will be specified in the USCG District 1 Local Notice to Mariners. • Time: 10:00 am to 4:00 pm. • Location: The regulated area includes all waters of Cumberland Bay on Lake Champlain in the vicinity of Plattsburgh, New York within the following points (NAD 83): 44°39′26″ N, 073°26′25″ W. 44°41′27″ N, 073°23′12″ W.
7.6 The Challenge Race	• Event Type: Rowing and Paddling Boat Race. • Sponsor: Lake Champlain Maritime Museum. • Date: A one day event on Saturday during the third week of July. The specific calendar date upon which the listed event falls for each calendar year will be specified in the USCG District 1 Local Notice to Mariners. • Time: 11:00 am to 3:00 pm. • Location: The regulated area includes all waters of Lake Champlain in the vicinity of Button Bay State Park within the following points (NAD 83): 44°12′25″ N, 073°22′32″ W. 44°12′00″ N, 073°21′42″ W. 44°12′19″ N, 073°21′25″ W. 44°13′16″ N, 073°21′36″ W.
7.7 Friendship Lobster Boat Races	• Event Type: Power Boat Race. • Sponsor: Friendship Lobster Boat Race Committee. • Date: A one day event on Saturday during the last week of July. The specific calendar date upon which the listed event falls for each calendar year will be specified in the USCG District 1 Local Notice to Mariners. • Time: 9:30 am to 3:00 pm. • Location: The regulated area includes all waters of Friendship Harbor, Maine within the following points (NAD 83): 43°57′51″ N, 069°20′46″ W. 43°58′14″ N, 069°19′53″ W. 43°58′19″ N, 069°20′01″ W. 43°58′00″ N, 069°20′46″ W.
7.8 Arthur Martin Memorial Regatta	• Event Type: Rowing and Paddling Boat Race. • Sponsor: I Row. • Date: A one day event on Saturday during the third week of July. The specific calendar date upon which the listed event falls for each calendar year will be specified in the USCG District 1 Local Notice to Mariners. • Time: 9:00 am to 1:00 pm. • Location: The regulated area includes all waters of the Piscataqua River, in the vicinity of Kittery Point, Maine within the following points (NAD 83): 43°03′51″ N, 070°41′55″ W. 43°04′35″ N, 070°42′18″ W. 43°04′42″ N, 070°43′15″ W. 43°05′14″ N, 070°43′12″ W. 43°05′14″ N, 070°43′06″ W. 43°04′44″ N, 070°43′11″ W. 43°04′35″ N, 070°42′13″ W. 43°03′53″ N, 070°41′40″ W.
7.9 Harpswell Lobster Boat Races	• Event Type: Power Boat Race. • Sponsor: Harpswell Lobster Boat Race Committee.

TABLE TO § 100.120—Continued

	• Date: A one day event on Sunday during the last week of July. The specific calendar date upon which the listed event falls for each calendar year will be specified in the USCG District 1 Local Notice to Mariners. • Time: 10:00 am to 3:00 pm. • Location: The regulated area includes all waters of Potts Harbor, Maine within the following points (NAD 83): 43°46′50″ N, 070°01′37″ W. 43°46′50″ N, 070°01′18″ W. 43°46′28″ N, 070°01′36″ W. 43°46′28″ N, 070°01′19″ W.
8.0	AUGUST
8.1 Eggemoggin Reach Regatta	• Event Type: Wooden Boat Parade. • Sponsor: Rockport Marine, Inc. and Brookline Boat Yard. • Date: A one day event on Saturday during the first week of August. The specific calendar date upon which the listed event falls for each calendar year will be specified in the USCG District 1 Local Notice to Mariners. • Time: 11:00 am to 7:00 pm. • Location: The regulated area includes all waters of Eggemoggin Reach and Jericho Bay in the vicinity of Naskeag Harbor, Maine within the following points (NAD 83): 44°15′16″ N, 068°36′26″ W. 44°12′41″ N, 068°29′26″ W. 44°07′38″ N, 068°31′30″ W. 44°12′54″ N, 068°33′46″ W.
8.2 Southport Rowgatta Rowing and Paddling Boat Race	• Event Type: Rowing and Paddling Boat Race. • Sponsor: Boothbay Region YMCA. • Date: A one day event on Saturday during the second week of August. The specific calendar date upon which the listed event falls for each calendar year will be specified in the USCG District 1 Local Notice to Mariners. • Time: 8:00 am to 3:00 pm. • Location: The regulated area includes all waters of Sheepscot Bay and Boothbay, on the shore side of Southport Island, Maine within the following points (NAD 83): 43°50′26″ N, 069°39′10″ W. 43°49′10″ N, 069°38′35″ W. 43°46′53″ N, 069°39′06″ W. 43°46′50″ N, 069°39′32″ W. 43°49′07″ N, 069°41′43″ W. 43°50′19″ N, 069°41′14″ W. 43°51′11″ N, 069°40′06″ W.
8.3 Winter Harbor Lobster Boat Races	• Event Type: Power Boat Race. • Sponsor: Winter Harbor Chamber of Commerce. • Date: A one day event on Saturday during the second week of August. The specific calendar date upon which the listed event falls for each calendar year will be specified in the USCG District 1 Local Notice to Mariners. • Time: 9:00 am to 3:00 pm. • Location: The regulated area includes all waters of Winter Harbor, Maine within the following points (NAD 83): 44°22′06″ N, 068°05′13″ W. 44°23′06″ N, 068°05′08″ W. 44°23′04″ N, 068°04′37″ W. 44°22′05″ N, 068°04′44″ W.
8.4 Lake Champlain Dragon Boat Festival	• Event Type: Rowing and Paddling Boat Race. • Sponsor: Dragonheart Vermont. • Date: A one day event on Sunday during the second week of August. The specific calendar date upon which the listed event falls for each calendar year will be specified in the USCG District 1 Local Notice to Mariners. • Time: 7:00 am to 5:00 pm. • Location: The regulated area includes all waters of Burlington Bay within the following points (NAD 83): 44°28′51″ N, 073°13′28″ W. 44°28′40″ N, 073°13′40″ W. 44°28′37″ N, 073°13′29″ W. 44°28′40″ N, 073°13′17″ W.

TABLE TO § 100.120—Continued

8.5 Merritt Brackett Lobster Boat Races.	• Event Type: Power Boat Race. • Sponsor: Town of Bristol, Maine. • Date: A one day event on Sunday during the second week of August. The specific calendar date upon which the listed event falls for each calendar year will be specified in the USCG District 1 Local Notice to Mariners. • Time: 10:00 am to 3:00 pm. • Location: The regulated area includes all waters of Pemaquid Harbor, Maine within the following points (NAD 83): 43°52′16″ N, 069°32′10″ W. 43°52′41″ N, 069°31′43″ W. 43°52′35″ N, 069°31′29″ W. 43°52′09″ N, 069°31′56″ W.
8.6 Multiple Sclerosis Regatta	• Event Type: Regatta and Sailboat Race. • Sponsor: Maine Chapter, Multiple Sclerosis Society. • Date: A one day event on Saturday during the third week of August. The specific calendar date upon which the listed event falls for each calendar year will be specified in the USCG District 1 Local Notice to Mariners. • Time: 10:00 am to 4:00 pm. • Location: The regulated area for the start of the race includes all waters of Casco Bay, Maine in the vicinity of Peaks Island within the following points (NAD 83): 43°40′24″ N, 070°14′20″ W. 43°40′36″ N, 070°13′56″ W. 43°39′58″ N, 070°13′21″ W. 43°39′46″ N, 070°13′51″ W.
8.7 Multiple Sclerosis Harborfest Tugboat Race	• Event Type: Power Boat Race. • Sponsor: Maine Chapter, National Multiple Sclerosis Society. • Date: A one day event on Sunday during the third week of August. The specific calendar date upon which the listed event falls for each calendar year will be specified in the USCG District 1 Local Notice to Mariners. • Time: 10:00 am to 3:00 pm. • Location: The regulated area includes all waters of Portland Harbor, Maine in the vicinity of Maine State Pier within the following points (NAD 83): 43°40′25″ N, 070°14′21″ W. 43°40′36″ N, 070°13′56″ W. 43°39′58″ N, 070°13′21″ W. 43°39′47″ N, 070°13′51″ W.
9.0	SEPTEMBER
9.1 Pirates Festival Lobster Boat Races	• Event Type: Power Boat Race. • Sponsor: Eastport Pirates Festival. • Date: A one day event on Sunday during the second weekend of September. The specific calendar date upon which the listed event falls for each calendar year will be specified in the USCG District 1 Local Notice to Mariners. • Time: 11:00 am to 6:00 pm. • Location: The regulated area includes all waters in the vicinity of Eastport Harbor, Maine within the following points (NAD 83): 44°54′14″ N, 066°58′52″ W. 44°54′14″ N, 068°58′56″ W. 44°54′24″ N, 066°58′52″ W. 44°54′24″ N, 066°58′56″ W.

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

3. The authority citation for Part 165 continues to read as follows:

Authority: 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701, 3306, 3703; 33 CFR 1.05–1, and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

4. Revise § 165.171 to read as follows:

§ 165.171 Safety zones for fireworks displays and swim events held in Coast Guard sector Northern New England Captain of the Port Zone.

The Coast Guard is establishing safety zones for the fireworks displays listed in the table to this section (Table to § 165.171). These regulations will be enforced for the duration of each event, on or about the dates indicated in the Table to § 165.171. Mariners should consult their Local Notice to Mariners to remain apprised of the specific calendar date upon which the listed event falls for each calendar year and other specific information concerning the event. First Coast Guard District Local Notice to Mariners can be found at: *http://www.navcen.uscg.gov/*. The Sector Northern New England Marine Events schedule can also be viewed electronically at

www.homeport.uscg.mil. Although listed in the Code of Federal Regulations, sponsors of events listed in the Table to § 165.171 shall submit an application each year in accordance with 33 CFR 100.15.

(a) The Coast Guard may patrol each event area under the direction of a designated Coast Guard Patrol Commander. The Patrol Commander may be contacted on Channel 16 VHF–FM (156.8 MHz) by the call sign ''PATCOM.'' The ''official patrol vessels'' may consist of any Coast Guard, Coast Guard Auxiliary, State, or local law enforcement vessels assigned or approved by the Captain of the Port, Sector Northern New England.

(b) Vessels may not transit the regulated areas without Patrol Commander approval. Vessels permitted to transit must operate at a no wake speed, in a manner which will not endanger participants or other crafts in the event.

(c) Spectators or other vessels shall not anchor, block, loiter, or impede the movement of event participants or official patrol vessels in the regulated areas during the effective dates and times, or dates and times as modified through the Local Notice to Mariners, unless authorized by an official patrol vessel.

(d) The Patrol Commander may control the movement of all vessels in the regulated area. When hailed or signaled by an official patrol vessel, a vessel shall come to an immediate stop and comply with the lawful directions issued. Failure to comply with a lawful direction may result in expulsion from the area, citation for failure to comply, or both.

(e) The Patrol Commander may delay or terminate any event in this subpart at any time to assure safety. Such action may be justified as a result of weather, traffic density, spectator operation or participant behavior.

(f) For all swim events listed, vessels not associated with the event shall maintain a separation zone of 200 feet from participating swimmers.

(g) For all fireworks displays listed below, the regulated area is that area of navigable waters within a 350 yard radius of the launch platform or launch site for each fireworks display.

TABLE TO § 165.171

5.0	MAY
5.1 Hawgs, Pies, & Fireworks	• Event Type: Fireworks Display. • Sponsor: Gardiner Maine Street. • Date: One night event on Saturday during the last week of May. The specific calendar date upon which the listed event falls for each calendar year will be specified in the USCG District 1 Local Notice to Mariners. • Time: 8:00 pm to 10:00 pm. • Location: In the vicinity of the Gardiner Waterfront, Gardiner, Maine in approximate position: 44°13′52″ N, 069°46′08″ W (NAD 83).
6.0	JUNE
6.1 Rotary Waterfront Days Fireworks	• Event Type: Fireworks Display. • Sponsor: Gardiner Rotary. • Date: Two night event on Wednesday and Saturday during the third week of June. The specific calendar date upon which the listed event falls for each calendar year will be specified in the USCG District 1 Local Notice to Mariners. • Time: 8:00 pm to 10:00 pm. • Location: In the vicinity of the Gardiner Waterfront, Gardiner, Maine in approximate position: 44°13′52″ N, 069°46′08″ W (NAD 83).
6.2 Windjammer Days Fireworks	• Event Type: Fireworks Display. • Sponsor: Boothbay Harbor Region Chamber of Commerce. • Date: One night event on Wednesday during the last week of June. The specific calendar date upon which the listed event falls for each calendar year will be specified in the USCG District 1 Local Notice to Mariners. • Time: 8:00 pm to 10:30 pm. • Location: In the vicinity of McFarland Island, Boothbay Harbor, Maine in approximate position: 43°50′38″ N, 069°37′57″ W (NAD 83).
7.0	JULY
7.1 Vinalhaven 4th of July Fireworks	• Event Type: Firework Display. • Sponsor: Vinalhaven 4th of July Committee. • Date: First Saturday in July. The specific calendar date upon which the listed event falls for each calendar year will be specified in the USCG District 1 Local Notice to Mariners. • Time: 8:00 pm to 10:30 pm. • Location: In the vicinity of Grime's Park, Vinalhaven, Maine in approximate position: 44°02′34″ N, 068°50′26″ W (NAD 83).
7.2 Burlington Independence Day Fireworks	• Event Type: Firework Display. • Sponsor: City of Burlington, Vermont.

TABLE TO § 165.171—Continued

	• Date: July 3rd. The specific calendar date upon which the listed event falls for each calendar year will be specified in the USCG District 1 Local Notice to Mariners. • Time: 9:00 pm to 11:00 pm. • Location: From a barge in the vicinity of Burlington Harbor, Burlington, Vermont in approximate position: 44°28′31″ N, 073°13′31″ W (NAD 83).
7.3 Camden 3rd of July Fireworks	• Event Type: Fireworks Display. • Sponsor: Camden, Rockport, Lincolnville Chamber of Commerce. • Date: July 3rd. The specific calendar date upon which the listed event falls for each calendar year will be specified in the USCG District 1 Local Notice to Mariners. • Time: 8:00 pm to 10:00 pm. • Location: In the vicinity of Camden Harbor, Maine in approximate position: 44°12′32″ N, 069°02′58″ W (NAD 83).
7.4 Bangor 4th of July Fireworks	• Event Type: Fireworks Display. • Sponsor: Bangor 4th of July Fireworks. • Date: July 4th. The specific calendar date upon which the listed event falls for each calendar year will be specified in the USCG District 1 Local Notice to Mariners. • Time: 8:00 pm to 10:30 pm. • Location: In the vicinity of the Bangor Waterfront, Bangor, Maine in approximate position: 44°47′27″ N, 068°46′31″ W (NAD 83).
7.5 Bar Harbor 4th of July Fireworks	• Event Type: Fireworks Display. • Sponsor: Bar Harbor Chamber of Commerce. • Date: July 4th. The specific calendar date upon which the listed event falls for each calendar year will be specified in the USCG District 1 Local Notice to Mariners. • Time: 8:00 pm to 10:30 pm. • Location: In the vicinity of Bar Harbor Town Pier, Bar Harbor, Maine in approximate position: 44°23′31″ N, 068°12′15″ W (NAD 83).
7.6 Boothbay Harbor 4th of July Fireworks	• Event Type: Fireworks Display. • Sponsor: Town of Boothbay Harbor. • Date: July 4th. The specific calendar date upon which the listed event falls for each calendar year will be specified in the USCG District 1 Local Notice to Mariners. • Time: 8:00 pm to 10:30 pm. • Location: In the vicinity of McFarland Island, Boothbay Harbor, Maine in approximate position: 43°50′38″ N, 069°37′57″ W (NAD 83).
7.7 Colchester 4th of July Fireworks	• Event Type: Fireworks Display. • Sponsor: Town of Colchester, Recreation Department. • Date: July 4th. The specific calendar date upon which the listed event falls for each calendar year will be specified in the USCG District 1 Local Notice to Mariners. • Time: 8:00 pm to 10:00 pm. • Location: In the vicinity of Bayside Beach and Mallets Bay in Colchester, Vermont at approximate position: 44°32′44″ N, 073°13′10″ W (NAD 83).
7.8 Eastport 4th of July Fireworks	• Event Type: Fireworks Display. • Sponsor: Eastport 4th of July Committee. • Date: July 4th. The specific calendar date upon which the listed event falls for each calendar year will be specified in the USCG District 1 Local Notice to Mariners. • Time: 9:00 pm to 9:30 pm. • Location: From the Waterfront Public Pier in Eastport, Maine at approximate position: 44°54′25″ N, 066°58′55″ W (NAD 83).
7.9 Ellis Short Sand Park Trustee Fireworks	• Event Type: Fireworks Display. • Sponsor: William Burnham. • Date: July 4th. The specific calendar date upon which the listed event falls for each calendar year will be specified in the USCG District 1 Local Notice to Mariners. • Time: 8:30 pm to 11:00 pm.

TABLE TO § 165.171—Continued

	• Location: In the vicinity of York Beach, Maine in approximate position: 43°10′27″ N, 070°48′31″ W (NAD 83).
7.10 Hampton Beach 4th of July Fireworks	• Event Type: Fireworks Display. • Sponsor: Hampton Beach Village District. • Date: July 4th. The specific calendar date upon which the listed event falls for each calendar year will be specified in the USCG District 1 Local Notice to Mariners. • Time: 8:30 pm to 11:00 pm. • Location: In the vicinity of Hampton Beach, New Hampshire in approximate position: 42°54′40″ N, 070°36′25″ W (NAD 83).
7.11 Jonesport 4th of July Fireworks	• Event Type: Fireworks Display. • Sponsor: Jonesport 4th of July Committee. • Date: July 4th. The specific calendar date upon which the listed event falls for each calendar year will be specified in the USCG District 1 Local Notice to Mariners. • Time: 9:30 pm to 10:00 pm. • Location: In the vicinity of Beals Island, Jonesport, Maine in approximate position: 44°31′18″ N, 067°36′43″ W (NAD 83).
7.12 Main Street Heritage Days 4th of July Fireworks	• Event Type: Fireworks Display. • Sponsor: Main Street Inc. • Date: July 4th. The specific calendar date upon which the listed event falls for each calendar year will be specified in the USCG District 1 Local Notice to Mariners. • Time: 8:00 pm to 10:30 pm. • Location: In the vicinity of Reed and Reed Boat Yard, Woolwich, Maine in approximate position: 43°54′56″ N, 069°48′16″ W (NAD 83).
7.13 Portland Harbor 4th of July Fireworks	• Event Type: Fireworks Display. • Sponsor: Department of Parks and Recreation, Portland, Maine. • Date: July 4th. The specific calendar date upon which the listed event falls for each calendar year will be specified in the USCG District 1 Local Notice to Mariners. • Time: 8:30 pm to 10:30 pm. • Location: In the vicinity of East End Beach, Portland, Maine in approximate position: 43°40′16″ N, 070°14′44″ W (NAD 83).
7.14 St. Albans Day Fireworks	• Event Type: Fireworks Display. • Sponsor: St. Albans Area Chamber of Commerce. • Date: July 4th. The specific calendar date upon which the listed event falls for each calendar year will be specified in the USCG District 1 Local Notice to Mariners. • Time: 9:00 pm to 10:00 pm. • Location: From the St. Albans Bay dock in St. Albans Bay, Vermont in the approximate position: 44°48′25″ N, 073°08′23″ W (NAD 83).
7.15 Stonington 4th of July Fireworks	• Event Type: Fireworks Display. • Sponsor: Deer Isle—Stonington Chamber of Commerce. • Date: July 4th. The specific calendar date upon which the listed event falls for each calendar year will be specified in the USCG District 1 Local Notice to Mariners. • Time: 8:00 pm to 10:30 pm. • Location: In the vicinity of Two Bush Island, Stonington, Maine in approximate position: 44°08′57″ N, 068°39′54″ W (NAD 83).
7.16 Urban/EPIC Triathlon	• Event Type: Swim Event. • Sponsor: Tri-Maine Productions. • Date: A one day event on Saturday during the second week of July. The specific calendar date upon which the listed event falls for each calendar year will be specified in the USCG District 1 Local Notice to Mariners. • Time: 7:00 am to 11:00 am. • Location: The regulated area includes all waters of Portland Harbor in the vicinity of East End Beach in Portland, Maine within the following points (NAD 83): 43°40′00″ N, 070°14′20″ W.

TABLE TO § 165.171—Continued

	43°40′00″ N, 070°14′00″ W. 43°40′15″ N, 070°14′29″ W. 43°40′17″ N, 070°13′22″ W.
7.17 Tri for a Cure Swim Clinics	• Event Type: Swim Event. • Sponsor: Maine Cancer Foundation. • Date: A two day event held on third Sunday and Thursday in July. The specific calendar date upon which the listed event falls for each calendar year will be specified in the USCG District 1 Local Notice to Mariners. • Time: 12:30 pm to 7:30 pm. • Location: The regulated area includes all waters of Portland Harbor, Maine in the vicinity of Spring Point Light within the following points (NAD 83): 43°39′01″ N, 070°13′32″ W. 43°39′07″ N, 070°13′29″ W. 43°39′06″ N, 070°13′41″ W. 43°39′01″ N, 070°13′36″ W.
7.18 Richmond Days Fireworks	• Event Type: Fireworks Display. • Sponsor: Town of Richmond, Maine. • Date: A one day event on Saturday during the fourth weekend of July. The specific calendar date upon which the listed event falls for each calendar year will be specified in the USCG District 1 Local Notice to Mariners. • Time: 8:00 pm to 10:00 pm. • Location: From a barge in the vicinity of the inner harbor, Tenants Harbor, Maine in approximate position: 44°08′42″ N, 068°27′06″ W (NAD83).
7.19 Colchester Triathlon	• Event Type: Swim Event. • Sponsor: Colchester Parks and Recreation Department. • Date: A one day event on Wednesday during the last week of July. The specific calendar date upon which the listed event falls for each calendar year will be specified in the USCG District 1 Local Notice to Mariners. • Time: 7:00 am to 11:00 am. • Location: The regulated area includes all waters of Malletts Bay on Lake Champlain, Vermont within the following points (NAD 83): 44°32′18″ N, 073°12′35″ W. 44°32′28″ N, 073°12′56″ W. 44°32′57″ N, 073°12′38″ W.
7.20 Peaks to Portland Swim	• Event Type: Swim Event. • Sponsor: Cumberland County YMCA. • Date: A one day event on Saturday during the last week of July. The specific calendar date upon which the listed event falls for each calendar year will be specified in the USCG District 1 Local Notice to Mariners. • Time: 5:00 am to 1:00 pm. • Location: The regulated area includes all waters of Portland Harbor between Peaks Island and East End Beach in Portland, Maine within the following points (NAD 83): 43°39′20″ N, 070°11′58″ W. 43°39′45″ N, 070°13′19″ W. 43°40′11″ N, 070°14′13″ W. 43°40′08″ N, 070°14′29″ W. 43°40′00″ N, 070°14′23″ W. 43°39′34″ N, 070°13′31″ W. 43°39′13″ N, 070°11′59″ W.
7.21 Friendship Days Fireworks	• Event Type: Fireworks Display. • Sponsor: Town of Friendship. • Date: A one day event on Saturday during the last weekend of July. The specific calendar date upon which the listed event falls for each calendar year will be specified in the USCG District 1 Local Notice to Mariners. • Time: 8:00 pm to 10:30 pm. • Location: In the vicinity of the Town Pier, Friendship Harbor, Maine in approximate position: 43°58′23″ N, 069°20′12″ W (NAD83).
7.22 Champ Chum Swim	• Event Type: Swim Event. • Sponsor: Against Malaria Foundation.

TABLE TO § 165.171—Continued

	• Date: A one day event on Saturday during the last week of July. The specific calendar date upon which the listed event falls for each calendar year will be specified in the USCG District 1 Local Notice to Mariners. • Time: 8:00 am to 12:00 pm. • Location: The regulated area includes all waters of Lake Champlain between Thompson's Point, Vermont and Spilt Rock in Adirondack Park, New York within the following points (NAD 83): 44°16′04″ N, 073°18′19″ W. 44°16′08″ N, 073°19′17″ W.
8.0	August
8.1 Sprucewold Cabbage Island Swim	• Event Type: Swim Event. • Sponsor: Sprucewold Association. • Date: A one day event on Saturday during the first week of August. The specific calendar date upon which the listed event falls for each calendar year will be specified in the USCG District 1 Local Notice to Mariners. • Time: 1:00 pm to 6:00 pm. • Location: The regulated area includes all waters of Linekin Bay between Cabbage Island and Sprucewold Beach in Boothbay Harbor, Maine within the following points (NAD 83): 43°50′37″ N, 069°36′23″ W. 43°50′37″ N, 069°36′59″ W. 43°50′16″ N, 069°36′46″ W. 43°50′22″ N, 069°36′21″ W.
8.2 Westerlund's Landing Party Fireworks.	• Event Type: Fireworks Display. • Sponsor: Portside Marina. • Date: A one day event on Saturday during the first weekend of August. The specific calendar date upon which the listed event falls for each calendar year will be specified in the USCG District 1 Local Notice to Mariners. • Time: 8:00 pm to 10:30 pm. • Location: In the vicinity of Westerlund's Landing in South Gardiner, Maine in approximate position: 44°10′19″ N, 069°45′24″ W (NAD 83).
8.3 Y–Tri Triathlon	• Event Type: Swim Event. • Sponsor: Plattsburgh YMCA. • Date: A one day event on Saturday during the first week of August. The specific calendar date upon which the listed event falls for each calendar year will be specified in the USCG District 1 Local Notice to Mariners. • Time: 9:00 am to 10:00 am. • Location: The regulated area includes all waters of Treadwell Bay on Lake Champlain in the vicinity of Point Au Roche State Park, Plattsburgh, New York within the following points (NAD 83): 44°46′30″ N, 073°23′26″ W. 44°46′17″ N, 073°23′26″ W. 44°46′17″ N, 073°23′46″ W. 44°46′29″ N, 073°23′46″ W.
8.4 Greater Burlington YMCA Lake Swim.	• Event Type: Swim Event. • Sponsor: Greater Burlington YMCA. • Date: A one day event on Saturday during the second week of August. The specific calendar date upon which the listed event falls for each calendar year will be specified in the USCG District 1 Local Notice to Mariners. • Time: 8:00 am to 6:00 pm. • Location: The regulated area includes all waters in Lake Champlain in the vicinity of North Hero Island within the following points (NAD 83): 44°46′55″ N, 073°22′14″ W. 44°47′08″ N, 073°19′05″ W. 44°46′48″ N, 073°17′13″ W. 44°46′10″ N, 073°16′39″ W. 44°41′08″ N, 073°20′58″ W. 44°41′36″ N, 073°23′01″ W.
8.5 York Beach Fire Department Fireworks.	• Event Type: Fireworks Display. • Sponsor: York Beach Fire Department.

TABLE TO § 165.171—Continued

	• Date: A one day event on Sunday during the first week in August. The specific calendar date upon which the listed event falls for each calendar year will be specified in the USCG District 1 Local Notice to Mariners. • Time: 8:30 pm to 11:30 pm. • Location: In the vicinity of Short Sand Cove in York, Maine in approximate position: 43°10′27″ N, 070°36′25″ W (NAD 83).
8.6 Tri for a Cure Swim Clinics	• Event Type: Swim Event. • Sponsor: Maine Cancer Foundation. • Date: A multi-day training event held during July. The specific calendar date upon which the listed event falls for each calendar year will be specified in the USCG District 1 Local Notice to Mariners. • Time: 8:30 am to 11:30 am. • Location: The regulated area includes all waters of Portland Harbor, Maine in the vicinity of Spring Point Light within the following points (NAD 83): 43°39′01″ N, 070°13′32″ W. 43°39′07″ N, 070°13′29″ W. 43°39′06″ N, 070°13′41″ W. 43°39′01″ N, 070°13′36″ W.
8.7 Tri for a Cure Triathlon	• Event Type: Swim Event. • Sponsor: Maine Cancer Foundation. • Date: A one day event on Sunday during the second week in August. The specific calendar date upon which the listed event falls for each calendar year will be specified in the USCG District 1 Local Notice to Mariners. • Time: 12:30 pm to 4:30 pm. • Location: The regulated area includes all waters of Portland Harbor, Maine in the vicinity of Spring Point Light within the following points (NAD 83): 43°39′01″ N, 070°13′32″ W. 43°39′07″ N, 070°13′29″ W. 43°39′06″ N, 070°13′41″ W. 43°39′01″ N, 070°13′36″ W.
8.8 Rockland Breakwater Swim	• Event Type: Swim Event. • Sponsor: Pen-Bay Masters. • Date: A one day event on Saturday during the fourth week of August. The specific calendar date upon which the listed event falls for each calendar year will be specified in the USCG District 1 Local Notice to Mariners. • Time: 7:30 am to 1:30 pm. • Location: The regulated area includes all waters of Rockland Harbor, Maine in the vicinity of Jameson Point within the following points (NAD 83): 44°06′16″ N, 069°04′39″ W. 44°06′13″ N, 069°04′36″ W. 44°06′12″ N, 069°04′43″ W. 44°06′17″ N, 069°04′44″ W. 44°06′18″ N, 069°04′40″ W.
9.0	SEPTEMBER
9.1 Windjammer Weekend Fireworks	• Event Type: Fireworks Display. • Sponsor: Town of Camden, Maine. • Date: A one day event on Friday during the first weekend of September. The specific calendar date upon which the listed event falls for each calendar year will be specified in the USCG District 1 Local Notice to Mariners. • Time: 8:00 pm to 9:30 pm. • Location: From a barge in the vicinity of Northeast Point, Camden Harbor, Maine in approximate position: 44°12′10″ N, 069°03′11″ W (NAD 83).
9.2 Eastport Pirate Festival Fireworks	• Event Type: Fireworks Display. • Sponsor: Eastport Pirate Festival. • Date: A one day event on Saturday during the second weekend of September. The specific calendar date upon which the listed event falls for each calendar year will be specified in the USCG District 1 Local Notice to Mariners. • Time: 7:00 pm to 10:00 pm.

TABLE TO § 165.171—Continued

	• Location: From the Waterfront Public Pier in Eastport, Maine at approximate position: 44°54′17″ N, 066°58′58″ W (NAD 83).
9.3 The Lobsterman Triathlon	• Event Type: Swim Event. • Sponsor: Tri-Maine Productions. • Date: A one day swim event on Saturday during the second weekend of September. The specific calendar date upon which the listed event falls for each calendar year will be specified in the USCG District 1 Local Notice to Mariners. • Time: 8:00 am to 11:00 am. • Location: The regulated area includes all waters in the vicinity of Winslow Park in South Freeport, Maine within the following points (NAD 83): 43°47′59″ N, 070°06′56″ W. 43°47′44″ N, 070°06′56″ W. 43°47′44″ N, 070°07′27″ W. 43°47′57″ N, 070°07′27″ W.
9.4 Burlington Triathlon	• Event Type: Swim Event. • Sponsor: Race Vermont. • Date: A one day swim event on Sunday during the second weekend of September. The specific calendar date upon which the listed event falls for each calendar year will be specified in the USCG District 1 Local Notice to Mariners. • Time: 7:00 am to 10:00 am. • Location: The regulated area includes all waters in the vicinity of North Beach, Burlington, Vermont within the following points (NAD 83): 44°29′31″ N, 073°14′22″ W. 44°29′12″ N, 073°14′14″ W. 44°29′17″ N, 073°14′34″ W.
9.5 Eliot Festival Day Fireworks	• Event Type: Fireworks Display. • Sponsor: Eliot Festival Day Committee. • Date: A one day event on Saturday during the fourth weekend of September. The specific calendar date upon which the listed event falls for each calendar year will be specified in the USCG District 1 Local Notice to Mariners. • Time: 8:00 pm to 10:30 pm. • Location: In the vicinity of Eliot Town Boat Launch, Eliot, Maine in approximate position: 43°08′56″ N, 070°49′52″ W (NAD 83).

Dated: December 8, 2011.

C. L. Roberge,

Captain, U.S. Coast Guard, Captain of the Port Sector Northern New England.

[FR Doc. 2011–33032 Filed 12–23–11; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 62

[EPA–R04–OAR–2011–0006(b); FRL–9611–9]

Approval and Promulgation of State Plans for Designated Facilities and Pollutants; State of Florida; Control of Hospital/Medical/Infectious Waste Incinerator (HMIWI) Emissions From Existing Facilities

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve the Clean Air Act (CAA) section 111(d)/129 State Plan (the Plan) submitted by the Florida Department of Environmental Protection (FDEP) for the State of Florida on December 21, 2010, for implementing and enforcing the Emissions Guidelines (EGs) applicable to existing Hospital/Medical/Infectious Waste Incinerators (HMIWIs). These EGs apply to devices that combust any amount of hospital waste and/or medical/infectious waste. In the Final Rules section of this **Federal Register,** EPA is approving the State's 111(d)/129 plan revision submittal as a direct final rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments.

DATES: Comments must be received in writing by January 26, 2012.

ADDRESSES: Submit your comments, identified by Docket ID Number EPA–R04–OAR–2011–0006 by one of the following methods:

1. *www.regulations.gov.* Follow the on-line instructions for submitting comments.

2. *Email: garver.daniel@epa.gov.*

3. *Fax:* (404) 562–9095.

4. *Mail:* EPA–R04–OAR–2011–0006, Daniel Garver, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW., Atlanta, Georgia 30303.

5. *Hand Delivery or Courier:* Mr. Daniel Garver, Air Toxics Assessment and Implementation Section, Air Toxics and Monitoring Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW., Atlanta, Georgia 30303–8960. Such deliveries are only accepted during the Regional Office's normal hours of operation. The Regional Office's official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding federal holidays.

Please see the direct final rule which is located in the Rules section of this **Federal Register** for detailed instructions on how to submit comments.

FOR FURTHER INFORMATION CONTACT: Daniel Garver, Air Toxics and Monitoring Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW., Atlanta, Georgia 30303–8960. The telephone number is (404) 562–9839. Mr. Garver can also be reached via electronic mail at *garver.daniel@epa.gov.*

SUPPLEMENTARY INFORMATION: For additional information see the direct final rule which is published in the Rules Section of this **Federal Register.** A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to this rule, no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period on this document. Any parties interested in commenting on this document should do so at this time.

Dated: November 21, 2011.

A. Stanley Meiburg,

Acting Regional Administrator, Region 4.

[FR Doc. 2011–33149 Filed 12–23–11; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL MARITIME COMMISSION

46 CFR Part 532

[Docket No. 11–22]

Non-Vessel-Operating Common Carriers Negotiated Rate Arrangements; Tariff Filing Exemption

AGENCY: Federal Maritime Commission.

ACTION: Notice of Inquiry.

SUMMARY: The Federal Maritime Commission is issuing this Notice of Inquiry seeking comments on ways to make the tariff filing exemption provided to licensed non-vessel-operating common carriers in its regulations more useful, including its possible extension to foreign-based non-vessel-operating common carriers not licensed by the Federal Maritime Commission.

DATES: Comments are due on or before March 26, 2012.

ADDRESSES: Submit comments to: Karen V. Gregory, Secretary, Federal Maritime Commission, 800 North Capitol Street NW., Washington, DC 20573–0001, or email non-confidential comments to: Secretary@*fmc.gov* (email comments as attachments preferably in Microsoft Word or PDF).

FOR FURTHER INFORMATION CONTACT: Karen V. Gregory, Secretary, Federal Maritime Commission, 800 N. Capitol Street NW., Washington, DC 20573–0001. (202) 523–5725, Fax (202) 523–0014, *Email: Secretary@fmc.gov,* Rebecca A. Fenneman, General Counsel; Federal Maritime Commission, 800 N. Capitol Street, NW., Washington, DC 20573–0001, (202) 523–5740, Fax (202) 523–5738, *Email: GeneralCounsel@fmc.gov.*

SUPPLEMENTARY INFORMATION:

Background

On July 31, 2008, the National Customs Brokers and Forwarders Association of America, Inc. (NCBFAA) filed a petition (Petition) with the Federal Maritime Commission (FMC or Commission), seeking an exemption from provisions of the Shipping Act of 1984 (the Act) requiring non-vessel-operating common carriers (NVOCCs) ''to publish and/or adhere to rate tariffs for ocean transportation in those instances where they have individually negotiated rates with their shipping customers and memorialized those rates in writing.'' NCBFAA Petition at 10. Notice of the Petition was published on August 11, 2008, with comments due by September 26, 2008. Petition No. P1–08, *Petition of the National Customs Brokers and Freight Forwarders Association of America, Inc. for Exemption from Mandatory Rate Tariff Publication,* 73 FR 46625–02 (August 11, 2008). The Commission considered the petition and comments at a meeting on February 18, 2010, and, by a 3–1 vote, determined to initiate a rulemaking to relieve licensed NVOCCs from the costs and burdens of rate tariff publication. On May 7, 2010, the Commission issued a notice of proposed rulemaking (NPR), pursuant to its authority under sections 16 and 17 of the Act, 46 U.S.C. 40103 and 46 U.S.C. 305, seeking comments on a proposal to exempt licensed NVOCCs from the rate publication requirements of the Shipping Act, subject to certain conditions. Docket No. 10–03, 75 FR 25151 (May 7, 2010). Additionally, the Commission requested interested parties to submit comments on whether the exemption should be extended to foreign-based NVOCCs who are unlicensed but bonded pursuant to 46 CFR 515.21(a)(3). On March 2, 2011, after consideration of the comments received in response to the NPR, the Commission issued a final rule, effective April 18, 2011, promulgating 46 CFR Part 532, which exempted licensed NVOCCs from their tariff rate publication obligations when entering into a ''negotiated rate arrangement'' (NRA).[1]

The final rule did not extend the exemption to foreign-based unlicensed NVOCCs due to concerns by Commission Staff that to do so could harm the agency's mission to protect the shipping public. *See* 76 FR 11355–11357. The final rule noted that:

> At this time, Commissioners hold differing views on the concerns the Staff has raised, and on the relevance and weight those concerns should be given in the Commission's decision whether or not to extend the exemption to foreign unlicensed NVOCCs. Accordingly, the Commission will move forward with the current rule as proposed for licensed NVOCCs, but as noted above, will commence proceedings to obtain and consider additional public comment on potential modifications to the final rule, including possible extension of the exemption to include foreign unlicensed NVOCCs. The record in this proceeding will be incorporated into the new Commission proceeding. 76 FR 11357.

NVOCCs have now been able to use NRAs for more than six months. In accordance with the statements in the final rule, the Commission now invites comment and information from all members of the interested public (whether they be located in the United States or elsewhere), including ocean common carriers, ocean transportation intermediaries, exporters, and beneficial cargo owners, on ways to make the exemption more useful, including possible extension of the exemption to include foreign unlicensed NVOCCs. Comments that are specific and provide supporting data are most helpful. The

[1] An NRA is defined as ''a written and binding arrangement between a shipper and an eligible NVOCC to provide specific transportation service for a stated cargo quantity, from origin to destination, on and after the receipt of the cargo by the carrier or its agent (or the originating carrier in the case of through transportation).'' 46 CFR 532.3(a). An NVOCC's use of NRAs is subject to several conditions, including (1) NVOCCs who use NRAs are required to continue publishing standard rules tariffs containing contractual terms and conditions governing shipments, including any accessorial charges and surcharges, and are required to make their rules tariffs available to shippers free of charge; (2) NRA rates charged by NVOCCs must be mutually agreed and memorialized in writing by the date cargo is received for shipment; and (3) NVOCCs who use NRAs must retain documentation confirming the agreed rate and terms for each shipment for a period of five years, and must make such documentation promptly upon request available to the Commission pursuant to the Commission's regulations at 46 CFR 515.31(g).

record in Docket 10–03 is incorporated into this proceeding.

Submit Comments

Non-confidential filings may be submitted in hard copy or by email as an attachment (preferably in Microsoft Word or PDF) addressed to *secretary@fmc.gov* on or before March 26, 2012. Include in the subject line: ''Negotiated Rate Arrangements—Response to NOI.'' Confidential filings must be submitted in the traditional manner on paper, rather than by email. Comments submitted that seek confidential treatment must be submitted in hard copy by U.S. mail or courier. Confidential filings must be accompanied by a transmittal letter that identifies the filing as ''confidential'' and describes the nature and extent of the confidential treatment requested. When submitting comments in response to the Notice of Inquiry that contain confidential information, the confidential copy of the filing must consist of the complete filing and be marked by the filer as ''Confidential-Restricted,'' with the confidential material clearly marked on each page. When a confidential filing is submitted, an original and one additional copy of the public version of the filing must be submitted. The public version of the filing should exclude confidential materials, and be clearly marked on each affected page, ''confidential materials excluded.'' The Commission will provide confidential treatment to the extent allowed by law for those submissions, or parts of submissions, for which confidential treatment is requested. Questions regarding filing or treatment of confidential responses to this Notice of Inquiry should be directed to the Commission's Secretary, Karen V. Gregory, at the telephone number or email provided above.

By the Commission.

Karen V. Gregory,

Secretary.

[FR Doc. 2011–33007 Filed 12–23–11; 8:45 am]

BILLING CODE 6730–01–P

Notices

Federal Register

Vol. 76, No. 248

Tuesday, December 27, 2011

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Office of the Secretary

Increasing Access to Rural Community Investment Opportunities for Investors

AGENCY: Office of the Secretary, USDA.

ACTION: Notice.

SUMMARY: This Notice applies to investors interested in investment opportunities in rural infrastructure; these potential investors are encouraged to contact the Department of Agriculture (USDA). The Rural Development Act of 1972 established USDA's authority to make loans and grants to rural communities. Currently, USDA manages a loan portfolio of approximately $150 billion, of which $5.3 billion is for community facilities. USDA seeks to partner with investors willing to create and implement investment structures that would improve rural communities' access to capital by expanding the leveraging of USDA's community facilities loan funds. Given current turbulent market conditions, these investments may be particularly attractive to the private sector as they have historically provided low-risk, steady cash flows. USDA is open to considering a variety of different investment structures.

DATES: Please provide your contact information on or before January 26, 2012.

ADDRESSES: Please submit your contact information to: Doug O'Brien, Room 205W, U.S. Department of Agriculture, 1400 Independence Ave., SW., Washington, DC 20250; *infrastructure.investments@osec.usda.gov.*

FOR FURTHER INFORMATION CONTACT: For further information on this notice, please contact: Daniel Burrows, Room 205W, U.S. Department of Agriculture, 1400 Independence Ave., SW., Washington, DC 20250; *infrastructure.investments@osec.usda.gov.*

SUPPLEMENTARY INFORMATION:

Purpose

This notice offers the opportunity for interested investors to partner with USDA in considering and implementing different investment structures that provide increased access to capital for rural communities. These structures could provide investors with greater access to a large and stable pool of investments in rural America.

USDA understands that investors have a responsibility to provide market rate returns for their investments, and these investment structures should be designed to be competitive as part of a larger ''positive value driven'' portfolio.

USDA is open to considering a variety of different investment structures. For example, investors could provide financing in projects with USDA at a project level or instead pool capital from different investors to create a dedicated infrastructure investment fund to invest directly in more projects. By law, USDA must continue to invest directly at a project level, but the private investor structure can be more flexible with debt and equity options, and driven by market interests. Investors would be at complete risk for any loss that results from their investment.

Background

USDA has a long and successful history of making loans to rural communities. USDA's Rural Development Community Facility Program manages a loan portfolio of approximately $150 billion, of which $5.3 billion is for community facilities. This program provides direct loans, guaranteed loans, and grants to rural communities to construct essential infrastructure such as schools, hospitals, and fire stations. This program creates jobs, increases the vibrancy of the rural economy, and enhances the quality of life in rural areas. Even in turbulent market conditions, these loans have generated steady returns, with very low default rates.

USDA's Community Facilities program has been oversubscribed for the last three Federal fiscal years. During fiscal year 2012, USDA will make $1.3 billion of direct loans available to rural communities, an amount not likely to meet the demand from worthy projects. Currently, USDA has applications for over one billion dollars in rural communities, and it expects this backlog to increase during this fiscal year.

USDA direct loans for community facilities are currently at a 3.75 percent interest rate. A potential borrower could leverage this with another loan at a slightly higher market rate, and the blended rate could still be attractive to them.

Thus, with the confluence of the backlog in projects and low lending rates, this is an opportune time to make funds available to these projects.

The Agency employs a well-developed methodology of due diligence in awarding loans for Community Facility projects. This methodology includes a comprehensive look at past performance and future projections, including management, revenue security, future demand forecasts, retirement profiles, and historical financials. The Agency also makes an assessment of the broad-based community support for the facility as demonstrated by a variety of factors, including previous fundraising efforts. As a result, the Community Facility loan portfolio has historically performed extraordinarily well. However, investors would be at complete risk for any loss that results from their investment. Also, the Agency would need to have at least a parity position with respect to the security, such that in the event of a default, each lender would be affected on a proportionate basis.

Thus, if the deal flow is there, our question to the private sector is whether there is also a demand for low-risk, long-term investments in rural America with stable cash flows.

With this Notice, USDA seeks to obtain a list of investors, as described below, who are interested in pursuing the creation and implementation of investment structures designed to facilitate and increase rural America's access to capital. USDA will contact each respondent to discuss specific items associated with the creation and implementation of such investment structures. Items that will be discussed will include, but are not necessarily limited to investor desires for:

- Debt or equity,
- Loan term,
- Interest rates,
- Lien positions,
- Collateral,
- Delinquency actions,
- Diversification, and

• Due diligence procedures.

Once we have made these contacts with each interested investor, USDA will hold one or more meetings, as necessary. It is expected that these meetings will occur over a one- to-two month period.

USDA believes that, in order for this effort to be successful, each participating investor:

• Should be a well-established investor, including, but not limited to, entities such as pension funds, commercial banking institutions, insurance investment funds, foundational endowments, or family offices;

• Interested in investing in low risk, rural infrastructure as part of a larger portfolio;

• Willing to commit funds for the long term (*e.g.,* 20+ years); and

• Interested in participating in a limited number of interviews and panels as we shape this initiative with USDA.

Interested Entities

If you are interested in the formation of, and participation in, this effort for increasing access to capital for community facility projects in rural America, please provide the following information to Doug O'Brien, as specified in the **ADDRESSES** section of this Notice, on or before January 26, 2012:

• Name of Institution,
• Headquarters Mailing Address,
• Contact Name and Title,
• Contact Mailing Address,
• Contact Telephone Number(s), and
• Contact Email Address.

Thomas J. Vilsack,

Secretary.

[FR Doc. 2011–33111 Filed 12–23–11; 8:45 am]

BILLING CODE 3410–01–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2011–0023]

Monsanto Co.; Determination of Nonregulated Status of Corn Genetically Engineered for Drought Tolerance

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice.

SUMMARY: We are advising the public of our determination that a corn line developed by the Monsanto Co., designated as event MON 87460, which has been genetically engineered for drought tolerance, is no longer considered a regulated article under our regulations governing the introduction of certain genetically engineered organisms. Our determination is based on our evaluation of data submitted by the Monsanto Company in its petition for a determination of nonregulated status, our analysis of available scientific data, and comments received from the public in response to our previous notice announcing the availability of the petition for nonregulated status and its associated environmental assessment and plant pest risk assessment. This notice also announces the availability of our written determination and finding of no significant impact.

DATES: *Effective Date:* December 27, 2011.

ADDRESSES: You may read the documents referenced in this notice and the comments we received in our reading room. The reading room is located in Room 1141 of the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 690–2817 before coming. Those documents are also available on the Internet at *http://www.aphis.usda.gov/biotechnology/not_reg.html* and are posted with the previous notice and the comments we received on the Regulations.gov Web site at *http://www.regulations.gov/#!docketDetail;D=APHIS-2011-0023.*

FOR FURTHER INFORMATION CONTACT: Mr. Evan Chestnut, Policy Analyst, Biotechnology Regulatory Services, APHIS, 4700 River Road Unit 147, Riverdale, MD 20737–1236; (301) 734–0942, email: *evan.a.chestnut@aphis.usda.gov.* To obtain copies of the documents referenced in this notice, contact Ms. Cindy Eck at (301) 734–0667, email: *cynthia.a.eck@aphis.usda.gov.*

SUPPLEMENTARY INFORMATION:

Background

The regulations in 7 CFR part 340, ''Introduction of Organisms and Products Altered or Produced Through Genetic Engineering Which Are Plant Pests or Which There Is Reason to Believe Are Plant Pests,'' regulate, among other things, the introduction (importation, interstate movement, or release into the environment) of organisms and products altered or produced through genetic engineering that are plant pests or that there is reason to believe are plant pests. Such genetically engineered organisms and products are considered ''regulated articles.''

The regulations in § 340.6(a) provide that any person may submit a petition to the Animal and Plant Health Inspection Service (APHIS) seeking a determination that an article should not be regulated under 7 CFR part 340. Paragraphs (b) and (c) of § 340.6 describe the form that a petition for a determination of nonregulated status must take and the information that must be included in the petition.

APHIS received a petition (APHIS Petition Number 09–055–01p) from the Monsanto Company (Monsanto) of St. Louis, MO, seeking a determination of nonregulated status of corn (*Zea mays* L.) designated as event MON 87460, which has been genetically engineered for drought tolerance, stating that this corn is unlikely to pose a plant pest risk and, therefore, should not be a regulated article under APHIS' regulations in 7 CFR part 340.

In a notice [1] published in the **Federal Register** on May 11, 2011 (76 FR 27303–27304, Docket No. APHIS–2011–0023), APHIS announced the availability of the Monsanto petition, a plant pest risk assessment (PPRA), and a draft environmental assessment (EA) for public comment. APHIS solicited comments on the petition, whether the subject corn is likely to pose a plant pest risk, the draft EA, and the PPRA for 60 days ending on July 11, 2011. On July 27, 2011, APHIS published in the **Federal Register** (76 FR 44891–44892, Docket No. APHIS–2011–0023) a notice announcing the extension of the public comment period for 30 days, ending on August 12, 2011.

APHIS received 250 comments through the Regulations.gov Web site during the comment period, with 21 commenters expressing support of the EA's preferred alternative to make a determination of nonregulated status and the remaining 229 commenters expressing opposition. Three of the submitted comments opposing a determination of nonregulated status included electronic attachments that consisted either of: (1) A single letter signed by numerous people (6,335 signatures), (2) many letters containing identical material (16,742 letters), or (3) a consolidated document of comments (22,500 comments). Many commenters generally expressed opposition to genetically engineered (GE) organisms

[1] To view the notices mentioned in this document, the petition, the draft EA, the PPRA, and the comments we received, go to *http://www.regulations.gov/#!docketDetail;D=APHIS-2011-0023.*

or crops but did not provide any specific disagreement with APHIS' analysis. Several commenters questioned the performance and drought-tolerant capabilities of corn event MON 87460. Other issues raised by commenters include concerns regarding the adequacy of the analysis in the EA, effects of GE crops on biodiversity and organic agriculture, increased use of glyphosate, health and environmental effects of GE crops, and marketing and trade implications. APHIS has addressed the issues raised during the comment period and has provided responses to the comments as an attachment to the finding of no significant impact.

National Environmental Policy Act

To provide the public with documentation of APHIS' review and analysis of any potential environmental impacts associated with the determination of nonregulated status of Monsanto's corn event MON 87460, an EA has been prepared. The EA was prepared in accordance with: (1) The National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. 4321 *et seq.*), (2) regulations of the Council on Environmental Quality for implementing the procedural provisions of NEPA (40 CFR parts 1500–1508), (3) USDA regulations implementing NEPA (7 CFR part 1b), and (4) APHIS' NEPA Implementing Procedures (7 CFR part 372). Based on our EA, the response to public comments, and other pertinent scientific data, APHIS has reached a finding of no significant impact with regard to the preferred alternative identified in the EA.

Determination

Based on APHIS' analysis of field and laboratory data submitted by Monsanto, references provided in the petition, peer-reviewed publications, information analyzed in the EA, the PPRA, comments provided by the public, and information provided in APHIS' response to those public comments, APHIS has determined that Monsanto's corn event MON 87460 is unlikely to pose a plant pest risk and therefore is no longer subject to our regulations governing the introduction of certain GE organisms.

Copies of the signed determination document, as well as copies of the petition, PPRA, EA, finding of no significant impact, and response to comments are available as indicated in the **ADDRESSES** and **FOR FURTHER INFORMATION CONTACT** sections of this notice.

Authority: 7 U.S.C. 7701–7772 and 7781–7786; 31 U.S.C. 9701; 7 CFR 2.22, 2.80, and 371.3.

Done in Washington, DC, this 19th day of December 2011.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2011–33011 Filed 12–22–11; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2010–0032]

Notice of Determination of Pest-Free Areas in Mendoza Province, Argentina

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice.

SUMMARY: We are advising the public that we are recognizing the Southern and Central Oases in the southern half of Mendoza Province in Argentina as pest-free areas for Mediterranean fruit fly and South American fruit fly. Based on our site visit to the area and our review of the documentation submitted by Argentina's national plant protection organization, which we made available to the public for review and comment through previous notices, the Administrator has determined that these areas meet the criteria in our regulations for recognition as pest-free areas for Mediterranean fruit fly and South American fruit fly.

DATES: *Effective Date:* December 27, 2011.

FOR FURTHER INFORMATION CONTACT: Ms. Meredith C. Jones, Regulatory Coordination Specialist, Regulatory Coordination and Compliance, APHIS, 4700 River Road Unit 156, Riverdale, MD 20737; (301) 734–7467.

SUPPLEMENTARY INFORMATION:

Under the regulations in ''Subpart—Fruits and Vegetables'' (7 CFR 319.56–1 through 319.56–54, referred to below as the regulations), the Animal and Plant Health Inspection Service (APHIS) of the U.S. Department of Agriculture prohibits or restricts the importation of fruits and vegetables into the United States from certain parts of the world to prevent plant pests from being introduced into and spread within the United States.

Section 319.56–4 of the regulations contains a performance-based process for approving the importation of commodities that, based on the findings of a pest risk analysis, can be safely imported subject to one or more of the designated phytosanitary measures listed in paragraph (b) of that section. One of the designated phytosanitary measures is that the fruits or vegetables are imported from a pest-free area in the country of origin that meets the requirements of § 319.56–5 for freedom from that pest and are accompanied by a phytosanitary certificate stating that the fruits or vegetables originated in a pest-free area in the country of origin.

Under the regulations in § 319.56–5, APHIS requires that determinations of pest-free areas be made in accordance with the criteria for establishing freedom from pests found in International Standards for Phytosanitary Measures (ISPM) No. 4, ''Requirements For the Establishment of Pest Free Areas.'' The international standard was established by the International Plant Protection Convention of the United Nations' Food and Agriculture Organization and is incorporated by reference in our regulations in 7 CFR 300.5. In addition, APHIS must also approve the survey protocol used to determine and maintain pest-free status, as well as protocols for actions to be performed upon detection of a pest. Pest-free areas are subject to audit by APHIS to verify their status.

In accordance with our process, we published a notice [1] in the **Federal Register** on June 25, 2010 (75 FR 36347–36348, Docket No. APHIS–2010–0032), in which we announced the availability, for review and comment, of a commodity import evaluation document (CIED) that evaluates the information presented by Argentina in support of its request to recognize additional areas as pest-free areas for Mediterranean fruit fly (*Ceratitis capitata*) in Argentina. We solicited comments on the notice for 60 days ending on August 24, 2010. We received two comments by that date, one from a State agricultural official and the other from an official of Argentina's national plant protection organization (NPPO).

The first commenter acknowledged Argentina's history of successful Medfly control efforts, but stated that APHIS should not relax its fruit fly-related restrictions until it can confirm that no other pest fruit flies—notably *Anastrepha* species fruit flies—are present in the area. The second commenter provided information to support a finding that the Mendoza Province is free of the South American

[1] To view the June 2010 and August 2011 notices, the CIEDs, and the comments we received, go to *http://www.regulations.gov/#!docketDetail;D=APHIS-2010-0032.*

fruit fly (*Anastrepha fraterculus*). As a result of these comments, APHIS contacted the Argentine NPPO, which requested that, in addition to the pest-free status for *C. capitata,* the Mendoza province of Argentina also be recognized as free of *A. fraterculus.*

We published a second notice in the **Federal Register** on August 19, 2011 (76 FR 51934–51935, Docket No. APHIS–2010–0032), in which we announced the availability, for review and comment, of a CIED evaluating the information presented by Argentina in support of its request to recognize additional areas as pest-free areas for the South American fruit fly and all other economically important species of *Anastrepha* in Argentina. We solicited comments on the notice for 60 days ending on October 18, 2011. We received no comments by that date.

Therefore, in accordance with § 319.56–5(c), we are announcing the Administrator's determination that the Southern and Central Oases in the southern half of Mendoza Province in Argentina meet the criteria of § 319.56–5(a) and (b) with respect to freedom from Medfly, South American fruit fly, and all other economically important species of *Anastrepha.* Accordingly, we are recognizing these areas as pest-free areas for Medfly, South American fruit fly, and all other economically important species of *Anastrepha* and have added them to the list of pest-free areas. A list of pest-free areas currently recognized by APHIS can be found at *http://www.aphis.usda.gov/import_export/plants/manuals/ports/downloads/DesignatedPestFreeAreas.pdf.*

Done in Washington, DC, this 19th day of December 2011.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2011–33110 Filed 12–23–11; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2011–0095]

Monsanto Co.; Availability of Petition, Plant Pest Risk Assessment, and Environmental Assessment for Determination of Nonregulated Status of Soybean Genetically Engineered To Produce Stearidonic Acid

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice.

SUMMARY: We are advising the public that the Animal and Plant Health Inspection Service has received a petition from the Monsanto Company seeking a determination of nonregulated status of soybean designated as MON 87769, which has been genetically engineered to produce stearidonic acid, an omega-3 fatty acid not found in conventional soybean. The petition has been submitted in accordance with our regulations concerning the introduction of certain genetically engineered organisms and products. We are soliciting comments on whether this genetically engineered soybean is likely to pose a plant pest risk. We are making available for public comment the Monsanto petition, our plant pest risk assessment, and our draft environmental assessment for the proposed determination of nonregulated status.

DATES: We will consider all comments that we receive on or before February 27, 2012.

ADDRESSES: You may submit comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/#!documentDetail;D=APHIS-2011-0095-0001.*
- *Postal Mail/Commercial Delivery:* Send your comment to Docket No. APHIS–2011–0095, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238.

Supporting documents and any comments we receive on this docket may be viewed at *http://www.regulations.gov/#!docketDetail;D=APHIS-2011-0095* or in our reading room, which is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 690–2817 before coming.

The petition, draft environmental assessment, and plant pest risk assessment are also available on the APHIS Web site at *http://www.aphis.usda.gov/brs/aphisdocs/09_18301p.pdf, http://www.aphis.usda.gov/brs/aphisdocs/09_18301p _dea.pdf,* and *http://www.aphis.usda.gov/brs/aphisdocs/09_18301p _dpra.pdf.*

FOR FURTHER INFORMATION CONTACT: Mr. Evan Chestnut, Policy Analyst, Biotechnology Regulatory Services, APHIS, 4700 River Road Unit 147, Riverdale, MD 20737–1236; (301) 734–0942, email: *evan.a.chestnut@aphis.usda.gov.* To obtain copies of the petition, draft environmental assessment, or plant pest risk assessment, contact Ms. Cindy Eck at (301) 734–0667, email: *cynthia.a.eck@aphis.usda.gov.*

SUPPLEMENTARY INFORMATION:

Background

Under the authority of the plant pest provisions of the Plant Protection Act (7 U.S.C. 7701 *et seq.*), the regulations in 7 CFR part 340, ''Introduction of Organisms and Products Altered or Produced Through Genetic Engineering Which Are Plant Pests or Which There Is Reason to Believe Are Plant Pests,'' regulate, among other things, the introduction (importation, interstate movement, or release into the environment) of organisms and products altered or produced through genetic engineering that are plant pests or that there is reason to believe are plant pests. Such genetically engineered organisms and products are considered ''regulated articles.''

The regulations in § 340.6(a) provide that any person may submit a petition to the Animal and Plant Health Inspection Service (APHIS) seeking a determination that an article should not be regulated under 7 CFR part 340. Paragraphs (b) and (c) of § 340.6 describe the form that a petition for a determination of nonregulated status must take and the information that must be included in the petition.

APHIS has received a petition (APHIS Petition Number 09–183–01p) from the Monsanto Company (Monsanto) of St. Louis, MO, seeking a determination of nonregulated status of soybean (*Glycine max*) designated as event MON 87769, which has been genetically engineered to produce stearidonic acid, an omega-3 fatty acid not found in conventional soybean, stating that this soybean is unlikely to pose a plant pest risk and, therefore, should not be a regulated article under APHIS' regulations in 7 CFR part 340.

As described in the petition, soybean event MON 87769 has been genetically engineered to express high levels of the fatty acid stearidonic acid and smaller amounts of three other fatty acids, as well as for reduced expression of linoleic acid. Soybean event MON 87769 is currently regulated under 7 CFR part 340. Interstate movements and field tests of soybean event MON 87769 have been conducted under permits issued or notifications acknowledged by APHIS.

Field tests conducted under APHIS oversight allowed for evaluation in a natural agricultural setting while imposing measures to minimize the risk

of persistence in the environment after completion of the test. Data are gathered on multiple parameters and used by the applicant to evaluate agronomic characteristics and product performance. These and other data are used by APHIS to determine if the new variety poses a plant pest risk.

In section 403 of the Plant Protection Act, ''plant pest'' is defined as any living stage of any of the following that can directly or indirectly injure, cause damage to, or cause disease in any plant or plant product: A protozoan, a nonhuman animal, a parasitic plant, a bacterium, a fungus, a virus or viroid, an infectious agent or other pathogen, or any article similar to or allied with any of the foregoing. APHIS has prepared a plant pest risk assessment to determine if soybean event MON 87769 is unlikely to pose a plant pest risk.

APHIS has also prepared a draft environmental assessment (EA) in which it presents two alternatives based on its analyses of data submitted by Monsanto, a review of other scientific data, and field tests conducted under APHIS oversight. APHIS is considering the following alternatives: (1) Take no action, *i.e.,* APHIS would not change the regulatory status of soybean event MON 87769 and it would continue to be a regulated article, or (2) make a determination of nonregulated status of soybean event MON 87769.

The draft EA has been prepared to provide the APHIS decisionmaker with a review and analysis of any potential environmental impacts associated with the proposed determination of nonregulated status of soybean event MON 87769. The draft EA was prepared in accordance with (1) the National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. 4321 *et seq.*), (2) regulations of the Council on Environmental Quality for implementing the procedural provisions of NEPA (40 CFR parts 1500–1508), (3) USDA regulations implementing NEPA (7 CFR part 1b), and (4) APHIS' NEPA Implementing Procedures (7 CFR part 372).

In accordance with § 340.6(d) of the regulations, we are publishing this notice to inform the public that APHIS will accept written comments regarding the petition for a determination of nonregulated status from interested or affected persons for a period of 60 days from the date of this notice. We are also soliciting written comments from interested or affected persons on the plant pest risk assessment and the draft EA prepared to examine any potential environmental impacts of the proposed determination for the deregulation of the subject soybean line. The petition, draft EA, and plant pest risk assessment are available for public review, and copies of the petition, draft EA, and plant pest risk assessment are available as indicated under **ADDRESSES** and **FOR FURTHER INFORMATION CONTACT** above.

After the comment period closes, APHIS will review all written comments received during the comment period and any other relevant information. All comments received regarding the petition, draft EA, and plant pest risk assessment will be available for public review. After reviewing and evaluating the comments on the petition, the draft EA, plant pest risk assessment, and other data, APHIS will furnish a response to the petitioner, either approving or denying the petition. APHIS will also publish a notice in the **Federal Register** announcing the regulatory status of soybean event MON 87769 and the availability of APHIS' written environmental decision and regulatory determination.

Authority: 7 U.S.C. 7701–7772 and 7781–7786; 31 U.S.C. 9701; 7 CFR 2.22, 2.80, and 371.3.

Done in Washington, DC this 19th day of December 2011.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2011–33002 Filed 12–22–11; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2010–0103]

Dow AgroScience LLC; Availability of Petition, Plant Pest Risk Assessment, and Environmental Assessment for Determination of Nonregulated Status of Corn Genetically Engineered for Herbicide Tolerance

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice.

SUMMARY: We are advising the public that the Animal and Plant Health Inspection Service has received a petition from Dow AgroScience LLC seeking a determination of nonregulated status of corn designated as DAS–40278–9, which has been genetically engineered for increased resistance to broadleaf herbicides in the phenoxy auxin group (such as the herbicide 2,4-D) and resistance to grass herbicides in the aryloxyphenoxypropionate acetyl coenzyme A carboxylase inhibitor group (such as quizalofop herbicides). The petition has been submitted in accordance with our regulations concerning the introduction of certain genetically engineered organisms and products. We are soliciting comments on whether this genetically engineered corn is likely to pose a plant pest risk. We are making available for public comment the Dow AgroScience LLC petition, our plant pest risk assessment, and our draft environmental assessment for the proposed determination of nonregulated status.

DATES: We will consider all comments that we receive on or before February 27, 2012.

ADDRESSES: You may submit comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/#!documentDetail;D=APHIS–2010–0103–0001.*
- *Postal Mail/Commercial Delivery:* Send your comment to Docket No. APHIS–2010–0103, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238.

Supporting documents and any comments we receive on this docket may be viewed at *http://www.regulations.gov/#!docketDetail;D=APHIS–2010–0103* or in our reading room, which is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 690–2817 before coming.

The petition, draft environmental assessment, and plant pest risk assessment are also available on the APHIS Web site at *http://www.aphis.usda.gov/brs/aphisdocs/09_23301p.pdf, http://www.aphis.usda.gov/brs/aphisdocs/09_23301p _dea.pdf,* and *http://www.aphis.usda.gov/brs/aphisdocs/09_23301p _dpra.pdf.*

FOR FURTHER INFORMATION CONTACT: Mr. Evan Chestnut, Policy Analyst, Biotechnology Regulatory Services, APHIS, 4700 River Road Unit 147, Riverdale, MD 20737–1236; (301) 734–0942, email: *evan.a.chestnut@aphis.usda.gov.* To obtain copies of the petition, draft environmental assessment, or plant pest risk assessment, contact Ms. Cindy Eck at (301) 734–0667, email: *cynthia.a.eck@aphis.usda.gov.*

SUPPLEMENTARY INFORMATION:

Background

Under the authority of the plant pest provisions of the Plant Protection Act (7

U.S.C. 7701 *et seq.*), the regulations in 7 CFR part 340, ''Introduction of Organisms and Products Altered or Produced Through Genetic Engineering Which Are Plant Pests or Which There Is Reason to Believe Are Plant Pests,'' regulate, among other things, the introduction (importation, interstate movement, or release into the environment) of organisms and products altered or produced through genetic engineering that are plant pests or that there is reason to believe are plant pests. Such genetically engineered organisms and products are considered ''regulated articles.''

The regulations in § 340.6(a) provide that any person may submit a petition to the Animal and Plant Health Inspection Service (APHIS) seeking a determination that an article should not be regulated under 7 CFR part 340. Paragraphs (b) and (c) of § 340.6 describe the form that a petition for a determination of nonregulated status must take and the information that must be included in the petition.

APHIS has received a petition (APHIS Petition Number 09–233–01p) from Dow AgroScience LLC (Dow) of Indianapolis, IN, seeking a determination of nonregulated status of corn (*Zea mays*) designated as event DAS–40278–9, which has been genetically engineered for increased resistance to broadleaf herbicides in the phenoxy auxin group (such as the herbicide 2,4-D) and resistance to grass herbicides in the aryloxyphenoxypropionate acetyl coenzyme A carboxylase inhibitor group (such as quizalofop herbicides), stating that this corn is unlikely to pose a plant pest risk and, therefore, should not be a regulated article under APHIS' regulations in 7 CFR part 340.

As described in the petition, corn event DAS–40278–9 has been genetically engineered to express the aryloxyalkanoate dioxygenase protein AAD–1. Corn event DAS–40278–9 is currently regulated under 7 CFR part 340. Interstate movements and field tests of corn event DAS–40278–9 have been conducted under permits issued or notifications acknowledged by APHIS.

Field tests conducted under APHIS oversight allowed for evaluation in a natural agricultural setting while imposing measures to minimize the risk of persistence in the environment after completion of the test. Data are gathered on multiple parameters and used by the applicant to evaluate agronomic characteristics and product performance. These and other data are used by APHIS to determine if the new variety poses a plant pest risk.

In section 403 of the Plant Protection Act, ''plant pest'' is defined as any living stage of any of the following that can directly or indirectly injure, cause damage to, or cause disease in any plant or plant product: A protozoan, a nonhuman animal, a parasitic plant, a bacterium, a fungus, a virus or viroid, an infectious agent or other pathogen, or any article similar to or allied with any of the foregoing. APHIS has prepared a plant pest risk assessment to determine if corn event DAS–40278–9 is unlikely to pose a plant pest risk.

APHIS has also prepared a draft environmental assessment (EA) in which it presents two alternatives based on its analyses of data submitted by Dow, a review of other scientific data, and field tests conducted under APHIS oversight. APHIS is considering the following alternatives: (1) Take no action, *i.e.,* APHIS would not change the regulatory status of corn event DAS–40278–9 and it would continue to be a regulated article, or (2) make a determination of nonregulated status of corn event DAS–40278–9.

The draft EA has been prepared to provide the APHIS decisionmaker with a review and analysis of any potential environmental impacts associated with the proposed determination of nonregulated status of corn event DAS–40278–9. The draft EA was prepared in accordance with (1) the National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. 4321 *et seq.*), (2) regulations of the Council on Environmental Quality for implementing the procedural provisions of NEPA (40 CFR parts 1500–1508), (3) USDA regulations implementing NEPA (7 CFR part 1b), and (4) APHIS' NEPA Implementing Procedures (7 CFR part 372).

In accordance with § 340.6(d) of the regulations, we are publishing this notice to inform the public that APHIS will accept written comments regarding the petition for a determination of nonregulated status from interested or affected persons for a period of 60 days from the date of this notice. We are also soliciting written comments from interested or affected persons on the plant pest risk assessment and the draft EA prepared to examine any potential environmental impacts of the proposed determination for the deregulation of the subject corn line. The petition, draft EA, and plant pest risk assessment are available for public review, and copies of the petition, draft EA, and plant pest risk assessment are available as indicated under **ADDRESSES** and **FOR FURTHER INFORMATION CONTACT** above.

After the comment period closes, APHIS will review all written comments received during the comment period and any other relevant information. All comments received regarding the petition, draft EA, and plant pest risk assessment will be available for public review. After reviewing and evaluating the comments on the petition, the draft EA, plant pest risk assessment, and other data, APHIS will furnish a response to the petitioner, either approving or denying the petition. APHIS will also publish a notice in the **Federal Register** announcing the regulatory status of corn event DAS–40278–9 and the availability of APHIS' written environmental decision and regulatory determination.

Authority: 7 U.S.C. 7701–7772 and 7781–7786; 31 U.S.C. 9701; 7 CFR 2.22, 2.80, and 371.3.

Done in Washington, DC, this 19th day of December 2011.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2011–33009 Filed 12–22–11; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

[Docket No. FSIS–2011–0028]

Food Source Attribution; Public Meeting

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Notice of public meeting.

SUMMARY: The Food Safety and Inspection Service (FSIS), in collaboration with the Food and Drug Administration (FDA), and the Centers for Disease Control and Prevention (CDC), is hosting a public meeting to discuss Federal efforts to advance tri-agency understanding of food source attribution and develop harmonized food source attribution estimates useful to informing targeted food safety strategies. The public meeting will also introduce the Interagency Food Safety Analytics Collaboration (IFSAC), which was formed to collaborate on analytic projects. The meeting will also serve as a platform to introduce IFSAC's draft Strategic Plan. Foodborne illness attribution was selected as the initial focus in light of the CDC foodborne illness burden estimates released in 2011 and in response to stakeholder input to develop a unified approach to attribution. FSIS, FDA, and CDC are also interested in input from stakeholders regarding existing data and methods for food source attribution in the United States and the opportunities and challenges in implementing the IFSAC Strategic Plan.

DATES: The public meeting will be held on Tuesday, January 31, 2012, 8:30 a.m. to 4 p.m.

ADDRESSES: The meeting will be held at the South Building Cafeteria, U.S. Department of Agriculture (USDA), 14th & Independence Avenue SW., Washington, DC 20250. Non-USDA employees must enter through wing 2, located at 12th and C Street SW. Attendees must provide a photo ID to enter the building.

FOR FURTHER INFORMATION CONTACT: For questions about registration, to register orally, or to submit a notice of participation by mail, fax, or by email: Courtney Treece, Planning Professionals, Ltd., 1210 W. McDermott, Suite 111, Allen, TX 75013, telephone: (704) 258–4983, fax: (469) 854–6992, email: *ctreece@planningprofessionals.com*.

For questions about the meeting, to request an opportunity to make public comments, or to submit the full text, comprehensive outline or summary of an oral presentation, contact: Juanita Yates, FDA, Center for Food Safety and Applied Nutrition, telephone: (240) 402–1731, email: *juanita.yates@fda.hhs.gov.* To request special accommodations due to a disability, contact Juanita Yates by January 25, 2012.

For logistical information about the meeting, contact Joan Lindenberger, Office of Public Affairs and Consumer Education, FSIS, telephone: (202) 720–6755, or by email at *joan.lindenberger@fsis.usda.gov.*

For technical information about the meeting, contact Dr. David Goldman, Assistant Administrator, Office of Public Health Science, USDA, FSIS, telephone: (202) 690–6462, fax: (202) 690–6337, email: *David.Goldman@fsis.usda.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

Estimating the number of illnesses, hospitalizations, and deaths caused by major foodborne pathogens is an important step in the prioritization of disease control programs. Estimating the proportions of these illnesses that are caused by specific food sources (food source attribution) is a necessary additional step in measuring progress toward public health goals resulting from food safety policies and interventions. The number of illnesses and their food source attribution are used together to inform strategic planning and policy decisions to allocate Federal resources towards pressing public health concerns.

Currently, work by Scallan et al (2011) [1] provides estimates of the annual number of foodborne illnesses caused by 31 major pathogens and was informed by a variety of data sources. Estimating the most common sources of these foodborne illnesses (food source attribution) also relies on multiple data sources and analytic methods. Data from foodborne outbreak investigations have always been an important source of attribution information because many of these investigations determine the specific food associated with illnesses. However, most foodborne illness is not associated with detected outbreaks, and some causes of foodborne illness, such as *Toxoplasma* and *Campylobacter,* are never or rarely associated with foodborne outbreaks. Consequently, additional data sources and analytic methods are needed to enhance food source attribution estimates and inform their interpretation. These may include studies of laboratory-confirmed illnesses, expert elicitations, and risk assessments.

In response to President Obama's Food Safety Working Group Key Findings on ''Improved Organization of Federal Food Safety Responsibilities,'' FSIS, FDA, and CDC formed IFSAC in February 2011 to meet the crucial need for strengthening Federal collaboration by addressing cross-cutting priorities for food safety data collection, analysis, and use. Additionally, as a part of tri-Agency public meetings on the development of feasible and effective food safety performance metrics held in March, July, and October 2010, stakeholders identified the need for the three Federal food safety agencies to work together and harmonize food source attribution efforts. This includes working jointly to advance the science and methods available for estimating attribution. As a result, IFSAC chose food source attribution as its first food safety analytical challenge.

The initial objective of IFSAC is the estimation of source attribution of foodborne infections to specific foods and settings. This includes the understanding that continuous improvements to data and the analytic methods available for generating attribution estimates will provide more accurate assessments of the attribution of foodborne illnesses across the broad range of commodities and points in the food safety chain. In Summer 2011, the three agencies worked together to develop a cohesive description of specific needs related to food source attribution, which includes both short-term needs such as developing shared attribution estimates for decision-making, as well as long-term needs that focus on plans for reducing the uncertainty, improving data and analytic methods, and obtaining comprehensive estimates of attribution that are informed by multiple data sources and analytic approaches. These needs, and the strategy for meeting these needs, were captured in the draft IFSAC Strategic Plan for Attribution.

In October 2011, this plan was reviewed by three food safety experts independent of the U.S. government, who did not provide any consensus recommendations or advice, and in November 2011, it was presented to members of the Food Safety Modernization Act (FSMA) surveillance workgroup. IFSAC also sought advice from the FDA Risk Communication Advisory Committee (RCAC) on August 15–16, 2011, on how to best communicate to stakeholders on the evolving methodology and complex data sources involved in food source attribution. Meeting materials, transcripts and meeting minutes from the RCAC meeting on August 15–16, 2011, are available at *http://www.fda.gov/AdvisoryCommittees/CommitteesMeetingMaterials/RiskCommunicationAdvisoryCommittee/ucm249108.htm.* Based on the feedback received on the Strategic Plan and communication challenges, IFSAC is developing new strategies and communication materials to meet the needs of the three agencies and food safety stakeholders.

The agencies will present the IFSAC Strategic Plan for Attribution and will seek input on the opportunities and challenges to improve food source attribution efforts in the United States. An agenda for the meeting and the draft IFSAC Strategic Plan will be finalized on or before the public meeting date and will be posted at *http://www.fsis.usda.gov/News_&_Events/meetings_&_events.*

II. Registration

Due to limited space, FSIS encourages all persons who wish to attend the meeting to register online at *http://www.fsis.usda.gov/News_&_Events/meetings_&_events* by January 25, 2012.

III. Comments

Stakeholders will have an opportunity to provide oral comments. Interested persons and organizations who desire an opportunity to make an oral presentation during the time allotted for

[1] Scallan E, Hoekstra RM, Angulo FJ, Tauxe RV, Widdowson M-A, Roy SL, et al. Foodborne illness acquired in the United States—major pathogens. *Emerg Infect Dis* [serial on the Internet]. 2011 Jan [cited 11/15/2011]. *http://www.cdc.gov/EID/content/17/1/7.htm.*

public comments at the meeting are encouraged to register in advance by January 9, 2012. Anyone registering to provide a public comment must also provide a brief description of the comment and any material to be used during the presentation by January 25, 2012.

In addition to this meeting, interested persons may submit comments on or before March 1, 2012, using either of the following methods:

Federal eRulemaking Portal: Go to *http://www.regulations.gov* and follow the online instructions at that site for submitting comments.

Mail, including CD–ROMS: Send to Docket Clerk, USDA, FSIS Docket Room, 1400 Independence Avenue SW., Patriots Plaza 3, Mailstop 3782, Room 8–163A, Washington, DC 20250–3700.

Hand- or courier-delivered items: Deliver to the Docket Clerk, USDA, FSIS Docket Room at Patriots Plaza 3, 355 E. Street SW., Room 8–164, Washington, DC 20250 between 8:30 a.m. and 4:30 p.m., Monday through Friday.

Instructions: All items submitted by mail or electronic mail must include the Agency name and docket number FSIS–2011–0028. Comments received in response to this docket will be made available for public inspection and posted without change, including any personal information, to *http://www.regulations.gov.*

Docket: For access to background documents or comments received, go to the FSIS Docket Room at Patriots Plaza 3, 355 E. Street SW., Room 8–164, Washington, DC 20250 between 8:30 a.m. and 4:30 p.m., Monday through Friday.

IV. Transcripts

As soon as the meeting transcripts are available, they will be accessible on the FSIS Web site at *http://www.fsis.usda.gov/news/meetings_&_events.* The transcripts may also be viewed at the FSIS Docket Room at the address listed above.

Additional Public Notification

FSIS will announce this notice online through the FSIS Web page located at *http://www.fsis.usda.gov/regulations_&_policies/Federal_Register_Notices/index.asp.*

FSIS will also make copies of this **Federal Register** publication available through the FSIS Constituent Update, which is used to provide information regarding FSIS policies, procedures, regulations, **Federal Register** notices, FSIS public meetings, and other types of information that could affect or would be of interest to constituents and stakeholders. The Update is communicated via Listserv, a free electronic mail subscription service for industry, trade groups, consumer interest groups, health professionals, and other individuals who have asked to be included. The Update is also available on the FSIS Web page. In addition, FSIS offers an electronic mail subscription service which provides automatic and customized access to selected food safety news and information. This service is available at *http://www.fsis.usda.gov/News_&_Events/Email_Subscription/.* Options range from recalls to export information to regulations, directives, and notices. Customers can add or delete subscriptions themselves, and have the option to password protect their accounts.

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To file a written complaint of discrimination, write USDA, Office of the Assistant Secretary for Civil Rights, 1400 Independence Avenue SW., Washington, DC 20250–9410 or call (202) 720–5964 (voice and TTY). USDA is an equal opportunity provider and employer.

Done at Washington, DC on December 19, 2011.

Alfred V. Almanza,

Administrator.

[FR Doc. 2011–33018 Filed 12–23–11; 8:45 am]

BILLING CODE 3410–DM–P

DEPARTMENT OF AGRICULTURE

Forest Service

Los Padres National Forest: California; Environmental Impact Statement for the Removal of the Noxious Weed Tamarisk on the Los Padres National Forest

AGENCY: Forest Service, USDA.

ACTION: Notice of intent to prepare an environmental impact statement.

SUMMARY: The USDA, Forest Service, Los Padres National Forest, gives notice of intent to conduct analysis and prepare an Environmental Impact Statement (EIS) for the removal of the noxious weed Tamarisk across the Los Padres National forest: this notice announces the beginning of scoping, describes the proposed action, decisions to be made, and estimates the dates for filing the draft and final EIS. This notice also provides information concerning public participation, and the names and addresses of the Agency officials who can provide information.

DATES: Comments concerning the scope of the analysis will be received for 45 days from publication in the **Federal Register**. The draft environmental impact statement is expected October 17, 2011 and the final environmental impact statement is expected April 30, 2012.

ADDRESSES: Send written comments to Los Padres National Forest, 6755 Hollister Avenue, Suite 150, Goleta, CA 93117, attention: Lloyd Simpson, Forest Botanist. Comments may also be sent via email to: *comments-pacificsouthwest-los-padres-ojai@fs.fed.us,* or via facsimile to (805) 646–0408.

Comments received in response to this solicitation, including names and addresses of those who comment, will be part of the public record for this proposed action.

FOR FURTHER INFORMATION CONTACT: Questions about the proposed action may be directed to Project Team Leader, Lloyd Simpson, Los Padres National Forest, Ojai Ranger District, 1190 E. Ojai Ave., Ojai, CA 93023; or by telephone: (805) 646–4348 ext. 316. Email: *commentspacificsouthwest-los-padres-ojai@fs.fed.us.*

Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-(800) 877–8339 between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday.

SUPPLEMENTARY INFORMATION:

Purpose and Need for Action

There is a need to eradicate the noxious weed tamarisk from Piru Creek, Lockwood Creek, Cuyama River, Santa Ynez River, Sisquoc River, and Arroyo Seco River in order to restore and maintain habitat for riparian dependent species such as the federally listed arroyo toad, California red-legged frog, and steelhead trout. The purpose of this project is to eradicate tamarisk in a timely manner and with an approach that is pest-specific, cost effective, and safe for the human and aquatic environments.

The project area is on the Los Padres National Forest in portions of the Piru Creek, Lockwood Creek, Cuyama River,

Santa Ynez River, Sisquoc River, and Arroyo Seco River watersheds. The analysis area covers 4,247 acres and 368 miles of perennial and intermittent streams. Infestations of tamarisk occurring in these streams and their tributaries within the analysis area are targeted for removal.

For fish and wildlife, direction is provided to maintain fisheries habitat for viable populations of native fish species and to prevent the destruction or adverse modification of habitat essential to threatened, endangered, or sensitive species. The Forest Plan states that ''management activities or practices may occur in riparian areas as long as habitat and species diversity of the area is maintained in a healthy state'' and that ''habitat improvement will enhance conditions for sensitive, threatened, and endangered species.''

Proposed Action

The Los Padres National Forest (LPNF) proposes to control the invasive species tamarisk in portions of the Piru Creek, Lockwood Creek, Cuyama River, Santa Ynez River, Sisquoc River, and Arroyo Seco River watersheds. This action will result in the improvement of riparian ecosystems that have been impacted by the invasion of tamarisk.

Tamarisk has replaced the native riparian plant community of willows, cottonwoods and other desirable native riparian species. Its' water-consuming ability has reduced the surface water available to wildlife. The best management strategy is to enact control measures now before the tamarisk infestations become any larger.

Successful invasive species control programs are implemented at the landscape level, particularly within watersheds for species that colonize stream courses. Partnerships are especially important for accomplishing weed control. Volunteers have worked for many years on the Los Padres to remove and control tamarisk. They will continue to be part of this effort.

Tamarisk infestations have various impacts on a number of federally listed threatened (F–T) and endangered (F–E) species, as well as some Region 5 Forest Service Sensitive (R5–S) species. Federally listed endangered Least Bell's vireo and Southwestern Willow Flycatcher have been known to nest in large groves of habitat dominated by tamarisk, but this is not likely in the Los Padres NF given the scattered nature of the present tamarisk populations. However, it is well documented that tamarisk removal will restore natural habitat for these birds as well as arroyo toad (F–E), California red-legged frog (F–T), southwestern pond turtle (R5–S), two-striped garter snake (R5–S) and steelhead trout (both F–E and F–T) stocks.

This project is designed to eradicate current infestations of Tamarisk (Tamarix ramosissima, T. chinensis, T. gallica, T. parviflora) and to prevent its further spread on National Forest System land. Tamarisk is a nonnative invasive tree-shrub that can grow in dense patches, out-compete native vegetation, change soil chemistry by depositing salts in deep ground water on the soil surface, and remove large amounts of water from streams and riparian areas via evapo-transpiration through its foliage. This project covers portions of the Piru Creek, Lockwood Creek, Cuyama River, Santa Ynez River, Sisquoc River, and Arroyo Seco River watersheds.

The current tamarisk infestation covers 368 miles or 4,247 acres of riparian habitat on NFS lands. The goal is to implement control measures now before tamarisk becomes a larger problem in riparian ecosystems.

The methods of tamarisk eradication have several constraints in this project: (1) Many treatment areas are very steep, making access and logistics difficult. There is no motorized access to most of the project area, much of it is in Congressionally designated Wilderness. All supplies and equipment must either be packed or flown in. Pile-burning cut tamarisk stems is not feasible due to the logistics of getting crews and suppression resources down into the canyons to do it. (2) There are few suitable areas to relocate tamarisk stems for disposal via burn piles. (3) There is habitat known for Least Bell's Vireo and Southwestern Willow Flycatcher, two federally endangered birds in the Piru creek watershed. The habitat area contains scattered tamarisk within the riparian vegetation.

The proposed action is a combination of tamarisk treatment methods designed to be as light on the land as possible and at the same time cost and labor efficient. The methods used will be a combination of hand treatments, herbicide applications, and biological control. Tamarisk seedlings will be removed by hand by pulling and placing them where they cannot reestablish. Herbicides are essential to meet the project objectives. Tamarisk will re-sprout if simply cut down and/or burned. Herbicide treatments are the most effective and the most efficient control method currently available. Herbicide use will be consistent with the Forest Service Pesticide Use Policy, will be in compliance with state and federal regulations, will follow Region 5 Best Management Practices for Vegetation Manipulation, the Region 5 Supplement for Pesticide-Use Management and Coordination, and the Forest Plan guidance including the Supplement to Soil and Water Conservation Practices FSH 2509.22–2005–1. A bio-control insect bred to assist in the treatment and control of tamarisk infestations is currently available. While tamarisk distribution across NFS land may be too spread out to maintain effective populations of a control insect, use of the insect may be appropriate in areas where there is higher tamarisk density.

Herbicide treatments will be restricted to ground-based/hand applications only; NO AERIAL SPRAYING is being proposed.

Seedlings and young plants will be hand-pulled where possible and removed from the riparian area and placed in the sun minimizing soil contact with the roots. Experience with hand pulling has shown that only plants 1 foot tall or less can be successfully removed. We will begin removing the younger plants on the boundaries of infestations and do as much as we can each year.

Large tamarisk within 10 horizontal feet of standing or running water will be treated with imazapyr (Habitat or similar formulation). Treatment type will depend on size of the individual tamarisk plant and the access available to do the treatment. Cut plant material will be removed from the waterway but left in small piles as wildlife habitat.

Treatment methods are:

Cut Stump Treatment: Tree trunks are cut near ground level with handsaws or chainsaws and then stumps are hand coated with the herbicide, surfactant and colorant using sponge brushes. The mixture is quickly absorbed by the plant's phloem and transported to the root; if the herbicide mixture is applied immediately (2–10 minutes), 85–95% control is possible.

Frill Treatment: With this method, a hatchet is used to cut downward into the water-conducting tissue (phloem) of standing trees. This treatment would be done using a Hypo-Hatchet to directly inject a pre-set amount of herbicide directly into the tree. Usually one injection is made for every inch of stem diameter evenly spaced around the circumference.

For plants beyond the 10 horizontal feet of standing or running water, another herbicide, triclopyr (Garlon 4 or similar formulation) may be used. Triclopyr is not labeled for use around water and would only be used on upland plants.

Treatments would be similar to imazapyr and based on plant size. Cut

material will be disposed of in the same way as the cut riparian tamarisk described earlier.

Resource Protection Measures

The following resource protection measures would be employed under all action alternatives:

Water Quality: Water quality would be protected following measures described in the Best Management Practices. Best Management Practices would be implemented during all activities associated with this proposed action. Best Management Practices (BMPs) are measures developed cooperatively with the Forest Service and the California State Water Quality Control Board to control non-point source pollution on National Forest System lands. Many BMPs are available for use and can be tailored to accommodate site-specific conditions. A monitoring protocol for this project will be included in the project implementation plan.

Wildlife and Fisheries: A biological assessment/evaluation of all threatened, endangered, and sensitive wild life and fish species that potentially occur in the project would be drafted to provide an assessment of the impacts of the proposed action. The best management practices above will minimize or eliminate the exposure of wildlife and fisheries to pesticides. The primary effect on federally listed or Forest Service sensitive species will be the physical presence to work crews in occupied habitat. The following resource protection measures would be carried out during project implementation to protect federally listed and R5 Forest Service sensitive species:

- To avoid trampling of arroyo toads and California red-legged frogs, a qualified biologist would conduct a training session for all project personnel prior to conducting the proposed action in habitat for arroyo toads and California red-legged frogs. At a minimum, the training would include a description of the arroyo toad and its habitat, the general provisions of the Endangered Species Act; the necessity for adhering to the provisions of the Act; the penalties associated with violating the provisions of the Act; the general measures that are being implemented to conserve the listed species as they relate to the project; and the access routes to and from project site boundaries within which the treatments may be accomplished.
- In arroyo toad and California red-legged frog habitat, all routes to treatment sites would be identified by a qualified biologist and used repeatedly by workers to minimize trampling of arroyo toads and vegetation.
- Applicators would avoid walking or stepping in water, to the maximum extent possible. They would also avoid spilling herbicide on footwear and clothing to prevent inadvertent contamination if contact with water occurs.
- All access routes and treatment sites within arroyo toad and California red-legged frog habitat would be thoroughly searched for the presence of arroyo toads and California red-legged frog by a qualified biologist prior to the onset of project activities at each site. This should occur within two weeks of work commencement.
- Arroyo toads and California red-legged frog found within the treatment sites shall be carefully moved outside the immediate work area and released by a qualified biologist permitted by USFWS to handle these species. Animals found within access routes may be moved to appropriate habitat if their avoidance is not practicable. If project activities cease for more than three days within any one treatment site, access routes and treatment areas would be searched again for arroyo toads and California red-legged frog prior to the start of the day's work. Information that includes the date, time of capture, specific location of capture, approximate size, age and health of the individual would be recorded.
- Treatments will be conducted during low stream flow or no stream flow periods of the year to avoid potential impacts to steelhead trout or their spawning redds during the late fall to early winter months.
- If workers encounter aquatic wildlife species other than arroyo toads and California red-legged frog during project implementation they will allow the animal(s) to flee to safe areas out of the work sites or physically move the animals to safe locations.

Sensitive Plants: A biological assessment/evaluation of all threatened, endangered, and sensitive plant species that potentially occur in the project would be drafted to provide an assessment of the impacts of the proposed action. Best Management practices above and the highly targeted application methods being used in this project will minimize the exposure of Forest Service sensitive plant species to herbicide.

Noxious Weeds: Require cleaning of any tools carried into or out of the project area to reduce the risk of noxious weed spread.

Heritage Resources: Areas requiring flagging and avoidance would be identified by a qualified heritage resources manager to the project planner prior to any implementation of project work.

Possible Alternatives

A full range of alternatives will be considered including action and no-action. Alternatives responding to issues generated during the scoping process and interdisciplinary team project development will also be developed and considered. All alternatives will comply with the Los Padres National Forest Land Management Plan.

Responsible Official

Peggy Hernandez, Forest Supervisor, Los Padres National Forest, Goleta California, is the responsible official for the EIS and its Record of Decision. As the Responsible Official, the Forest Supervisor will document the decision and reason for the decision in the Record of Decision. The decision will be subject to Forest Service Appeals Regulations (36 CFR part 215).

Nature of Decision To Be Made

The Responsible Official will make a decision considering the following:

1. Whether the proposed action will proceed as proposed, with modifications, or not at all.
2. What associated mitigation measures and monitoring requirements will be required Preliminary Issues.

Preliminary issues identified include the following:

1. Hand removal is not controlling the current infestations of Tamarisk and herbicides are needed.
2. Use of herbicides and the need to protect water quality and public safety.
3. Presence of listed threatened and endangered species, their habitat, and/or mapped critical habitat.

Scoping Process

This notice of intent initiates the scoping process, which guides the development of the environmental impact statement.

The Forest Supervisor is seeking public and agency comment on the proposed action to identify issues that arise from the proposed action. The issues may lead to other alternatives, or additional mitigation measure and monitoring requirements. In addition to this notice, public scoping letters will be mailed to interested parties.

It is important reviewers provide their comments at such times and in such a way they are useful to the Agency's preparation of the environmental impact statement. The submission of timely and specific comments can affect a reviewer's ability to participate in subsequent administrative appeal of judicial review.

Dated: September 7, 2011.

Peggy Hernandez,

Forest Supervisor.

[FR Doc. 2011–33021 Filed 12–23–11; 8:45 am]

BILLING CODE M

DEPARTMENT OF AGRICULTURE

National Institute of Food and Agriculture

Solicitation of Veterinary Shortage Situation Nominations for the Veterinary Medicine Loan Repayment Program (VMLRP)

AGENCY: National Institute of Food and Agriculture, USDA.

ACTION: Notice and solicitation for nominations.

SUMMARY: The National Institute of Food and Agriculture (NIFA) is soliciting nominations of veterinary service shortage situations for the Veterinary Medicine Loan Repayment Program (VMLRP; [75 FR 20239–20248]) for fiscal year (FY) 2012, as authorized under the National Veterinary Medical Services Act (NVMSA), 7 U.S.C. 3151a. This notice initiates a 60-day nomination period and prescribes the procedures and criteria to be used by State, Insular Area, DC and Federal Lands to nominate veterinary shortage situations. Each year all of the aforementioned entities are eligible to submit nominations, up to the maximum indicated for each entity in this notice. NIFA is conducting this solicitation of veterinary shortage situation nominations under previously approved information collection (OMB Control Number 0524–0046).

FOR FURTHER INFORMATION CONTACT: Gary Sherman; National Program Leader, Veterinary Science; National Institute of Food and Agriculture; U.S. Department of Agriculture; STOP 2220; 1400 Independence Avenue SW.; Washington, DC 20250–2220; Voice: (202) 401–4952; Fax: (202) 401–6156; Email: *vmlrp@nifa.usda.gov.*

SUPPLEMENTARY INFORMATION:

Background and Purpose

A landmark series of three peer-reviewed studies published in 2007 in the Journal of the American Veterinary Medical Association (JAVMA), and sponsored by the Food Supply Veterinary Medicine Coalition (*http://www.avma.org/fsvm/recognition.asp*), gave considerable attention to the growing shortage of food supply veterinarians, the causes of shortages in this sector, and the consequences to the U.S. food safety infrastructure and to the general public if this trend continues to worsen. Food supply veterinary medicine embraces a broad array of veterinary professional activities, specialties and responsibilities, and is defined as the full range of veterinary medical practices contributing to the production of a safe and wholesome food supply and to animal, human, and environmental health. However, the privately practicing food animal veterinary practitioner population within the U.S. is, numerically, the largest, and arguably the most important single component of the food supply veterinary medical sector. Food animal veterinarians, working closely with livestock producers and State and Federal officials, constitute the first line of defense against spread of endemic and zoonotic diseases, introduction of high consequence foreign animal diseases, and other threats to the health and well being of both animals and humans who consume animal products.

Among the most alarming findings of the Coalition-sponsored studies was objective confirmation that insufficient numbers of veterinary students are selecting food supply veterinary medical careers. This development has led both to current shortages and to projections for worsening shortages over the next 10 years. While there were many reasons students listed for opting not to choose a career in food animal practice or other food supply veterinary sectors, chief among the reasons was concern over burdensome educational debt. According to a survey of veterinary medical graduates conducted by the American Veterinary Medical Association (AVMA) in the spring of 2009, the average educational debt for students graduating from veterinary school is approximately $130,000. Such debt loads incentivize students to select other veterinary careers, such as companion animal medicine, which tend to be more financially lucrative and, therefore, enable students to more quickly repay their outstanding educational loans. Furthermore, when this issue was studied in the Coalition report from the perspective of identifying solutions to this workforce imbalance, panelists were asked to rate 18 different strategies for addressing shortages. Responses from the panelists overwhelmingly showed that student debt repayment and scholarship programs were the most important strategies in addressing future shortages (JAVMA 229:57–69).

Paperwork Reduction Act

In accordance with the Office of Management and Budget (OMB) regulations (5 CFR part 1320) that implement the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35), the information collection and recordkeeping requirements imposed by the implementation of these guidelines have been approved by OMB Control Number 0524–0046.

List of Subjects in Guidelines for Veterinary Shortage Situation Nominations

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Guidelines for Veterinary Shortage Situation Nominations

I. Preface and Authority

In January 2003, the National Veterinary Medical Service Act (NVMSA) was passed into law adding section 1415A to the National Agricultural Research, Extension, and Teaching Policy Act of 1997 (NARETPA). This law established a new Veterinary Medicine Loan Repayment Program (7 U.S.C. 3151a) authorizing the Secretary of Agriculture to carry out a program of entering into agreements with veterinarians under which they agree to provide veterinary services in veterinarian shortage situations. In November 2005, the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2006 (Pub. L. 109–97) appropriated $495,000 to implement the VMLRP and represented the first time funds had been appropriated for this program. In February 2007, the Revised Continuing Appropriations Resolution, 2007 (Pub. L. 110–5) appropriated an additional $495,000 for support of the program, in December 2007, the Consolidated Appropriations Act, 2008 appropriated an additional

$868,875 for support of the VMLRP, in March 2009, the Omnibus Appropriations Act, 2009 (Pub. L. 111–8) appropriated $2,950,000 for the VMLRP, and in October 2009, the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act of 2010 (Pub. L. 111–80) appropriated $4,800,000 for the VMLRP. On April 15, 2011, the President signed into law, Public Law 112–10, Department of Defense and Full-Year Continuing Appropriations Act, 2011, which after a .2% rescission, appropriated an additional $4,790,400 for the VMLRP.

In FY 2010, NIFA announced the first funding opportunity for the VMLRP and received 260 applications from which 53 awards totaling $5,186,000 were issued. Consequently, there was a cumulative total of up to $8,000,000 available for awards heading into the FY 2011 funding opportunity. Funding for FY 2012 and future years will be based on annual appropriations and balances, if any, carried forward from prior years, and may vary from year to year.

Section 7105 of the Food, Conservation, and Energy Act of 2008, Public Law 110–246, (FCEA) amended section 1415A to revise the determination of veterinarian shortage situations to consider (1) geographical areas that the Secretary determines have a shortage of veterinarians; and (2) areas of veterinary practice that the Secretary determines have a shortage of veterinarians, such as food animal medicine, public health, epidemiology, and food safety. This section also added that priority should be given to agreements with veterinarians for the practice of food animal medicine in veterinarian shortage situations.

NARETPA section 1415A requires the Secretary, when determining the amount of repayment for a year of service by a veterinarian to consider the ability of USDA to maximize the number of agreements from the amounts appropriated and to provide an incentive to serve in veterinary service shortage areas with the greatest need. This section also provides that loan repayments may consist of payments of the principal and interest on government and commercial loans received by the individual for attendance of the individual at an AVMA-accredited college of veterinary medicine resulting in a degree of Doctor of Veterinary Medicine or the equivalent. This program is not authorized to provide repayments for any government or commercial loans incurred during the pursuit of another degree, such as an associate or bachelor degree.

The Secretary delegated the authority to carry out this program to NIFA.

Pursuant to the requirements enacted in the NVMSA of 2004 (as revised), and the implementing regulation for this Act, Part 3431 Subpart A of the VMLRP Final Rule [75 FR 20239–20248], NIFA hereby implements guidelines for authorized State Animal Health Officials to nominate veterinary shortage situations for the FY 2012 program cycle:

II. Nomination of Veterinary Shortage Situations

A. General

1. Eligible Shortage Situations

Section 1415A of the National Agricultural Research, Extension, and Teaching Policy Act of 1997 (NARETPA), as amended and revised by Section 7105 of the Food, Conservation, and Energy Act of 2008, Public Law 110–246, (FCEA) directs determination of veterinarian shortage situations to consider: (1) Geographical areas that the Secretary determines have a shortage of veterinarians; and (2) areas of veterinary practice that the Secretary determines have a shortage of veterinarians, such as food animal medicine, public health, epidemiology, and food safety. This section also added that priority should be given to agreements with veterinarians for the practice of food animal medicine in veterinarian shortage situations.

While the NVMSA (as amended) specifies priority be given to food animal medicine shortage situations, and that consideration also be given to specialty areas such as public health, epidemiology and food safety, the Act does not identify any areas of veterinary practice as ineligible. Accordingly, all nominated veterinary shortage situations will be considered eligible for submission. However, the competitiveness of submitted nominations, upon evaluation by the external review panel convened by NIFA, will reflect the intent of Congress that priority be given to certain types of veterinary service shortage situations. NIFA therefore anticipates that, as in the first two years of the program, the 2012 program cycle and perhaps additional subsequent early years of program implementation, the most competitive nominations will be those directly addressing food supply veterinary medicine shortage situations.

NIFA has adopted definitions of the practice of veterinary medicine and the practice of food supply medicine that are broadly inclusive of the critical roles veterinarians serve in both public practice and private practice situations. Nominations describing either public or private practice veterinary shortage situations will therefore be eligible for submission. However, NIFA interprets that Congressional intent is to give priority to the private practice of food animal medicine. NIFA is grateful to the Association of American Veterinary Medical Colleges (AAVMC), the American Veterinary Medical Association (AVMA), and other stakeholders for their recommendations regarding the appropriate balance of program emphasis on public and private practice shortage situations. NIFA will seek to achieve a final distribution of approximately 90 percent of nominations (and eventual agreements) that are geographic, private practice, food animal veterinary medicine shortage situations, and approximately 10 percent of nominations that reflect public practice shortage situations.

2. State Respondents and Use of Consultation

Respondents on behalf of each State include the chief State Animal Health Official (SAHO), as duly authorized by the Governor or the Governor's designee in each State. The SAHOs are requested to submit nominations to *vmlrp@nifa.usda.gov* by way of the Veterinarian Shortage Situation Nomination Form (OMB Control Number 0524–0046), which is available in the State Animal Health Officials section on the VMLRP Web site at *www.nifa.usda.gov/vmlrp.* One form must be submitted for each nominated shortage situation. *NIFA strongly encourages the SAHO to involve leading health animal experts in the State in the identification and prioritization of shortage situation nominations.*

3. Rationale for Capping Nominations and State Allocation Method

In its consideration of fair, transparent and objective approaches to solicitation of shortage area nominations, NIFA evaluated three alternative strategies before deciding on the appropriate strategy. The first option considered was to impose no limits on the number of nominations submitted. The second was to allow each state the same number of nominations. The third (eventually selected) was to differentially cap the number of nominations per state based on defensible and intuitive criteria.

The first option, providing no limits to the number of nominations per state, is fair to the extent that each state and insular area has equal opportunity to nominate as many situations as desired. However, funding for the VMLRP is limited (relative to anticipated demand) and so allowing potentially high and

disproportionate submission rates of nominations could both unnecessarily burden the nominators and the reviewers with a potential avalanche of nominations and dilute highest need situations with lower-level need situations. Moreover, NIFA believes that the distribution of opportunity under this program (*i.e.,* distribution of mapped shortage situations resulting from the nomination solicitation and review process) should roughly reflect the national distribution of food supply veterinary service demand. By not capping nominations based on some objective criteria, it is likely there would be no correlation between the mapped pattern and density of certified shortage situations and the actual pattern and density of need. This in turn could undermine confidence in the program with Congress, the public, and other stakeholders.

The second option, limiting all states and insular areas to the same number of nominations suffers from some of the same disadvantages as option one. It has the benefit of limiting administrative burden on both the SAHO and the nomination review process. However, like option one, there would be no correlation between the mapped pattern of certified shortage situations and the actual pattern of need. For example, Guam and Rhode Island would be allowed to submit the same number of nominations as Texas and Nebraska, despite the large difference in the sizes of their respective animal agriculture industries and rural land areas requiring veterinary service coverage.

The third option, to cap the number of nominations in relation to major parameters correlating with veterinary service demand, achieves the goals both of practical control over the administrative burden to the states and NIFA, and of achieving a mapped pattern of certified nominations that approximates the theoretical actual shortage distribution. In addition, this method limits dilution of highest need areas with lower-level need areas. The disadvantage of this strategy is that there is no validated, unbiased, direct measure of veterinary shortage and so it is necessary to employ robust surrogate parameters that correlate with the hypothetical cumulative relative need for each state in comparison to other states. Such parameters exist and the degree to which they are not perfect measures of veterinary need is compensated for by generously assigning nomination allowances based on state rank for each parameter.

In the absence of a validated unbiased direct measure of relative veterinary service need or risk for each state and insular area, the National Agricultural Statistics Service (NASS) provided NIFA with reliable, publically accessible, high quality, unbiased data that correlate with demand for food supply veterinary service. NIFA has consulted with NASS and determined that NASS state-level variables most strongly correlated with food supply veterinary service need are ''Livestock and Livestock Products Total Sales ($)'' and ''Land Area'' (acres). The ''Livestock and Livestock Products Total Sales ($)'' variable broadly predicts veterinary service need in a State because this is a normalized (to cash value) estimate of the extent of (live) animal agriculture in the state. The State ''land area'' variable predicts veterinary service need because there is positive correlation between state land area, percent of state area classified as rural and the percent of land devoted to actual or potential livestock production. Importantly, land area is also directly correlated with the number of veterinarians needed to provide veterinary services in a state because of the practical limitations relating to the maximum radius of a standard veterinary service area; due to fuel and other cost factors, the maximum radius a veterinarian operating a mobile veterinary service can cover is approximately 60 miles, which roughly corresponds to two or three contiguous counties of average size.

NIFA recognizes that that these two NASS variables are not perfect predictors of veterinary service demand. However, for the purpose of fairly and transparently estimating veterinary service demand, NIFA believes these two unbiased composite variables account for a significant proportion of several of the most relevant factors influencing veterinary service need and risk. To further ensure fairness and equitability, NIFA is employing these variables in a straightforward, transparent and liberal manner that ensures every state and insular area is eligible for at least one nomination and that all States receive a generous apportionment of nominations, relative to their geographic size and size of agricultural animal industries.

Following this rationale, the Secretary is specifying the maximum number of nominations per state in order to (1) assure distribution of designated shortage areas in a manner generally reflective of the differential overall demand for food supply veterinary services in different states, (2) ensure a practical balance between the number of potential awardees and the available shortage situations, (3) assure the number of shortage situation nominations submitted fosters emphasis on selection by nominators and applicants of the highest priority need areas, and (4) provide practical and proportional limitations of the administrative burden borne by SAHOs preparing nominations, and by panelists serving on the NIFA nominations review panel.

Furthermore, instituting a limit on the number of nominations is consistent with language in the Final Rule stating, ''The solicitation may specify the maximum number of nominations that may be submitted by each State animal health official.''

4. State Allocation of Nominations

For any given program year, the number of designated shortage situations per state will be limited by NIFA, and this will in turn impact the number of new nominations a state may submit each time NIFA solicits shortage nominations. In the first two years of the program, NIFA accepted a number of nominations equivalent to the allowable number of designated shortage areas for each state. In the 2012 cycle, NIFA is again accepting the number of nominations equivalent to the allowable number of designated shortage areas for each state. All eligible submitting entities will, for the 2012 cycle, have an opportunity to do the following: (1) Retain designated status for any shortage situation successfully designated in 2011 (if there is no change to any information, the nomination will be approved for 2012 without the need for re-review by the merit panel), (2) rescind any nomination officially designated in 2011, and (3) submit new nominations. The total of the number of new nominations plus designated nominations retained (carried over) may not exceed the total number of shortages each entity is permitted. Any amendment to an existing shortage nomination is presumed to constitute a significant change. Therefore, amended nominations must be rescinded and resubmitted to NIFA as new nominations and be re-evaluated by the 2012 review panel.

The state cap on number of nominations (and potential designations) will remain the same in 2012 as they were for the previous two years. Thus, all states have the opportunity to re-establish the maximum number of designated shortage situations. Awards from previous years have no bearing on a state's maximum number of allowable shortage nomination submissions or number of designations for subsequent years. NIFA reserves the right in the future to proportionally adjust the

maximum number of designated shortage situations per state to ensure a balance between available funds and the requirement to ensure priority is given to mitigating veterinary shortages corresponding to situations of greatest need. Nomination Allocation tables for FY 2012 are available under the State Animal Health Officials section of the VMLRP Web site at *http://www.nifa.usda.gov/vmlrp.*

Table I represents ''Special Consideration Areas'' which include any State or Insular Area not reporting data, and/or reporting less than $1,000,000 in annual Livestock and Livestock Products Total Sales ($), and/or possessing less than 500,000 Acres, as reported by NASS. One nomination is allocated to any State or Insular Area classified as a Special Consideration Area.

Table II shows how NIFA determined nomination allocation based on quartile ranks of States for two variables broadly correlated with demand for food supply veterinary services; ''Livestock and Livestock Products Total Sales ($)'' (LPTS) and ''Land Area (acres)'' (LA). The total number of NIFA-approved/designated shortage situations per state in any given program year is based on the quartile ranking of each state in terms of LPTS and LA. States for which NASS has both LPTS and LA values, and which have at least $1,000,000 LPTS and at least 500,000 acres LA (typically all states plus Puerto Rico), were independently ranked from least to greatest value for each of these two composite variables. The two ranked lists were then divided into quartiles with quartile 1 containing the lowest variable values and quartile 4 containing the highest variable values. Each state then received the number of designated shortage situations corresponding to the number of the quartile in which the state falls. Thus a state that falls in the second quartile for LA and the third quartile for LPTS may have a maximum of five designated shortage situations (2 + 3), should the external review panel recommend all allowable nominations, and NIFA concur with the panels' recommendations. This transparent computation was made for each state thereby giving a range of 2 to 8 designated shortage situations, contingent upon each state's quartile ranking for the two variables. Should changes in future funding for the program indicate the need for an increase or decrease in the maximum number of designated shortage situations, a multiplier either greater or less than one will be applied to make a proportional adjustment to every state.

The maximum number of designated shortage situations for each State in 2012 is shown in Table III.

While Federal Lands are widely dispersed within States and Insular Areas across the country, they constitute a composite total land area over twice the size of Alaska. If the 200-mile limit U.S. coastal waters and associated fishery areas are added, Federal Land total acreage would exceed 1 billion. Both State and Federal Animal Health officials have responsibilities for matters relating directly or indirectly to terrestrial and aquatic food animal health on Federal Lands. An example of a food animal health problem requiring coordination between State and Federal animal health officials is the reemergence of bovine TB infection, thought to be caused in part by circulation of this pathogen in a variety of undomesticated animal reservoirs that come in contact with domestic cattle. Interaction between wildlife and domestic livestock, such as sheep and cattle, is particularly common in the plains states where significant portions of Federal lands are leased for grazing. Therefore, both SAHOs and the Chief Federal Animal Health Officer (Deputy Administrator, Animal and Plant Health Inspection Service or designee) may submit nominations to address shortage situations on or related to Federal Lands.

NIFA emphasizes that shortage nomination allocation is merely intended to broadly balance the number of designated shortage situations across states prior to the applications and awards phase of the VMLRP. In the awards phase, no state will be given a preference for placement of awardees. Awards will be made based strictly on the peer review panels' assessment of the quality of the match between the knowledge, skills and abilities of the applicant and the attributes of the specific shortage situation applied for.

5. FY 2012 Shortage Situation Nomination Process

As described in Section 4 above, all SAHOs will, for the FY 2012 cycle, have an opportunity to do the following: (1) Retain (carry over) designated status for any shortage situation successfully designated in 2011 and not revised, without need for reevaluation by merit review panel, (2) rescind any nomination officially designated in 2011, and (3) submit new nominations. The total number of new nominations and designated nominations retained (carried over) may not exceed the maximum number of shortages each State is allocated. An amendment to an existing shortage nomination constitutes a significant change and therefore must be rescinded and resubmitted to NIFA as a new nomination, to be evaluated by the 2012 review panel. The maximum number of nominations (and potential designations) for each state is the same in 2012 as 2011 and 2010.

The following process is the mechanism by which a SAHO should retain or rescind a designated nomination: NIFA will initiate the process by sending an email to each SAHO of States with at least one designated nomination from FY 2011 that went unfilled with a PDF copy of each nomination form attached to the email. If the SAHO wishes to retain (carry over) one or more designated nomination(s), the SAHO shall copy and paste the prior year information (unrevised) into the current year's nomination form. The SAHO will then email the carry over nomination(s), along with any new nominations, to *vmlrp@nifa.usda.gov* by the given deadline.

Both new and retained nominations should be submitted on the Veterinary Shortage Situation Nomination form provided in the State Animal Health Officials section at *http://www.nifa.usda.gov/vmlrp.*

6. Submission and Due Date

Shortage situation nominations, both new and carry over, must be submitted by February 27, 2012, to the Veterinary Medicine Loan Repayment Program; Division of Animal Systems; Institute of Food Production and Sustainability; National Institute of Food and Agriculture; U.S. Department of Agriculture, or by email to *vmlrp@nifa.usda.gov.*

7. Period Covered

Each designated shortage situation shall be certified and remain certified until filled, or withdrawn by the SAHO. A SAHO may request that NIFA remove a previously certified and designated shortage situation by sending an email to *vmlrp@nifa.usda.gov.* The request should specifically identify the shortage situation the SAHO wishes to withdraw, and reason(s) for its withdrawal should be included. The program manager will review the request, make a determination, and inform the requesting SAHO of the final action taken. Where a request for withdrawal of a designated shortage situation leads to its removal from the list of NIFA-designated shortage situations, the withdrawn situation may not be replaced by nomination of an alternate shortage situation until the next program cycle NIFA solicits shortage nominations for this program.

8. Definitions

For the purpose of implementing the solicitation for veterinary shortage situations, the definitions provided in 7 CFR part 3431 are applicable.

B. Nomination Form and Description of Fields

1. Access to Nomination Form

The veterinary shortage situation nomination form is available in the State Animal Health Officials section at *http://www.nifa.usda.gov/vmlrp.* The completed form must be emailed to *vmlrp@nifa.usda.gov.*

2. Physical Location of Shortage Area or Position

Following conclusion of the nomination submission and designation process, NIFA will prepare lists and/or map(s) that include all designated shortage situations for the current program year. This will require specification of a physical location representing the center of the service area (for a geographic shortage), or the location of the main office or work address for a public practice and/or specialty practice shortage. For example, if the state seeks to certify a tri-county area as a food animal veterinary service (*e.g.,* Type I) shortage situation, a road intersection approximating the center of the tri-county area would constitute a satisfactory physical location for NIFA's listing and mapping purposes. By contrast, if the state is identifying ''veterinary diagnostician,'' a Type III nomination, as a shortage situation, then the nominator would complete this field by filling in the address of the location where the diagnostician would work (*e.g.,* State animal disease diagnostic laboratory).

3. Type I Shortage—80 Percent or Greater Private Practice Food Supply Veterinary Medicine

SAHOs identifying this shortage type must check one or more boxes indicating which specie(s) constitute the veterinary shortage situation. The Type I shortage situation must entail at least an 80 percent time commitment to private practice food supply veterinary medicine. The nominator will specify the minimum percent time (between 80 and 100 percent of a standard 40 hour week) a veterinarian must commit in order to satisfactorily fill the specific nominated situation. The shortage situation may be located anywhere (rural or non-rural) so long as the veterinary service shortages to be mitigated are consistent with the definition of ''practice of food supply veterinary medicine.'' The minimum 80 percent time commitment is, in part, recognition of the fact that occasionally food animal veterinary practitioners are expected to meet the needs of other veterinary service sectors such as clientele owning companion and exotic animals. Type I nominations are intended to address those shortage situations where the nominator believes a veterinarian can operate profitably committing between 80 and 100 percent time to food animal medicine activities in the designated shortage area, given the client base and other socio-economic factors impacting viability of veterinary practices in the area. This generally corresponds to a shortage area where clients can reasonably be expected to pay for professional veterinary services and where food animal populations are sufficiently dense to support a (or another) veterinarian. The personal residence of the veterinarian (VMLRP awardee) and the address of veterinary practice employing the veterinarian may or may not fall within the geographic bounds of the designated shortage area.

4. Type II Shortage—30 Percent or Greater Private Practice Food Supply Veterinary Medicine in a Rural Area (as Defined)

SAHOs identifying this shortage type must check one or more boxes indicating which specie(s) constitute the veterinary shortage situation. The shortage situation must be in an area satisfying the definition of ''rural.'' The minimum 30 percent-time (12 hr/wk) commitment of an awardee to serve in a rural shortage situation is in recognition of the fact that there may be some remote or economically depressed rural areas in need of food animal veterinary services that are unable to support a practitioner predominately serving the food animal sector, yet the need for food animal veterinary services for an existing, relatively small, proportion of available food animal business is nevertheless great. The Type II nomination is therefore intended to address those rural shortage situations where the nominator believes there is a shortage of food supply veterinary services, and that a veterinarian can operate profitably committing 30 to 100 percent to food animal medicine in the designated rural shortage area. The nominator will specify the minimum percent time (between 30 and 100 percent) a veterinarian must commit in order to satisfactorily fill the specific nominated situation. Under the Type II nomination category, the expectation is that the veterinarian may provide veterinary services to other veterinary sectors (*e.g.,* companion animal clientele) as a means of achieving financial viability. As with Type I nominations, the residence of the veterinarian (VMLRP awardee) and/or the address of veterinary practice employing the veterinarian may or may not fall within the geographic bounds of the designated shortage area. However, the awardee is required to verify the specified minimum percent time commitment (30 percent to 100 percent, based on a standard 40 hour work week) to service within the specified geographic shortage area.

5. Type III Shortage—Public Practice Shortage (49%-Time or Greater Public Practice)

SAHOs identifying this shortage type must, in the spaces provided, identify the ''Employer'' and the presumptive ''Position Title,'' and check one or more of the appropriate boxes identifying the specialty/disciplinary area(s) being nominated as a shortage situation. This is a broad nomination category comprising many types of specialized veterinary training and employment areas relating to food supply veterinary workforce capacity and capability. These positions are typically located in city, county, State and Federal Government, and institutions of higher education. Examples of positions within the public practice sector include university faculty and staff, veterinary laboratory diagnostician, County Public Health Officer, State Veterinarian, State Public Health Veterinarian, State Epidemiologist, FSIS meat inspector, Animal and Plant Health Inspection Service (APHIS) Area Veterinarian in Charge (AVIC), and Federal Veterinary Medical Officer (VMO).

Veterinary shortage situations such as those listed above are eligible for consideration under Type III nomination. However, nominators should be aware that Congress has stipulated that the VMLRP must emphasize private food animal practice shortage situations. Accordingly, NIFA anticipates that loan repayments for the Public Practice sector will be limited to approximately 10 percent of total nominations and available funds.

The minimum time commitment serving under a Type III shortage nomination is 49 percent. The nominator will specify the minimum percent time (between 49 percent and 100 percent) a veterinarian must commit in order to satisfactorily fill the specific nominated situation. NIFA understands that some public practice employment opportunities that are shortage situations may be part-time positions. For example, a veterinarian pursuing an

advanced degree (in a shortage discipline area) on a part-time basis may also be employed by the university for the balance of the veterinarian's time to provide part-time professional veterinary service(s) such as teaching, clinical service, or laboratory animal care; areas that may or may not also qualify as veterinary shortage situations. The 49 percent minimum therefore provides flexibility to nominators wishing to certify public practice shortage situations that would be ineligible under more stringent minimum percent time requirements.

6. Written Response Sections

a. Objectives of a veterinarian meeting this shortage situation.

Within the allowed word limit the nominator should clearly state overarching objectives the State hopes to achieve by placing a veterinarian in the nominated situation. Include the minimum percent time commitment (within the range of the shortage type selected) the awardee is expected to devote to filling the specific food supply veterinary shortage situation.

b. Activities of a veterinarian meeting this shortage situation.

Within the allowed word limit the nominator should clearly state the principal day-to-day professional activities that would have to be conducted in order to achieve the objectives described in (a) above.

c. Past efforts to recruit and retain a veterinarian in the shortage situation.

Within the allowed word limit the nominator should explain any prior efforts to mitigate this veterinary service shortage, and prospects for recruiting veterinarian(s) in the future.

d. Risk of this veterinarian position not being secured or retained.

Within the allowed word limit the nominator should explain the consequences of not addressing this veterinary shortage situation.

e. Candidacy for a ''service in emergency'' agreement.

NIFA is not requesting information in support of this type of agreements at this time.

C. NIFA Review of Shortage Situation Nominations

1. Review Panel Composition and Process

NIFA will convene a panel of food supply veterinary medicine experts from Federal and state agencies, as well as institutions receiving Animal Health and Disease Research Program funds under section 1433 of the National Agricultural Research, Extension, and Teaching Policy Act (NARETPA), who will review the nominations and make recommendations to the NIFA Program Manager. NIFA explored the possibility of including experts from non-governmental professional organizations and sectors for this process, but under NARETPA section 1409A(e), panelists for the purposes of this process are limited to Federal and State agencies and cooperating state institutions (*i.e.,* NARETPA section 1433 recipients).

The VMLRP Program Manager will review the panel recommendations and designate the VMLRP shortage situations. The list of shortage situations will be made available on the VMLRP Web site at *http://www.nifa.usda.gov/vmlrp.*

2. Review Criteria

Criteria used by the shortage situation nomination review panel and NIFA for certifying a veterinary shortage situation will be consistent with the information requested in the shortage situations nomination form. NIFA understands that defining the risk landscape associated with shortages of veterinary services throughout a state is a process that may require consideration of many qualitative and quantitative factors. In addition, each shortage situation will be characterized by a different array of subjective and objective supportive information that must be developed into a cogent case identifying, characterizing, and justifying a given geographic or disciplinary area as one deficient in certain types of veterinary capacity or service. To accommodate the uniqueness of each shortage situation, the nomination form provides opportunities to present a case using both supportive metrics and narrative explanations to define and explain the proposed need. At the same time, the elements of the nomination form provide a common structure for the information collection process which will in turn facilitate fair comparison of the relative merits of each nomination by the evaluation panel.

While NIFA anticipates some arguments made in support of a given shortage situation will be qualitative, respondents are encouraged to present verifiable quantitative and qualitative evidentiary information where ever possible. Absence of quantitative data such as animal and veterinarian census data for the proposed shortage area(s) may lead the panel to recommend not approving the shortage nomination.

The maximum point value review panelists may award for each element is as follows:

20 points: Describe the objectives of a veterinarian meeting this shortage situation as well as being located in the community, area, state/insular area, or position requested above.

20 points: Describe the activities of a veterinarian meeting this shortage situation and being located in the community, area, state/insular area, or position requested above.

5 points: Describe any past efforts to recruit and retain a veterinarian in the shortage situation identified above.

35 points: Describe the risk of this veterinarian position not being secured or retained. Include the risk(s) to the production of a safe and wholesome food supply and/or to animal, human, and environmental health not only in the community but in the region, state/insular area, nation, and/or international community.

An additional 20 points will be used by review panelists to evaluate overall merit/quality of the case made for inclusion of each nomination in the list of certified veterinary shortage situations.

Prior to the panel being convened, shortage situation nominations will be evaluated and scored according to the established scoring system by a primary reviewer. When the panel convenes, the primary reviewer will present each nomination orally in summary form. After each presentation, panelists will have an opportunity, if necessary, to discuss the nomination, with the primary reviewer leading the discussion and recording comments. After the panel discussion is complete, any scoring revisions will be made by and at the discretion of the primary reviewer. The panel is then polled to recommend, or not recommend, the shortage situation for designation. Nominations scoring 70 or higher by the primary reviewer (on a scale of 0 to 100), and receiving a simple majority vote in support of designation as a shortage situation will be ''recommended for designation as a shortage situation.'' Nominations scoring below 70 by the primary reviewer, and failure to achieve a simple majority vote in support of designation will be ''not recommended for designation as a shortage situation.'' In the event of a discrepancy between the primary reviewer's scoring and the panel poll results, the VMLRP program manager will be authorized to make the final determination on the nomination's designation.

Done in Washington, DC, this 16th day of December, 2011.

Chavonda Jacobs-Young,

Acting Director, National Institute of Food and Agriculture.

[FR Doc. 2011–33112 Filed 12–23–11; 8:45 am]

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DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

Agency: National Oceanic and Atmospheric Administration (NOAA).

Title: Deep Seabed Mining Regulations for Exploration Licenses.

OMB Control Number: 0648–0145.

Form Number(s): None.

Type of Request: Regular submission (extension of a currently approved information collection).

Number of Respondents: 1.

Average Hours per Response: Annual report, 20 hours; extension, 30 hours.

Burden Hours: 60.

Needs and Uses: This request is for extension of a currently approved information collection.

NOAA's regulations at 15 CFR 970 govern the issuing and monitoring of exploration licenses under the Deep Seabed Hard Mineral Resources Act. Any persons seeking a license must submit certain information that allows NOAA to ensure the applicant meets the standards of the Act. Persons with licenses are required to conduct monitoring and make reports, and they may request revisions, transfers, or extensions of licenses.

Affected Public: Business or other for-profit organizations.

Frequency: Annually and on occasion.

Respondent's Obligation: Mandatory.

OMB Desk Officer: *OIRA_Submission@omb.eop.gov.*

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, Room 6616, 14th and Constitution Avenue NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *OIRA_Submission@omb.eop.gov.*

Dated: December 20, 2011.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2011–33057 Filed 12–23–11; 8:45 am]

BILLING CODE 3510–08–P

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

Agency: International Trade Administration.

Title: Survey of International Air Travelers (SIAT).

Form Number(s): None.

OMB Control Number: 0625–0227.

Type of Request: Regular submission (extension and revision of a currently approved information collection).

Burden Hours: 24,850.

Number of Respondents: 99,400.

Average Hours per Response: 15 minutes.

Needs and Uses: The Survey of International Air Travelers (Survey) program, administered by the Office of Travel and Tourism Industries (OTTI) of the International Trade Administration provides source data required to: (1) Estimate international travel and passenger fare exports, imports and the trade balance for the United States, (2) comply with the U.S. Travel Promotion Act of 2009 (Pub. L. 111–145), collect, analyze and report information to the Corporation for Travel Promotion (CTP), and support the National Export Initiative (NEI) to double U.S. exports, (3) comply with the 1945, 1961, 1981, and 1996 travel and tourism related acts to collect and publish comprehensive international travel and tourism statistics and other marketing information, and (4) support the continuation of the Travel & Tourism Satellite Accounts for the United States, which provide the only spending and employment figures for the industry. The Survey program contains the core data that is analyzed and communicated by OTTI with other government agencies, associations and businesses that share the same objective of increasing U.S. international travel exports.

The Survey assists OTTI in assessing the economic impact of international travel on state and local economies, providing visitation estimates, key market intelligence, and identifying traveler and trip characteristics. The U.S. Department of Commerce assists travel industry enterprises to increase international travel and passenger fare exports for the country as well as outbound travel on U.S. carriers. The Survey program provides the only available estimates of nonresident visitation to the states and cities within the United States, as well as U.S. resident travel abroad.

The Survey also assists OTTI in producing in-depth statistical reports, fact sheets and briefings on economic factors and policy issues affecting U.S. industries. With the Survey statistical data not replicable by private sector trade associations or by private firms, Federal agencies, Congress and international organizations rely on these statistic-based tools, as do American businesses, state and local governments, and news organizations.

A new survey instrument (questionnaire) (English version plus its translations into eleven foreign languages) has been developed that reflects input from over 70 respondents, including segments of the travel industry (airlines, travel associations, destinations, lodging); consultants; financial firms; educational institutions; and U.S. government agencies. Also, this new Survey questionnaire reflects changes in various questions relating to trip purpose; payment methods; booking/information sources; additional package components, health care/vaccinations/travel insurance information; additional transportation used responses; assessment of the visitor's experience; intentions for further travel to the United States; and ethnicity/race. Survey questions relating to a traveler's general impression of their airline carrier, flight connections, several airline rating attributes, baggage delivery wait time, selected activities, number of trips in the last five years, and whether they had personal safety concerns were eliminated from the new Survey questionnaire.

Affected Public: Individuals or households: International travelers departing the United States 18 years or older which includes U.S. and non-U.S. residents for all countries except Canada.

Frequency: Monthly.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Wendy Liberante, (202) 395–3647.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, Room 6616, 14th and Constitution Avenue NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to Wendy Liberante, OMB Desk

Officer, Fax number (202) 395–7285 or via the Internet at *Wendy_L._Liberante@omb.eop.gov.*

Dated: December 21, 2011.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2011–33071 Filed 12–23–11; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

Agency: National Oceanic and Atmospheric Administration (NOAA).

Title: NOAA Customer Surveys.

OMB Control Number: 0648–0342.

Form Number(s): NA.

Type of Request: Regular submission (extension of a current information collection).

Number of Respondents: 605,529.

Average Hours Per Response: 5–6 minutes.

Burden Hours: 57,000.

Needs and Uses: This request is for extension of a current information collection.

This collection follows the guidelines contained in the OMB Resource Manual for Customer Surveys. In accordance with Executive Order 12862, the National Performance Review, and good management practices, NOAA offices seek approval to continue to gather customer feedback on services and/or products, which can be used in planning for service/product modification and prioritization. Under this generic clearance, individual offices would use approved questionnaires and develop new questionnaires, as needed, by selecting subsets of the approved set of collection questions and tailoring those specific questions to be meaningful for their particular programs. These proposed questionnaires would then be submitted to OMB using a fast-track request for approval process, for which separate **Federal Register** notices are not required. Surveys currently being conducted include Web site satisfaction surveys, a Chart Users survey, and a Coastal Services Center Training Evaluation.

The generic clearance will not be used to survey any bodies NOAA regulates unless precautions are taken to ensure that the respondents believe that they are not under any risk for not responding or for the contents of their responses; *e.g.,* in no survey to such a population will the names and addresses of respondents be required.

Affected Public: Individuals or households, not-for-profit organizations, Federal government, state, local and tribal governments.

Frequency: Annually and on occasion.

Respondent's Obligation: Voluntary.

OMB Desk Officer: *OIRA_Submission@omb.eop.gov.*

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, Room 6616, 14th and Constitution Avenue NW, Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *OIRA_Submission@omb.eop.gov.*

Dated: December 20, 2011.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2011–33058 Filed 12–23–11; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Docket 83–2011]

Foreign-Trade Zone 44—Morris County, NJ; Application for Expansion

An application has been submitted to the Foreign-Trade Zones (FTZ) Board (the Board) by the New Jersey Department of State, grantee of FTZ 44, requesting authority to expand its zone in the Morris County, New Jersey area, within/adjacent to the New York/Newark Customs and Border Protection port of entry. The application was submitted pursuant to the provisions of the Foreign-Trade Zones Act, as amended (19 U.S.C. 81a–81u), and the regulations of the Board (15 CFR part 400). It was formally filed on December 20, 2011.

FTZ 44 was approved by the Board on October 19, 1978 (Board Order 139, 43 FR 50234, 10/27/78), and expanded on May 29, 2001 (Board Order 1168, 66 FR 31611–31612, 06/12/01), and on April 28, 2008 (Board Order 1558, 73 FR 24940, 05/06/08).

The current zone project includes the following sites: *Site 1* (80 acres within the 650-acre complex)—International Trade Center, 300 Waterloo Valley, Mount Olive; *Site 2* (307 acres)—Rockefeller Cranbury Industrial Park, Half Acre Rd. and north of Cranbury Station Rd., Cranbury Township; *Site 3* (177 acres, sunset 04/30/13)—Central Crossing Business Park, Bordentown-Hedding Rd., Bordentown; *Site 4* (57 acres, sunset 04/30/13)—Old York Office Park, Old York Rd., Bordentown; *Site 5* (40 acres, sunset 04/30/15)—Rockefeller Group Foreign Trade Zone Meadowlands, County Rd., Jersey City; and, *Site 6* (275 acres, sunset 04/30/13)—Norfolk Southern Rail Yard, County Rd., Jersey City and Secaucus.

The applicant is now requesting authority to expand the zone to include the following site: *Proposed Site 7* (20 acres)—warehouse facility, 700 Bartley Chester Road, Flanders (Morris County). No specific manufacturing authority is being requested at this time. Such requests would be made on a case-by-case basis.

In accordance with the Board's regulations, Kathleen Boyce of the FTZ Staff is designated examiner to evaluate and analyze the facts and information presented in the application and case record and to report findings and recommendations to the Board.

Public comment is invited from interested parties. Submissions (original and 3 copies) shall be addressed to the Board's Executive Secretary at the address below. The closing period for their receipt is February 27, 2012. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period to March 12, 2012.

A copy of the application will be available for public inspection at the Office of the Executive Secretary, Foreign-Trade Zones Board, Room 2111, U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230–0002, and in the ''Reading Room'' section of the Board's Web site, which is accessible via *http://www.trade.gov/ftz.* For further information, contact Kathleen Boyce at *Kathleen.Boyce@trade.gov* or (202) 482–1346.

Dated: December 20, 2011.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2011–33180 Filed 12–23–11; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Order No. 1803]

Approval for Manufacturing Authority; Foreign-Trade Zone 26; Makita Corporation of America; (Hand-Held/ Stationary Power Tool and Gasoline/ Electric-Powered Lawn and Garden Product Manufacturing); Buford, GA

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), the Foreign-Trade Zones Board (the Board) adopts the following Order:

Whereas, Georgia Foreign-Trade Zone, Inc., grantee of Foreign-Trade Zone 26, has requested manufacturing authority on behalf of Makita Corporation of America (Makita), within Site 20 of FTZ 26 in Buford, Georgia, (FTZ Docket 50–2011, filed 07/26/2011);

Whereas, notice inviting public comment has been given in the **Federal Register** (76 FR 45771–45772, 08/01/2011) and the application has been processed pursuant to the FTZ Act and the Board's regulations; and,

Whereas, the Board adopts the findings and recommendations of the examiner's report, and finds that the requirements of the FTZ Act and Board's regulations are satisfied, and that the proposal is in the public interest;

Now, therefore, the Board hereby orders:

The application for manufacturing authority under zone procedures within FTZ 26 on behalf of Makita, as described in the application and **Federal Register** notice, is approved, subject to the FTZ Act and the Board's regulations, including Section 400.28.

Signed at Washington, DC this 16th day of December, 2011.

Paul Piquado

Assistant Secretary of Commerce for Import Administration, Alternate Chairman, Foreign-Trade Zones Board.

Attest:

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2011–33194 Filed 12–23–11; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Order No. 1804]

Reorganization of Foreign-Trade Zone 277 Under Alternative Site Framework; Western Maricopa County, AZ

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), the Foreign-Trade Zones Board (the Board) adopts the following Order:

Whereas, the Board adopted the alternative site framework (ASF) (74 FR 1170, 01/12/09; correction 74 FR 3987, 01/22/09; 75 FR 71069–71070, 11/22/10) as an option for the establishment or reorganization of general-purpose zones;

Whereas, Greater Maricopa Foreign-Trade Zone, Inc., grantee of Foreign-Trade Zone 277, submitted an application to the Board (FTZ Docket 36–2011, filed 05/23/2011) for authority to reorganize under the ASF with a service area of a portion of Maricopa County, Arizona, as described in the application, adjacent to the Phoenix U.S. Customs and Border Protection port of entry, and FTZ 277's existing Sites 1 through 4 would be categorized as magnet sites;

Whereas, notice inviting public comment was given in the **Federal Register** (76 FR 30906, 05/27/2011) and the application has been processed pursuant to the FTZ Act and the Board's regulations; and,

Whereas, the Board adopts the findings and recommendations of the examiner's report, and finds that the requirements of the FTZ Act and Board's regulations are satisfied, and that the proposal is in the public interest;

Now, therefore, the Board hereby orders:

The application to reorganize FTZ 277 under the alternative site framework is approved, subject to the FTZ Act and the Board's regulations, including Section 400.28, to the Board's standard 2,000-acre activation limit for the overall general-purpose zone project, and to a five-year ASF sunset provision for magnet sites that would terminate authority for Sites 1 through 4 if not activated by December 31, 2016.

Signed at Washington, DC, this 16th day of December, 2011.

Paul Piquado,

Assistant Secretary of Commerce for Import Administration, Alternate Chairman, Foreign-Trade Zones Board.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2011–33186 Filed 12–23–11; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Order No. 1802]

Voluntary Termination of Foreign-Trade Subzone 84S Academy Sports and Outdoors, Katy and Brookshire, TX

Pursuant to the authority granted in the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), and the Foreign-Trade Zones Board Regulations (15 CFR part 400), the Foreign-Trade Zones Board has adopted the following order:

Whereas, on April 30, 2007, the Foreign-Trade Zones Board issued a grant of authority to the Port of Houston Authority (grantee of FTZ 84) authorizing the establishment of Foreign-Trade Subzone 84S at the Academy Sports and Outdoors facilities in Katy and Brookshire, Texas (Board Order 1511, 72 FR 26074, 5/8/07);

Whereas, the Port of Houston Authority has advised that zone procedures are no longer needed at the facilities and requested voluntary termination of Subzone 84S (FTZ Docket 74–2011);

Whereas, the request has been reviewed by the FTZ Staff and Customs and Border Protection officials, and approval has been recommended;

Now, therefore, the Foreign-Trade Zones Board terminates the subzone status of Subzone 84S, effective this date.

Signed at Washington, DC this 16th day of December, 2011.

Paul Piquado,

Assistant Secretary of Commerce for Import Administration, Alternate Chairman, Foreign-Trade Zones Board.

Attest:

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2011–33181 Filed 12–23–11; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

International Trade Administration

Proposed Information Collection; Comment Request; Export Trading Companies Contact Facilitation Services

AGENCY: International Trade Administration, Commerce.

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

DATES: Written comments must be submitted on or before February 27, 2012.

ADDRESSES: Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6616, 14th and Constitution Avenue NW, Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Jeffrey Anspacher Senior Economist, Office of Competition and Economic Analysis; (202) 482–6015; *Jeffrey.Anspacher@trade.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

One of the goals of the Export Trading Company (ETC) Act of 1982 is to increase U.S. exports of goods and services by encouraging a more efficient provision of export trade services to U.S. producers. Section 104 of the Act directs the U.S. Department of Commerce (DOC) to provide a service to facilitate contact between producers of exportable goods and services, and firms offering export trade services. The Export Trading Company Contact Facilitation Service (CFS) is a database designed to carry out the goal of Section 104 of the Act by putting U.S. producers of goods and services together with U.S. export service providers.

The DOC's International Trade Administration (ITA) maintains the CFS database of U.S. producers and export service providers (export trading and export management firms, export sales agents, freight forwarders, and other export trade service providers) through a public-private partnership. The producers and export service providers voluntarily register their export interests online at *http://www.exportyellowpages.com* for inclusion in the CFS. The Export Yellow Pages[reg], an ITA program, uses the CFS to help promote U.S. goods and services, and enable U.S. producers to locate export service providers.

The commercial profiles of CFS registrants are accessible at *http://www.exportyellowpages.com.* CFS registrants are also listed in an annual print directory distributed worldwide. The CFS print and electronic directories are made available through ''The Export Yellow Pages''. Without the information collected by the form, the CFS database and the resulting directories would be unreliable and ineffective, because end-users of this data need current information about the listed companies.

II. Method of Collection

Form ITA–4094P is accessible to U.S. firms at *http://www.exportyellowpages.com.* This form can also be sent by request to U.S. firms.

III. Data

OMB Control Number: 0625–0120.
Form Number(s): ITA–4094P.
Type of Review: Regular submission.
Affected Public: Business or other for-profit organizations; not-for-profit institutions; state, local, or tribal government.
Estimated Number of Respondents: 18,000.
Estimated Time per Response: 15 minutes.
Estimated Total Annual Burden Hours: 4,500.
Estimated Total Annual Cost to Public: $0.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: December 21, 2011.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2011–33102 Filed 12–23–11; 8:45 am]

BILLING CODE 3510–DR–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–967]

Antidumping Order on Aluminum Extrusions from the People's Republic of China: Initiation of Changed Circumstances Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Initiation of Changed Circumstances Review.

SUMMARY: In response to a request from Zhaoqing New Zhongya Aluminum Co., Ltd. (''New Zhongya''), a producer of aluminum extrusions from the People's Republic of China (''PRC''), and pursuant to section 751(b) of the Tariff Act of 1930, as amended (the ''Act''), and 19 CFR 351.216 and 351.221(c)(3), the Department is initiating a changed circumstances review (''CCR'') of the antidumping duty order on aluminum extrusions from the PRC. This review is being conducted to determine whether Guangdong Zhongya Aluminum Company Limited is the successor-in-interest to New Zhongya for purposes of determining antidumping duty liability.

DATES: *Effective Date:* December 27, 2011.

FOR FURTHER INFORMATION CONTACT: Paul Stolz, Office of AD/CVD Operations, Office 8, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–4474.

Background

New Zhongya, a producer of aluminum extrusions, participated in the antidumping duty investigation of aluminum extrusions from the PRC. The Department issued its final determination for this investigation on April 4, 2011. *See Aluminum Extrusions From the People's Republic of China: Final Determination of Sales at Less Than Fair Value,* 76 FR 18524 (April 4, 2011); *see also Aluminum Extrusions From the People's Republic of China: Notice of Correction to the Final Determination of Sales at Less Than Fair Value,* 76 FR 20627 (April 13,

2011). As a result of this final determination, New Zhongya's weighted-average dumping margin is 33.28 percent *ad valorem. Id.* The antidumping duty order was issued on May 26, 2011. *See Aluminum Extrusions from the People's Republic of China: Antidumping Duty Order,* 76 FR 30650 (May 26, 2011).

On November 7, 2011, New Zhongya requested a CCR claiming that it changed its name to Guangdong Zhongya Aluminum Company Limited. New Zhongya requested that the antidumping duty rates in effect before the date of the name change (*i.e.*, August 16, 2011) continue under the new name. New Zhongya's request was accompanied by supporting documents, and the company stated that it underwent no changes other than the change in the name. Specifically, New Zhongya stated that no changes were made in personnel, management, ownership, facilities, customers, suppliers, *etc.*

Scope of the Order

The merchandise covered by the order is aluminum extrusions which are shapes and forms, produced by an extrusion process, made from aluminum alloys having metallic elements corresponding to the alloy series designations published by The Aluminum Association commencing with the numbers 1, 3, and 6 (or proprietary equivalents or other certifying body equivalents). Specifically, the subject merchandise made from aluminum alloy with an Aluminum Association series designation commencing with the number 1 contains not less than 99 percent aluminum by weight. The subject merchandise made from aluminum alloy with an Aluminum Association series designation commencing with the number 3 contains manganese as the major alloying element, with manganese accounting for not more than 3.0 percent of total materials by weight. The subject merchandise is made from an aluminum alloy with an Aluminum Association series designation commencing with the number 6 contains magnesium and silicon as the major alloying elements, with magnesium accounting for at least 0.1 percent but not more than 2.0 percent of total materials by weight, and silicon accounting for at least 0.1 percent but not more than 3.0 percent of total materials by weight. The subject aluminum extrusions are properly identified by a four-digit alloy series without either a decimal point or leading letter. Illustrative examples from among the approximately 160 registered alloys that may characterize the subject merchandise are as follows: 1350, 3003, and 6060.

Aluminum extrusions are produced and imported in a wide variety of shapes and forms, including, but not limited to, hollow profiles, other solid profiles, pipes, tubes, bars, and rods. Aluminum extrusions that are drawn subsequent to extrusion (drawn aluminum) are also included in the scope.

Aluminum extrusions are produced and imported with a variety of finishes (both coatings and surface treatments), and types of fabrication. The types of coatings and treatments applied to subject aluminum extrusions include, but are not limited to, extrusions that are mill finished (*i.e.,* without any coating or further finishing), brushed, buffed, polished, anodized (including bright-dip anodized), liquid painted, or powder coated. Aluminum extrusions may also be fabricated, *i.e.,* prepared for assembly. Such operations would include, but are not limited to, extrusions that are cut-to-length, machined, drilled, punched, notched, bent, stretched, knurled, swedged, mitered, chamfered, threaded, and spun. The subject merchandise includes aluminum extrusions that are finished (coated, painted, *etc.*), fabricated, or any combination thereof.

Subject aluminum extrusions may be described at the time of importation as parts for final finished products that are assembled after importation, including, but not limited to, window frames, door frames, solar panels, curtain walls, or furniture. Such parts that otherwise meet the definition of aluminum extrusions are included in the scope. The scope includes the aluminum extrusion components that are attached (*e.g.,* by welding or fasteners) to form subassemblies, *i.e.,* partially assembled merchandise unless imported as part of the finished goods 'kit' defined further below. The scope does not include the non-aluminum extrusion components of subassemblies or subject kits.

Subject extrusions may be identified with reference to their end use, such as fence posts, electrical conduits, door thresholds, carpet trim, or heat sinks (that do not meet the finished heat sink exclusionary language below). Such goods are subject merchandise if they otherwise meet the scope definition, regardless of whether they are ready for use at the time of importation.

The following aluminum extrusion products are excluded: aluminum extrusions made from aluminum alloy with an Aluminum Association series designations commencing with the number 2 and containing in excess of 1.5 percent copper by weight; aluminum extrusions made from aluminum alloy with an Aluminum Association series designation commencing with the number 5 and containing in excess of 1.0 percent magnesium by weight; and aluminum extrusions made from aluminum alloy with an Aluminum Association series designation commencing with the number 7 and containing in excess of 2.0 percent zinc by weight.

The scope also excludes finished merchandise containing aluminum extrusions as parts that are fully and permanently assembled and completed at the time of entry, such as finished windows with glass, doors with glass or vinyl, picture frames with glass pane and backing material, and solar panels. The scope also excludes finished goods containing aluminum extrusions that are entered unassembled in a ''finished goods kit.'' A finished goods kit is understood to mean a packaged combination of parts that contains, at the time of importation, all of the necessary parts to fully assemble a final finished good and requires no further finishing or fabrication, such as cutting or punching, and is assembled 'as is' into a finished product. An imported product will not be considered a 'finished goods kit' and therefore excluded from the scope of the investigation merely by including fasteners such as screws, bolts, *etc.* in the packaging with an aluminum extrusion product.

The scope also excludes aluminum alloy sheet or plates produced by other than the extrusion process, such as aluminum products produced by a method of casting. Cast aluminum products are properly identified by four digits with a decimal point between the third and fourth digit. A letter may also precede the four digits. The following Aluminum Association designations are representative of aluminum alloys for casting: 208.0, 295.0, 308.0, 355.0, C355.0, 356.0, A356.0, A357.0, 360.0, 366.0, 380.0, A380.0, 413.0, 443.0, 514.0, 518.1, and 712.0. The scope also excludes pure, unwrought aluminum in any form.

The scope also excludes collapsible tubular containers composed of metallic elements corresponding to alloy code 1080A as designated by the Aluminum Association where the tubular container (excluding the nozzle) meets each of the following dimensional characteristics: (1) Length of 37 mm or 62 mm, (2) outer diameter of 11.0 mm or 12.7 mm, and (3) wall thickness not exceeding 0.13 mm.

Also excluded from the scope of the order are finished heat sinks. Finished heat sinks are fabricated heat sinks made from aluminum extrusions the design and production of which are organized around meeting certain specified thermal performance requirements and which have been fully, albeit not necessarily individually, tested to comply with such requirements.

Imports of the subject merchandise are provided for under the following categories of the Harmonized Tariff Schedule of the United States (''HTS''): 7604.21.0000, 7604.29.1000, 7604.29.3010, 7604.29.3050, 7604.29.5030, 7604.29.5060, 7608.20.0030, and 7608.20.0090. The subject merchandise entered as parts of other aluminum products may be classifiable under the following additional Chapter 76 subheadings: 7610.10, 7610.90, 7615.19, 7615.20, and 7616.99 as well as under other HTS chapters. In addition, fin evaporator coils may be classifiable under HTS numbers: 8418.99.80.50 and 8418.99.80.60. While HTS subheadings are provided for convenience and customs purposes, the written description of the scope of the order is dispositive.

Initiation of Changed Circumstances Review

Pursuant to section 751(b)(1) of the Act, the Department will conduct a CCR upon receipt of a request from an interested party which shows changed circumstances sufficient to warrant a review of the order. On November 7, 2011, New Zhongya filed a request for an antidumping duty CCR in which it claimed that Guangdong Zhongya Aluminum Company Limited is the successor-in-interest to New Zhongya. With its request, the company submitted certain information related to its claim and stated that this name change has not affected the company's management, sales operations, supplier relationships or customer base in any meaningful way. In accordance with section 751(b) of the Act and 19 CFR 351.216, the Department has determined that there is a sufficient basis to initiate an antidumping duty CCR to determine whether Guangdong Zhongya Aluminum Company Limited is the successor-in-interest to New Zhongya.[1]

In making a successor-in-interest determination in antidumping duty proceedings, the Department typically examines several factors including, but not limited to: (1) Management; (2) production facilities; (3) supplier relationships, and (4) customer base. *See, e.g., Brass Sheet and Strip From Canada: Final Results of Antidumping Duty Administrative Review,* 57 FR 20460, 20462 (May 13, 1992) and *Certain Cut-To-Length Carbon Steel Plate from Romania: Initiation and Preliminary Results of Changed Circumstances Antidumping Duty Administrative Review,* 70 FR 22847 (May 3, 2005) (*Plate from Romania*), unchanged in the *Notice of Final Results of Antidumping Duty Changed Circumstances Review: Certain Cut-to-Length Carbon Steel Plate From Romania,* 70 FR 35624 (June 21, 2005). While no single factor or combination of factors will necessarily be dispositive, the Department generally will consider the new company to be the successor to the predecessor company if the resulting operations are essentially the same as those of the predecessor company. *See, e.g., Industrial Phosphoric Acid from Israel: Final Results of Antidumping Duty Changed Circumstances Review,* 59 FR 6944, 6945 (February 14, 1994), and *Plate from Romania,* 70 FR at 22847. Thus, if the record evidence demonstrates that, with respect to the production and sale of the subject merchandise, the new company operates as the same business entity as the predecessor company, the Department may assign the new company the cash deposit rate of its predecessor. *See, e.g., Final Results of Antidumping Duty Changed Circumstances Review: Fresh and Chilled Atlantic Salmon from Norway,* 75 FR 32370, 32371 (June 8, 2010), and accompanying Issues and Decision Memorandum at Comment 1.

During the course of this CCR, cash deposit requirements for subject merchandise exports will continue to be the rate established in the antidumping duty investigation. The cash deposit rates will be altered, if warranted, pursuant only to the final results of the review.

The Department will issue questionnaires requesting additional information concerning the antidumping duty review and will publish in the **Federal Register** a notice of the preliminary results of the CCR, in accordance with 19 CFR 351.221(b)(2) and (4), and 19 CFR 351.221(c)(3)(i). The antidumping duty notice will set forth the factual and legal conclusions upon which our preliminary results are based and a description of any action proposed. Pursuant to 19 CFR 351.221(b)(4)(ii), interested parties will have an opportunity to comment on the preliminary results of the review. In accordance with 19 CFR 351.216(e), the Department will issue the final results of its antidumping duty CCR not later than 270 days after the date on which the review is initiated.

This notice of initiation is in accordance with section 751(b)(1) of the Act, 19 CFR 351.216(b) and (d), and 19 CFR 351.221(b)(1).

Dated: December 19, 2011.

Christian Marsh,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2011–33184 Filed 12–23–11; 8:45 am]

BILLING CODE 3510–DS–P

[1] On November 7, 2011, New Zhongya also requested a CCR in the complementary countervailing duty order on aluminum extrusions from the PRC, which the Department rejected due to insufficient information for initiation. *See* Letter from Kristen Johnson, Acting Program Manager, Office 3, to New Zhongya, dated December 12, 2011.

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA894

Gulf of Mexico Fishery Management Council; Public Meeting

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Council to convene a public meeting.

SUMMARY: The Gulf of Mexico Fishery Management Council will convene a meeting of the Red Snapper Advisory Panel (AP).

DATES: The meeting will convene at 9 a.m.–5 p.m. on Friday, January 13, 2012.

ADDRESSES: The meeting will be held at the Gulf of Mexico Fishery Management Council, 2203 North Lois Avenue, Suite 1100, Tampa, FL 33607; telephone: (813) 348–1630.

Council address: Gulf of Mexico Fishery Management Council, 2203 N. Lois Avenue, Suite 1100, Tampa, FL 33607.

FOR FURTHER INFORMATION CONTACT: Steven Atran, Population Dynamics Statistician; Gulf of Mexico Fishery Management Council; telephone: (813) 348–1630.

SUPPLEMENTARY INFORMATION: The Red Snapper AP will review updated catch data and other information on the red snapper fishery provided by the Southeast Fisheries Science Center, and the recommendations from the Standing and Special Reef Fish Scientific and Statistical Committee for acceptable biological catch beginning in 2012. Using this information, the AP will provide recommendations for catch

limits and targets for red snapper. The AP will also be asked to provide recommendations for issues to consider in a red snapper benchmark assessment to be conducted during 2012 and 2013. The AP will also review a draft regulatory amendment to revise the Fall red snapper recreational closed season and set the red snapper annual catch limit for 2012. The AP will also review an options paper to consider providing weekend only or weekday only openings during portions of the recreational red snapper season, or during a reopening if the season is closed prematurely.

Copies of the agenda and other related materials can be obtained by calling (813) 348–1630 or can be downloaded from the Council's ftp site, *ftp.gulfcouncil.org.*

Although other non-emergency issues not on the agenda may come before the Scientific and Statistical Committees for discussion, in accordance with the Magnuson-Stevens Fishery Conservation and Management Act, those issues may not be the subject of formal action during this meeting. Actions of the Scientific and Statistical Committees will be restricted to those issues specifically identified in the agenda and any issues arising after publication of this notice that require emergency action under Section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Kathy Pereira at the Council (see **ADDRESSES**) at least 5 working days prior to the meeting.

Dated: December 21, 2011.

Tracey L. Thompson,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2011–33068 Filed 12–23–11; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA895

Pacific Fishery Management Council; Public Meeting

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of a public meeting.

SUMMARY: The Pacific Fishery Management Council's (Pacific Council) Ad Hoc Groundfish Essential Fish Habitat Review Committee (EFHRC) will hold a work session to continue the periodic review of groundfish essential fish habitat (EFH).

DATES: The work session will be held January 17–18, 2012; starting at 10 a.m. the first day, and 8 a.m. the second day.

ADDRESSES: The work session will be held at the Embassy Suites Portland Airport Hotel, 7900 NE 82nd Avenue, Portland, OR 97220.

Council address: Pacific Fishery Management Council, 7700 NE Ambassador Place, Suite 101, Portland, OR 97220–1384.

FOR FURTHER INFORMATION CONTACT: Mr. Kerry Griffin, Staff Officer, Pacific Council; (503) 820–2280.

SUPPLEMENTARY INFORMATION: The purpose of the work session is to continue developing the Phase I report on the review of information relevant to EFH for Pacific Coast groundfish stocks. The Phase I report is designed to compile new and newly-available information, and compare it with the suite of information that was used to establish the current groundfish EFH designations. The EFHRC is scheduled to report to the Council at its April 1–6, 2012 meeting in Seattle, WA.

Although non-emergency issues not contained in the meeting agenda may come before the EFHRC for discussion, those issues may not be the subject of formal EFHRC action during this meeting. EFHRC action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the EFHRC's intent to take final action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Mr. Kris Kleinschmidt at (503) 820–2280 at least 5 days prior to the meeting date.

Dated: December 21, 2011.

Tracey L. Thompson,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2011–33069 Filed 12–23–11; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA898

Endangered Species; File Nos. 13599 and 1614

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; receipt of applications for permit modifications.

SUMMARY: Notice is hereby given that the following applicants have applied in due form for modifications to their scientific research permits: the National Ocean Service Marine Forensic Lab (NOS Lab) [Responsible Party: Julie Carter], 219 Fort Johnson Road, Charleston, SC 29412 (Permit No. 13599–01), and the NOAA Fisheries Northeast Region, Protected Resources Division [Responsible Party: Mary Colligan], 1 Blackburn Drive, Gloucester, MA 01930 (Permit No. 1614–01).

DATES: Written, telefaxed, or email comments must be received on or before January 26, 2012.

ADDRESSES: Documents associated with this amendment request are available upon written request or by appointment in the following office(s):

Permits, Conservation and Education Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301) 427–8401; fax (301) 713–0376;

Northeast Region, NMFS, One Blackburn Drive, Gloucester, MA 01930–2298; phone (978) 281–9300; fax (978) 281–9394; and

Southeast Region, NMFS, 263 13th Avenue South, Saint Petersburg, Florida 33701; phone (727) 824–5312; fax (727) 824–5309.

Written comments on this application should be submitted to the Chief, Permits and Conservation Division, at the address listed above. Comments may also be submitted by facsimile to (301) 713–0376, or by email to *NMFS.Pr1Comments@noaa.gov.* Please include the File No. in the subject line of the email comment.

Those individuals requesting a public hearing should submit a written request to the Chief, Permits and Conservation Division at the address listed above. The request should set forth the specific reasons why a hearing on this application would be appropriate.

FOR FURTHER INFORMATION CONTACT: Jennifer Skidmore or Colette Cairns, (301) 427–8401.

SUPPLEMENTARY INFORMATION: The subject modifications to Permit No. 13599–01 and 1614–01 are requested under the authority of the Endangered Species Act of 1973 (ESA), as amended (16 U.S.C. 1531 *et seq.*) and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR 222–226).

Permit No. 13599–01, issued on September 20, 2010 (73 FR 78724), authorizes the permit holder to receive, import, export, transfer, archive, and conduct analyses of marine mammal and endangered species parts. Species include all cetaceans, pinnipeds (except for walrus), sea turtles (in the water), smalltooth sawfish (*Pristis pectinata*), shortnose (*Acipenser brevirostrum*), green (*Acipenser medirostris*) and Gulf (*Acipenser oxyrinchus desotoi*) sturgeon, black (*Haliotis cracherodii*) and white (*Haliotis sorenseni*) abalone, chinook (*Oncorhynchus tshawytscha*), chum (*Oncorhynchus keta*), coho (*Oncorhynchus kisutch*) and sockeye (*Oncorhynchus nerka*) salmon, steelhead trout (*Oncorhynchus mykiss*), and totoaba (*Totoaba macdonaldi*). Permit No. 1614–01, (73 FR 25668) issued on April 30, 2008 authorizes the permit holder to collect, receive and transport 100 dead shortnose sturgeon, or parts thereof, annually. Researchers are also authorized the receipt and transport of up to 350 captive bred, dead shortnose sturgeon annually from any U.S. facility authorized to hold captive sturgeon.

The permit holders are requesting their permits be modified to include Atlantic sturgeon (*Acipenser oxyrinchus oxyrinchus*), due to the proposed listing of this species under the ESA. The modifications to include Atlantic sturgeon on these permits would be issued once the listing becomes effective. The permit holders request authorization for the receipt, importation, exportation, transfer, archive and analysis of Atlantic sturgeon parts and carcasses. Atlantic sturgeon parts and samples would be used to support law enforcement actions, research studies (primarily genetics), and outreach education. Atlantic sturgeon samples would be obtained from individuals authorized to collect them in the course of scientific research, salvage activities, or taken during other authorized activities. The modifications would be valid until each permit expires.

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), an initial determination has been made that the activities proposed are categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement.

Dated: December 20, 2011.

Tammy C. Adams,

Acting Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2011–33166 Filed 12–23–11; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA408

Small Takes of Marine Mammals Incidental to Specified Activities; Cape Wind's High Resolution Survey in Nantucket Sound, MA

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; issuance of an incidental harassment authorization.

SUMMARY: In accordance with the Marine Mammal Protection Act (MMPA), notification is hereby given that NMFS has issued an Incidental Harassment Authorization (IHA) to Cape Wind Associates (CWA) to take marine mammals, by harassment, incidental to pre-construction high resolution survey activities in Nantucket Sound.

DATES: Effective January 1, 2012, through December 31, 2012.

ADDRESSES: A copy of the IHA and application are available by writing to Michael Payne, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910.

An electronic copy of the application containing a list of references used in this document may be obtained by writing to the above address, telephoning the contact listed here (see **FOR FURTHER INFORMATION CONTACT**), or visiting the Internet at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications*. NMFS prepared its own Environmental Assessment (EA) and Finding of No Significant Impact (FONSI), which are available at the same Internet address. Documents cited in this notice may be viewed, by appointment, during regular business hours, at the aforementioned address.

FOR FURTHER INFORMATION CONTACT: Michelle Magliocca, Office of Protected Resources, NMFS, (301) 427–8401.

SUPPLEMENTARY INFORMATION:

Background

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specific geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed authorization is provided to the public for review.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant), and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring, and reporting of such takings are set forth. NMFS has defined ''negligible impact'' in 50 CFR 216.103 as '' * * * an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.''

Section 101(a)(5)(D) of the MMPA established an expedited process by which citizens of the United States can apply for an authorization to incidentally take small numbers of marine mammals by harassment. Section 101(a)(5)(D) establishes a 45-day time limit for NMFS to review an application followed by a 30-day public notice and comment period on any proposed authorizations for the incidental harassment of marine mammals. Within 45 days of the close of the comment period, NMFS must either issue or deny the authorization.

Except with respect to certain activities not pertinent here, the MMPA defines ''harassment'' as:

> any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].

Summary of Request

On April 26, 2011, NMFS received an application from CWA requesting an IHA for the take, by Level B harassment, of small numbers of minke whales, Atlantic white-sided dolphins, harbor porpoises, gray seals, and harbor seals, incidental to conducting a high resolution geophysical survey in Nantucket Sound. Upon receipt of additional information, NMFS determined the application adequate and complete on August 5, 2011.

CWA plans to conduct a high resolution geophysical survey in Nantucket Sound, Massachusetts over a 5-month period. The survey would satisfy the mitigation and monitoring requirements for ''cultural resources and geology'' in the environmental stipulations of the Bureau of Ocean Energy Management, Regulation, and Enforcement's (BOEMRE) lease. The survey is required prior to the future installation of 130 wind turbine generators as part of a long-term Cape Wind energy project.

Acoustic stimuli (*i.e.,* increased underwater sound) generated during operation of the shallow-penetration and medium-penetration subbottom profilers may have the potential to cause short-term behavioral disturbance for marine mammals in the survey area. This is the principal means of marine mammal taking associated with these activities and CWA has requested an authorization to take five species of marine mammals by Level B harassment. Take is not expected to result from the geotechnical portion of the survey or from other survey equipment. Also, NMFS does not expect take to result from collision with survey vessels because they will be moving at relatively slow speeds (3 knots) during seismic acquisition and there is not a high density of marine mammals within Nantucket Sound. It is likely that any marine mammal in the vicinity would be able to avoid the vessel.

Description of the Specified Activity

CWA's high resolution geophysical survey is scheduled to commence in January, 2012 and continue during daylight hours for 137 days. Some deviation from this timeline is possible, depending on logistics and weather conditions. NMFS is issuing an authorization that extends from January 1, 2012, to December 31, 2012.

Within this time period, CWA will collect data along predetermined track lines using a towed array of instrumentation to identify any submerged cultural resources that may be present and to further describe the geological environment within the survey area. Survey vessels are expected to depart from Falmouth Harbor, Massachusetts and will complete an estimated 17 Nautical miles (Nm) of track lines each day. In total, the survey is expected to cover 110 square kilometers (km^2) (42.5 square miles [mi^2]). This area includes the future location of the wind turbine generators—an area about 8.4 km (5.2 mi) from Point Gammon, 17.7 km (11 mi) from Nantucket Island, and 8.9 km (5.5 mi) from Martha's Vineyard—and cables connecting the wind park to the mainland. The total track line distance covered during the survey is estimated to be about 4,292 km (2,317 NM).

NMFS expects that acoustic stimuli resulting from the operation of the shallow-penetration and medium-penetration subbottom profilers have the potential to harass marine mammals. NMFS expects these disturbances to be temporary and result in short-term behavioral modifications and/or low-level physiological effects (Level B harassment only) of small numbers of certain species of marine mammals. The serious injury or mortality of marine mammals is not expected to occur, nor authorized, incidental to survey activities.

NMFS further outlined the purpose and details of the survey in a previous notice for the proposed IHA (76 FR 56735, September 14, 2011). The activities to be conducted have not changed between the IHA notice and this final notice announcing the issuance of the IHA. For a more detailed description of the authorized action, including vessel and acoustic source specifications, the reader should refer to the proposed IHA notice (76 FR 56735, September 14, 2011), the application, and associated documents referenced above this section.

Comments and Responses

A proposed authorization and request for public comments was published in the **Federal Register** on September 14, 2011 (76 FR 56735). During the 30-day public comment period, NMFS received more than 80 comments from the general public, in addition to comments from the Marine Mammal Commission (Commission), the Alliance to Protect Nantucket Sound (Alliance; in conjunction with the Public Employees for Environmental Responsibility, Lower Laguna Madre Foundation, Cetacean Society International, Pegasus Foundation, Oceans Public Trust Initiative, and a private citizen), the Humane Society of the United States (HSUS), the Tribal Historic Preservation Department of the Wampanoag Tribe of Gay Head (Aquinnah) (WTGH(A)), the Oceans Public Trust Initiative (OPTI), and a joint letter from the Gloucester Fishermen's Wives Association, Hyannis Yacht Club, Institute for Fisheries Resources, Oceans Public Trust Initiative, A Project of Earth Island Institute's International Marine Mammal Project, Pegasus Foundation, Save Our Sound/Alliance to Protect Nantucket Sound, and Three Bays Preservation (Gloucester Fishermen's Wives Association, *et al.*). Numerous members of the public commented on their general opposition toward the long-term Cape Wind energy project. All comments have been compiled and posted at *http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications.* Some comments were specific to the application, but do not have a bearing on NMFS' determinations for issuing an IHA. For example, the Alliance pointed out an inaccurate statement within a footnote of the application. Those comments have been passed on to CWA for consideration in future IHA applications. Any application-specific comments that address the statutory and regulatory requirements or findings NMFS must make to issue an IHA are addressed in this section of the **Federal Register** notice.

Comment 1: The Commission requested further justification for the use of 17 log R to calculate harassment zones for both shallow- and medium-penetration sub-bottom profilers and the Alliance believes that the 17 log R spreading rate should be validated.

Response: The use of 17 log R (loss of about 5.1 dB per doubling of distance) represents a middle-ground between spherical spreading (loss of 6 dB per doubling of distance) and practical spreading (loss of 4.5 dB per doubling of distance). While NMFS often uses 15 log R as an easy intermediate (between 10 log R and 20 log R), it is simply an estimate. Underwater sound source data collected at the Utgrunden Wind Park (a location with similar water depths to Nantucket Sound) shows a decrease in sound with distance that fits the attenuation curve for spherical spreading (20 log R). Based on this dataset from an area with water depths similar to Nantucket Sound, the use of 17 log R is considered a conservative estimate.

However, based on the Alliance's recommendation, CWA has agreed to conduct hydroacoustic monitoring during the initial deployment of the survey equipment in order to verify the estimated 160 and 180 dB isopleths.

Comment 2: The Commission requested that NMFS require CWA to recalculate the buffer zone for the

shallow-penetration sub-bottom profiler based on the 120-dB threshold and, if two or more survey vessels are used simultaneously, account for overlap of the ensonified areas in the calculation of the revised buffer zones.

Response: Recalculating the buffer zone for the shallow-penetration sub-bottom profiler based on a 120-dB threshold is not consistent with NMFS' acoustic threshold criteria, or with previously authorized activities. The shallow-penetration sub-bottom profiler (''chirper'') is a non-impulsive, but intermittent (as opposed to continuous), sound source. Continuous sound sources are best represented by vibratory pile driving or drilling and produce sounds that are quite different sound sources compared to sub-bottom profilers. NMFS has previously applied the 160-dB threshold to non-tactical sonar sources used in conjunction with seismic surveys. The pseudo-random noise stimulus and tactical sonar-like signals that were used in the SOCAL–10 behavioral response study are also considered non-impulsive intermittent sources and were authorized by NMFS using the 160-dB threshold. NMFS believes that the 160-dB threshold is appropriately applied to the shallow-penetration sub-bottom profiler and there is no need for CWA to recalculate their buffer zone.

If CWA uses two or more vessels to conduct survey activities, the vessels will work at least 15 miles apart. Therefore, there will be no overlap of sounds generated by the vessels.

Comment 3: The Commission requested that NMFS require CWA to specify the zone of exposure used to estimate the number of takes for each species and ensure that the zone is used consistently for all species.

Response: CWA calculated the zone of exposure as a function of the distance a survey vessel with a deployed boomer would travel in one survey day and the area around the boomer where sound levels would reach or exceed 160 dB. Essentially, the zone of exposure is equivalent to the 160-dB isopleth for the boomer: 444 m (1,457 ft). This distance was applied consistently to all marine mammal species.

Comment 4: The Commission requested that CWA re-estimate the number of takes for each species to address the following: (1) The revised harassment zone for the shallow-penetration sub-bottom profiler; (2) the possibility that buffer zones from two or more vessels would overlap; and (3) the recalculation of density estimates based on haul out counts.

Response: (1) As explained in NMFS' response to Comment 2, there is no reason to recalculate the harassment zone for the shallow-penetration sub-bottom profiler. (2) Also explained in NMFS' response to Comment 2, buffer zones from two or more vessels would not overlap. Therefore, the use of two or more vessels would not affect take estimates. (3) Density estimates for seals based on haul out counts were not used due to the distance of haul outs from the activity area (12.7 miles to Monomoy Island and 7.4 miles to Muskeget Island). Grey seals and harbor seals congregating in these locations are not expected to hear sounds from the survey equipment at 160 dB or higher. The seals most likely to be exposed to potentially disturbing sounds are the individuals swimming and/or foraging within 444 m of the activated medium-penetration subbottom profiler. CWA calculated seal density estimates based on aerial survey counts for seals observed swimming and/or foraging in open water within the activity area. CWA included an adjustment factor in these density calculations for seals not seen, but considered present during aerial surveys. Seal density estimates were not based on seal haul out counts because it is highly improbable that all seals (*i.e.,* those seen swimming and/or foraging, as well as those found at the haul out sites) would be in the activity area simultaneously. Using the haul out counts to estimate take would misrepresent the number of seals potentially exposed to sounds at or above 160 dB.

Comment 5: The Commission requested that NMFS require CWA to monitor the presence and behavior of marine mammals during all proposed geophysical and geotechnical survey activities (*i.e.,* operation of sub-bottom profilers, drilling, and vibracore sampling).

Response: As stated in the proposed IHA **Federal Register** notice (76 FR 56735), CWA must designate at least one biologically-trained on-site protected species observer (PSO), approved in advance by NMFS to monitor the area for marine mammals 60 minutes before, during, and 60 minutes after all geophysical survey activities. The PSO will call for shut down if any marine mammal is observed within or approaching the designated 500-m exclusion zone, a distance that exceeds even the Level B harassment zone. Additional PSOs will be used to monitor marine mammal presence and behavior twice a week from the survey vessel and once a month from an additional vessel. NMFS believes that geotechnical survey activities are not likely to result in the take of marine mammals. Underwater sound levels from drill rigs are estimated to be within 118 and 145 dB at the source and the maximum estimated sound level of 145 dB during drilling activities is expected to decrease to 101.5 dB by 150 m. Additionally, monitoring during geotechnical activities is not financially practicable for the applicant.

Comment 6: The Commission requested that NMFS require PSOs to gather the necessary data and work with CWA and other applicants to assess the effectiveness of soft-starts as a mitigation measure.

Response: The IHA requires that PSOs make observations for 60 minutes prior to commencing surveys (including soft-starts), during surveys, and for 60 minutes after surveys end. PSOs will record the following information when a marine mammal is sighted:

(i) Dates, times, locations, heading, speed, weather, sea conditions (including Beaufort sea state and wind force), and associated activities during all survey operations and marine mammal sightings;

(ii) Species, number, location, distance from the vessel, and behavior of any marine mammals, as well as associated survey activity (number of shut-downs or delays), observed throughout all monitoring activities;

(iii) An estimate of the number (by species) of marine mammals that: (A) are known to have been exposed to the survey activity (based on visual observation) at received levels greater than or equal to 160 dB re 1 μPa (rms) and/or 180 dB re 1 μPa (rms) for cetaceans and 190 dB re 1 μPa (rms) for pinnipeds with a discussion of any specific behaviors those individuals exhibited; and

(iv) A description of the implementation and effectiveness of the mitigation measures of the Incidental Harassment Authorization.

Comment 7: The Commission requested that NMFS require CWA to cease all operations when the exclusion zone is obscured by fog or poor lighting conditions.

Response: NMFS included language regarding poor visibility in the Monitoring section of this notice as well as the IHA. This concern is also addressed in CWA's lease, which states that ''seismic surveys shall not commence at night time or when the exclusion zone cannot be effectively monitored.'' The lease further states that during monitoring of the 500-m exclusion zone, ''the zone may not be obscured by fog or poor lighting conditions.''

Comment 8: The Commission requested additional justification for

NMFS' preliminary determination that the proposed monitoring program will be sufficient to detect, with a high level of confidence, all marine mammals within or entering the identified exclusion and buffer zones.

Response: NMFS believes that the planned monitoring program will be sufficient to detect (using visual monitoring), with reasonable certainty, marine mammals within or entering the identified exclusion zone (500 m). This monitoring, along with the required mitigation measures, will result in the least practicable adverse impact on the affected species or stocks and will result in a negligible impact on the affected species or stocks of marine mammals. Also, NMFS expects some animals to avoid areas around the airgun array ensonified at the level of the exclusion zone. The final monitoring and mitigation measures are considered the most effective and feasible measures and public comment has not revealed any additional monitoring or mitigation measures that could be reasonably implemented to increase the effectiveness of detection.

Comment 9: The Commission requested that NMFS condition the IHA to require CWA to (1) report immediately all injured or dead marine mammals to NMFS and the local stranding network and (2) suspend the construction activities if a marine mammal is seriously injured or killed and the injury or death could have been caused by those activities (*e.g.,* a fresh carcass)—if supplemental measures are not likely to reduce the risk of additional serious injuries or deaths to a very low level, NMFS should require CWA to obtain the necessary authorization for such takings under section 101(a)(5)(A) of the MMPA before resuming its survey activities.

Response: NMFS included language in the Reporting section of this notice and in the IHA that requires CWA to: (1) Suspend activities and immediately report incidents to NMFS and the local stranding network if survey activities cause the unauthorized take of a marine mammal; (2) immediately report incidents to NMFS and the local stranding network if CWA discovers an injured or dead marine mammal, and the lead PSO determines that the cause of injury or death is unknown and relatively recent; and (3) report to NMFS and the local stranding network, within 24 hours, incidents of injured or dead marine mammals not associated with or related to survey activities. If survey activities result in the serious injury or death of a marine mammal and supplemental measures are not likely to reduce the risk of additional serious injuries or deaths to a very low level, CWA will not be authorized to take marine mammals incidental to these activities unless they obtain the necessary authorization for such takings under section 101(a)(5)(A) of the MMPA.

Comment 10: The Alliance, HSUS, WTGH(A), Gloucester Fishermen's Wives Association *et al.,* OPTI, and numerous individuals, suggested that NMFS cannot issue an IHA for the proposed activity because CWA is attempting to segment their larger wind energy project and avoid the issuance of a Letter of Authorization (LOA) and associated regulations.

Response: CWA requested an IHA for a discrete, specified activity, the conduct of a high resolution geophysical survey that is required prior to construction of CWA's long-term energy project. The MMPA directs NMFS to allow, upon request, the incidental taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity within a specified geographical region if certain findings are made. All statutory requirements have been met in this instance. The issuance of regulations and an LOA is only required if the proposed activity has the potential to result in incidental takings of marine mammals by serious injury or mortality. Applicants have the option of applying for a 1-year IHA if their specified activity (in this case, the high resolution geophysical survey) would not result in the serious injury or mortality of marine mammals. Based on factors addressed in the application and proposed IHA (*e.g.,* estimated sound propagation, slow vessel speeds, and monitoring and mitigation measures), CWA does not anticipate, nor is NMFS authorizing, the incidental taking of marine mammals by serious injury or mortality. Therefore, an IHA is appropriate. NMFS has notified CWA that future activities may also require separate authorization(s) under the MMPA.

Comment 11: The Alliance, OPTI, and numerous individuals, also suggested that NMFS cannot make a final determination on the CWA's IHA application until an EA is released for public comment.

Response: In accordance with NEPA, NMFS prepared an EA to analyze the environmental effects of authorizing Level B incidental take of marine mammals during CWA's high resolution geophysical survey in Nantucket Sound. We note that neither NEPA nor the Council on Environmental Quality regulations require the circulation of a draft EA for public comment prior to taking final agency action. Instead, NMFS makes every effort, based on the totality of the circumstances, to provide the public with sufficient environmental information to permit the public to weigh in with their views and inform the final decision. During the development of this action, including the EA, several documents were available to the public, all of which provided a detailed description of the action and potential environmental impacts. For example, the analysis of impacts to marine mammals from the proposed high resolution geophysical survey activities was contained in NMFS' proposed issuance of an IHA dated September 1, 2011 (76 FR 56735) and is similar to what is contained in the EA. Additional environmental information is contained in CWA's IHA application, which was also made available to the public on September 14th. Other documents used to inform the EA included the Biological Opinion (issued December 30, 2010 by NMFS Northeast Regional Office, and available at *http://www.epa.gov/region1/communities/pdf/CapeWind/CapeWindBiologicalOpinion-12-30-10.pdf*) and the Final Environmental Impact Statement (published by BOEMRE on January 21, 2009 [74 FR 3635]) for the long-term Cape Wind energy project. The EA describes potential environmental impacts from the limited action for which an IHA was requested—the take of marine mammals incidental to CWA's high resolution geophysical survey—which is similar to numerous other survey activities that NMFS has analyzed in the past. NMFS believes that sufficient environmental information was presented to the public and comments on the proposed IHA were taken into consideration during preparation of the EA. In this instance, the project schedule and statutory deadlines contained in the MMPA made it impracticable to provide a separate public review and comment period for the EA itself.

Comment 12: The Alliance pointed out that NMFS did not propose a sound level limit for sound sources that are not expected to result in the harassment of marine mammals (*i.e.,* single-beam echo sounder, multi-beam echo sounder, and side-scan sonar).

Response: CWA indicated that the actual sound sources to be used during survey activities will be comparable to those listed in the application. Sounds from the single-beam echo sounder, multi-beam echo sounder, and side-scan sonar are not expected to reach levels that would result in the harassment of marine mammals.

Comment 13: The Alliance believes that NMFS underestimates the

possibility of a survey vessel striking a marine mammal while transiting to and from port at speeds up to 15 knots.

Response: NMFS believes that the likelihood of a survey vessel striking a marine mammal is low considering the low marine mammal densities within Nantucket Sound, the relatively short distance from port to the survey site, the limited number of vessels, and the small vessel size. Large whales are considered rare in Nantucket Sound and small marine mammals (*e.g.,* harbor porpoise and seals) move quickly through the water column and will likely avoid the vessels. CWA did not request take from a ship strike and NMFS is not authorizing take from a ship strike.

Comment 14: The Alliance requested that NMFS specify the port or ports that survey vessels will transit to and from, which could determine the number and species of marine mammals encountered.

Response: CWA expects that survey vessels will transit to and from ports within Nantucket Sound, most likely out of Falmouth Harbor, Massachusetts. This port location was considered in the Biological Opinion for the long-term Cape Wind energy project.

Comment 15: The Alliance believes that CWA's survey activities are likely to result in the take of right whales. Specifically, they noted the risk of ship strike, the likelihood of harassing right whales by causing them to avoid vessel traffic, and the possibility of displacing right whales from areas with elevated underwater sound levels.

Response: In 2008, NMFS published a final rule in the **Federal Register** instituting Mid-Atlantic Seasonal Management Areas with a mandatory 10-knot speed restriction to reduce the threat of ship collisions with right whales. The Seasonal Management Areas were established to provide additional protection for right whales and the timing, duration, and geographic extent of the speed restrictions were specifically designed to reflect right whale movement, distribution, and aggregation patterns. Nantucket Sound is not considered a Seasonal Management Area or a Dynamic Management Area (with a voluntary 10-knot speed zone). Furthermore, survey vessels will not enter a Seasonal Management Area or a Dynamic Management Area while transiting to and from port. The presence of right whales in Nantucket Sound is considered rare and sporadic and NMFS believes that the possibility of a survey vessel striking a right whale is unlikely.

The very qualities that make right whales susceptible to being struck by vessels in certain areas also make them highly detectable. NMFS believes that the size of right whales, their slow movements, and the amount of time they spend at the surface would make them extremely likely to be spotted by PSOs before they are exposed to sounds that constitute harassment. Whenever survey activities are underway, at least one PSO will be monitoring the 500-m exclusion zone—which is larger than both the Level A (30 m) and Level B (444 m) harassment isopleths—and will call for a shutdown if any marine mammal is observed within or moving toward the exclusion zone. Furthermore, right whales are not common in Nantucket Sound and have not been observed on Horseshoe Shoal, likely due to the shallower water depths. However, as stated in the Biological Opinion for the long-term Cape Wind energy project, CWA will monitor the Right Whale Sighting Advisory System and can modify their survey schedule in the unlikely event that whales are present within Nantucket Sound.

Because right whales are uncommon in Nantucket Sound, CWA's survey activities are not expected to result in displacement. Furthermore, there are no known foraging grounds or other important habitats for right whales in Nantucket Sound.

Comment 16: The Alliance takes issue with the proposed IHA's statement that there is no information on species-specific TTS for harbor porpoises. The Alliance points out that data published by Lucke *et al.* (2009) and Kastelein *et al.* (2011) suggests that TTS onset occurs at lower received energy levels than has been found in other odontocetes. The Alliance believes that existing impact criteria for cetaceans based on other species may underestimate effects on harbor porpoises.

Response: As explained in the proposed IHA notice (76 FR 56735), TTS is the mildest form of hearing impairment that can occur during exposure to a strong sound (Kryter, 1985). While experiencing TTS, the hearing threshold rises, and a sound must be stronger in order to be heard. At least in terrestrial mammals, TTS can last from minutes or hours to (in cases of strong TTS) days, can be limited to a particular frequency range, and can occur to varying degrees (*i.e.,* a loss of a certain number of dBs of sensitivity). For sound exposures at or somewhat above the TTS threshold, hearing sensitivity in both terrestrial and marine mammals recovers rapidly after exposure to the noise ends.

Marine mammal hearing plays a critical role in communication with conspecifics and in interpretation of environmental cues for purposes such as predator avoidance and prey capture. Depending on the degree (elevation of threshold in dB), duration (*i.e.,* recovery time), and frequency range of TTS and the context in which it is experienced, TTS can have effects on marine mammals ranging from discountable to serious. For example, a marine mammal may be able to readily compensate for a brief, relatively small amount of TTS in a non-critical frequency range that takes place during a time when the animal is traveling through the open ocean, where ambient noise is lower and there are not as many competing sounds present. Alternatively, a larger amount and longer duration of TTS sustained during a time when communication is critical for successful mother/calf interactions could have more serious impacts if it were in the same frequency band as the necessary vocalizations and of a severity that it impeded communication. The fact that animals exposed to levels and durations of sound that would be expected to result in this physiological response would also be expected to have behavioral responses of a comparatively more severe or sustained nature is also notable and potentially of more importance than the simple existence of a TTS.

TTS is considered by NMFS to be just one type of Level B (non-injurious) harassment. NMFS is aware that some studies suggest that harbor porpoises may be more sensitive to sound than other odontocetes and should have included those references (Lucke *et al.,* 2009 and Kastelein *et al.,* 2011) in the previous **Federal Register** notice. NMFS agrees that TTS onset may occur in harbor porpoises at lower received levels (when compared to other odontocetes). However, NMFS' 160-dB threshold criteria are based on the onset of behavioral harassment, not the onset of TTS. NMFS does not currently have criteria specific to TTS. Rather, the potential for TTS is considered within NMFS' analysis of potential impacts from Level B harassment.

Comment 17: The Alliance noted that if the source level of the chosen boomer exceeds 205 dB, the analysis in the application underestimates effects and take levels.

Response: As explained in the proposed IHA, CWA will use sound sources comparable to what was included in their application. CWA is aware of NMFS' acoustic threshold requirements and does not plan to use a boomer with a source level greater than 205 dB.

Comment 18: The Alliance stated that the proposed IHA specifies a shutdown radius based on a 160-dB criterion, rather than the standard 180-dB criterion and requests that the 180-dB criterion be adopted.

Response: The shutdown radius is based on CWA's 500-m exclusion zone, not a 160-dB criterion. The 500-m exclusion zone was established by BOEMRE in CWA's lease requirements and is actually more conservative (*i.e.,* larger) than the estimated Level B (444 m) or Level A (30 m) harassment isopleths. Typically, NMFS would require an applicant to shut down at the Level A harassment isopleth.

Comment 19: The Alliance claimed that the procedure used in CWA's application to estimate the number of potential exposures provides insufficient consideration to the effects of multiple takes on the same animal, based on the close spacing of survey lines.

Response: For purposes of the MMPA, NMFS considers take of an individual marine mammal to occur once per event within a 24-hour period. After 24 hours, the clock is essentially reset and a second take is possible if an animal is exposed to another event that constitutes harassment. While an animal may experience multiple exposures from an event within a 24-hour window, NMFS only accounts for a single take within a 24-hour window. CWA's take estimates were calculated based on the area ensonified by sound at 160 dB or higher each day. Therefore, they sufficiently accounted for the entire area of exposure within a single day.

Comment 20: The Alliance noted that CWA's application does not state whether the density data used for cetaceans was derived with the inclusion of correction factors allowing for marine mammals to be missed during surveys due to (1) animals being below the surface (availability bias); or (2) animals being at the surface, but not seen (detection bias). Similarly for seals, the Alliance suggested that the procedures described in CWA's application are correct for availability bias, but not for detection bias.

Response: CWA did not apply a correction factor to the sightings data from Pittman *et al.* (2006) for cetaceans discussed in the application. However, as discussed in the application, CWA used the higher sightings values to be conservative when estimating cetacean density. The sightings data illustrate a gradient in cetacean density with higher densities in waters outside of Nantucket Sound. The higher sightings values are considered conservative for the activity area because they are associated with deeper, more seaward areas.

Comment 21: The Alliance noted that while Figure 2 of CWA's application appears to show more than 17 seal sightings within the proposed project area in 2002 alone, the application states that only 17 seal observations were made during three years of aerial surveys.

Response: Figure 2 of CWA's application depicts binned ranges of seal observations in and around Nantucket Sound. However, CWA highlighted the anticipated area of ensonification to illustrate the number of seal observations within the survey area. Within that anticipated area of ensonification, there are only one to four observations of seals during 2002. NMFS believes that Figure 2 accurately depicts the range of seal observations over a 3-year period and this information was correctly stated in CWA's application.

Comment 22: The Alliance raised concerns regarding the minke whale population estimates used in CWA's application and the proposed IHA. More specifically, the Alliance noted that the application quotes a population estimate for an area that does not include the study area, whereas the proposed IHA quotes a larger population estimate for a larger area that does include the study area. The Alliance believes that the population estimates are relevant because of NMFS' need to anticipate take as a percentage of the population size.

Response: Minke whales off the eastern coast of the U.S. are considered to be part of the Canadian East Coast stock, which inhabits the area from the western half of the Davis Strait to the Gulf of Mexico. Both the application and the proposed IHA use the best recent abundance estimate for the Canadian East Coast population; however, CWA quoted only the U.S. survey, whereas NMFS quoted the sum of the U.S. and Canadian surveys. Data used to create the abundance estimate for this stock was gathered from surveys in the Gulf of Maine and northward. While surveys did not specifically cover Nantucket Sound, the NMFS 2010 stock assessment report is still considered the best available information for this population of minke whales.

CWA miscalculated their percentage of the minke whale population using an incorrect take estimate. However, CWA also used the smaller, U.S. survey population size when estimating take as a percentage of the population size. This actually results in a larger percentage. Therefore, CWA requested take authorization for an even smaller portion of the overall Canadian East Coast stock of minke whales than was noted in the proposed IHA. Whether the U.S. survey population size or the sum of the U.S. and Canadian surveys is used, the estimated take of minke whales is less than one percent of the stock.

Comment 23: The Alliance referred to CWA's application, which indicates that the anticipated impacts to marine mammals would be temporary behavioral changes due to avoidance. Given that the survey would continue for approximately 137 days, the Alliance believes that CWA's application understates the potential impacts to marine mammals because the application should have addressed the possibility that some animals would be excluded from habitat for an extended period of time.

Response: While CWA's survey activities may last for a total of 137 days, they will only occur during daylight hours and will ensonify a relatively small radius (maximum 444 m). Furthermore, marine mammal densities in Nantucket Sound are low and the area is not known to be a primary foraging ground. Therefore, any marine mammals who avoid the survey area due to elevated sound levels will likely not be excluded from vital habitat.

Comment 24: The Alliance requested clarity on the minimum number of NMFS-approved protected species observers that will be on the survey vessel.

Response: As explained in the Monitoring section on this notice, CWA will have at least one PSO to monitor the 500-m exclusion zone (an area that is larger than the Level B harassment zone) on the survey vessel at all times. Due to the survey vessel's small size and limited space for up to six personnel, it is not feasible for CWA to guarantee that more than one PSO will be available for mitigation monitoring. In addition to captain and crew members, a project archaeologist and CWA's environmental engineer will be present during survey activities. However, CWA will also provide additional monitoring efforts to increase knowledge of marine mammal species in Nantucket Sound. At least one NMFS-approved PSO will conduct behavioral monitoring from the survey vessel at least twice a week to estimate take and evaluate the behavioral impacts that survey activities have on marine mammals outside of the 500-m exclusion zone. In addition, CWA will send out a separate vessel with an NMFS-approved PSO to collect data on species presence and behavior before

surveys begin and once a month during survey activities.

Comment 25: The Alliance took issue with NMFS' assumption that marine mammals would be detected before entering the 180-dB isopleth. The Alliance believes that marine mammals may enter the 180-dB isopleth without being detected and therefore, may incur auditory impairment.

Response: The 180-dB Level A harassment isopleth is estimated to occur 30 m from the survey vessel. NMFS believes that marine mammals are highly likely to be detected within 30 m of the vessel, especially since a PSO(s) will be responsible for monitoring a 500-m exclusion zone around the vessel. The 500-m exclusion zone creates a large buffer around the 180-dB isopleth where the potential for injury occurs. NMFS believes that the mitigation and monitoring measures in place are sufficient to prevent marine mammals from being exposed to sounds at 180 dB or higher. NMFS further addressed this issue in the response to Comment 8.

Comment 26: The Alliance notes that CWA's application proposes to submit a 90-day report, but the proposed IHA requires a 120-day report.

Response: The BOEMRE lease requires CWA to submit a report to BOEMRE and NMFS within 90 days of completion of survey activities. NMFS sometimes gives applicants up to 120 days to submit a report, so this language incidentally carried over into the proposed IHA. CWA will submit their report within 90 days of completion due to the lease requirement, and the 90-day time period is included in the final IHA. However, the report is due *after* the activity, so the amount of time specified simply determines how long the applicant has to organize their monitoring results and prepare a document for NMFS. The deadline does not change the activity's impacts on marine mammals.

Comment 27: HSUS raised concern that impacts from the survey are not confined to the project footprint because sound levels from the boomer would not fall below 160 dB for approximately ¼ of a mile from the vessel and could be heard for many miles beyond that distance.

Response: NMFS analyzed acoustic impacts to marine mammals out to the 160-dB isopleth, which is considered our threshold for marine mammal harassment. Received levels below 160 dB (for the sound sources being used by CWA) are not considered to harass marine mammals and are, therefore, not considered to result in take under the MMPA.

Comment 28: HSUS disagreed that three species of cetaceans (minke whale, harbor porpoise, and Atlantic white-sided dolphin) are likely to be taken incidental to survey activities and, along with WTGH(A), requested that the North Atlantic right whale be considered. HSUS also believes that the 2010 and 2011 right whale sightings in Nantucket Sound should be part of an ESA consultation.

Response: NMFS addressed the potential for right whale harassment in the response to Comment 15. The right whale sightings in Nantucket Sound from 2010 were addressed in NMFS' Biological Opinion on the long-term Cape Wind energy project. Right whale sightings in Nantucket Sound are still considered rare and the area is not a known foraging, breeding, or calving ground for right whales.

Comment 29: WTGH(A) requested that NMFS begin ''government-to-government consultation on CWA's request for an IHA under the National Environmental Policy Act (NEPA) and the National Historic Preservation Act (NHPA).''

Response: NMFS conducted an independent environmental analysis in the form of an EA to comply with NEPA. Section 106 of the National Historic Preservation Act requires federal agencies to take into account the effect of their undertakings on historic properties, and requires agency officials to consult with any Indian tribe that attaches religious and cultural significance to historic properties that may be affected by an undertaking. Executive Order 13175 requires that federal agencies conduct government-to-government consultation with Indian tribes prior to issuing regulations that have tribal implications. The Executive Order also outlines principles that should be followed by agencies when formulating policies with tribal implications. Regulations and policies with ''tribal implications'' include those that have substantial direct effects on one or more Indian tribes, on the relationship between the federal government and Indian tribes, or on the distribution of power and responsibilities between the federal government and Indian tribes.

NMFS recognizes the importance of Nantucket Sound to WTGH(A) as a Traditional Cultural Property, and that CWA's long-term energy project was the subject of a consultation undertaken by BOEMRE under section 106 of the NHPA. However, NMFS' undertaking here is narrowly limited to issuance of an IHA under the MMPA. NMFS has determined that issuance of an incidental take authorization for the harassment of marine mammals is a type of undertaking that does not have the potential to cause effects to historic properties. The authorized Level B harassment will have only a negligible impact on affected marine mammal species or stocks. Therefore, consultation under NHPA is not required (36 CFR 800.3(a)(1); see *Save Our Heritage, Inc.* v. *FAA,* 269 F.3d 49 (1st Cir. 2001) (consultation under NHPA not required where federal agency had found that effects of undertaking on environment and historic properties would be *de minimus*)). Similarly, issuance of the IHA to CWA does not constitute a regulation or policy with tribal implications. Issuance of the IHA will not have substantial direct effects upon the tribe, and government-to-government consultation is therefore not required on this action.

Comment 30: WTGH(A) and the Gloucester Fishermen's Wives Association *et al.* requested that NOAA ask the Department of the Interior (DOI) to defer further action on offshore wind leasing until Coastal and Marine Spatial Planning (CMSP) is in place. Furthermore, WTGH(A) requested that NOAA ask DOI to require EISs, rather than EAs, for lease issuance.

Response: NOAA supports the development of a CMSP framework to inform future decisions. However, the MMPA mandates that the incidental taking of marine mammals be authorized if certain findings can be made. NMFS must proceed with incidental take authorizations so long as the requirements set forth in sections 101(a)(5)(A) and (D) of the MMPA are met. With regard to EISs versus EAs, DOI's Bureau of Ocean Energy Management, Regulation, and Enforcement (BOEMRE) published the Cape Wind Final Environmental Impact Statement (EIS) on January 21, 2009 (74 FR 3635).

Comment 31: WTGH(A) and the Gloucester Fishermen's Wives Association *et al.* requested that NMFS deny CWA's IHA application until LOA regulations are in place and a full EIS has been prepared.

Response: As explained in the responses to Comments 10 and 11, issuance of regulations and an associated LOA are not required for this activity. BOEMRE published an EIS for the Cape Wind long-term energy project on January 21, 2009 (74 FR 3635) and NMFS will publish an EA concurrently with this notice.

Comment 32: OPTI claimed that NMFS has done nothing to comply with ESA as it relates to the MMPA authorizations.

Response: NMFS' Northeast Regional Office completed a Biological Opinion on December 30, 2010, which analyzed the effects of the long-term Cape Wind energy project and concluded that the project is not likely to adversely affect right, humpback, or fin whales and, therefore, is not likely to jeopardize the continued existence of these species. CWA did not propose, nor is NMFS authorizing, the take of any ESA-listed marine mammals. Therefore, further consultation is not required.

Comment 33: One individual commented on the lack of adequate data on marine mammals and believes that the issuance of an IHA is too risky.

Response: The MMPA mandates that the incidental taking of marine mammals be authorized if certain findings can be made. NMFS must proceed with incidental take authorizations so long as the requirements set forth in sections 101(a)(5)(A) and (D) of the MMPA are met. NMFS used the best-available science to inform our final determination and believes that the information is adequate to support our findings.

Comment 34: Numerous individuals commented on their general opposition towards killing marine mammals.

Response: CWA did not propose, nor is NMFS authorizing, the take of marine mammals by serious injury or mortality. The IHA authorizes Level B harassment of marine mammals, incidental to the high resolution geophysical survey.

Description of Marine Mammals in the Area of the Specified Activity

Marine mammals with known occurrences in Nantucket Sound that could be harassed by high resolution geophysical survey activity in Nantucket Sound are listed in Table 1. These are the species for which take is being authorized. In general, large whales do not frequent Nantucket Sound, but they are discussed below because some species have been reported near the project vicinity. While other marine mammal species are present in the New England region (*e.g.,* humpback, fin, and right whales), they are considered rare in Nantucket Sound; this is likely due to the shallow depths of Nantucket Sound and its location outside of the coastal migratory corridor. NFMS has presented a more detailed discussion of the status of these stocks and their occurrence in Nantucket Sound in the notice of the proposed IHA (76 FR 56735, September 14, 2011).

TABLE 1—MARINE MAMMALS THAT COULD BE IMPACTED BY SURVEY ACTIVITIES IN NANTUCKET SOUND.

Common name	Scientific name	MMPA status[1]	Time of year in New England
Whales and Dolphins (Cetaceans)			
Minke whale	*Balaenoptera actuorostrata*	N–D	April through October.
Atlantic white-sided dolphin	*Lagenorhynchus acutus*	N–D	October through December.
Harbor porpoise	*Phocoena phocoena*	N–D	Year-round (peak Sept-Apr).
Seals (Pinnipeds)			
Gray seal	*Halichoerus grypis*	N–D	Year-round.
Harbor seal	*Phoca vitulina*	N–D	October through April.

[1] N–D = non-depleted. None of the species are listed under the Endangered Species Act.

Potential Effects on Marine Mammals

Acoustic stimuli generated by the operation of the shallow-penetration and medium-penetration subbottom profilers, which introduce sound into the marine environment, have the potential to cause Level B behavioral harassment of marine mammals in the survey area. The effects of sounds from this type of survey equipment might include one or more of the following: tolerance, masking of natural sounds, behavioral disturbance, temporary or permanent impairment, or non-auditory physical or physiological effects (Richardson *et al.,* 1995; Gordon *et al.,* 2004; Nowacek *et al.,* 2007; Southall *et al.,* 2007). Permanent hearing impairment, in the unlikely event that it occurred, would constitute injury, but temporary threshold shift (TTS) is not an injury (Southall *et al.,* 2007). Although the possibility cannot be entirely excluded, it is unlikely that the project would result in any cases of temporary or permanent hearing impairment, or any significant non-auditory physical or physiological effects. Based on the available data and studies described here and in the proposed IHA notice, some behavioral disturbance is expected, but NMFS expects the disturbance to be localized and short-term.

The notice of the proposed IHA (76 FR 56735, September 14, 2011) included a discussion of the effects of sounds from subbottom profilers on cetaceans and pinnipeds. NMFS refers the reader to CWA's application and NMFS' EA for additional information on the behavioral reactions (or lack thereof) by all types of marine mammals to geophysical surveys.

Anticipated Effects on Marine Mammal Habitat

NMFS included a detailed discussion of the potential effects of this action on marine mammal habitat, including physiological and behavioral effects on marine fish and invertebrates in the notice of the proposed IHA (76 FR 56735, September 14, 2011). While NMFS anticipates that the specified activity may result in marine mammals avoiding certain areas due to temporary ensonification, this impact to habitat is temporary and reversible, which NMFS considered in further detail in the notice of the proposed IHA (76 FR 56735, September 14, 2011) as behavioral modification. The main impact associated with the activity would be temporarily elevated noise levels and the associated direct effects on marine mammals.

Mitigation

In order to issue an IHA under section 101(a)(5)(D) of the MMPA, NMFS must, where applicable, set forth the permissible methods of taking pursuant to such activity, and other means of effecting the least practicable impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stock for taking for subsistence uses where relevant.

To reduce the potential for disturbance from acoustic stimuli associated with the specified activity, CWA will implement the following mitigation measures for marine mammals:

Establishment of an Exclusion Zone

During all survey activities involving the shallow-penetration and medium-penetration subbottom profilers, CWA will maintain a 500-m radius exclusion zone around each survey vessel. This area will be monitored for marine mammals 60 minutes (as stipulated by the BOEMRE lease) prior to starting or restarting surveys, during surveys, and 60 minutes after survey equipment has been turned off. Typically, the exclusion zone is based on the area in which marine mammals could be exposed to injurious (Level A) levels of sound. CWA's lease requirements specify a 500-m exclusion zone, which exceeds both the Level A (30 m) and Level B (444 m) isopleths for marine mammal harassment. Therefore, CWA's exclusion zone is extremely conservative and minimizes potential impacts to marine mammals from increased sound exposures.

Shut Down and Delay Procedures

If a PSO sees a marine mammal within or approaching the exclusion zone prior to the start of surveying, the observer will notify the appropriate individual who will then be required to delay surveying or shut down survey equipment until the marine mammal moves outside of the exclusion zone or if the animal has not been resighted for 60 minutes.

Soft-Start Procedures

A ''soft-start'' technique would be used at the beginning of survey activities each day (or following a shut down) to allow any marine mammal that may be in the immediate area to leave before the sound sources reach full energy.

NMFS has carefully evaluated the applicant's proposed mitigation measures and considered a range of other measures in the context of ensuring that NMFS prescribes the means of effecting the least practicable adverse impact on the affected marine mammal species and stocks and their habitat. Our evaluation of potential measures included consideration of the following factors in relation to one another: (1) The manner in which, and the degree to which, the successful implementation of the measure is expected to minimize adverse impacts to marine mammals; (2) the proven or likely efficacy of the specific measure to minimize adverse impacts as planned; and (3) the practicability of the measure for applicant implementation, including consideration of personnel safety, and practicality of implementation.

Based on our evaluation of the applicant's proposed measures, as well as other measures considered by NMFS or recommended by the public, NMFS has determined that the mitigation measures provide the means of effecting the least practicable adverse impacts on marine mammals species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance.

Monitoring and Reporting

In order to issue an IHA for an activity, section 101(a)(5)(D) of the MMPA states that NMFS must set forth ''requirements pertaining to the monitoring and reporting of such taking''. The MMPA implementing regulations at 50 CFR 216.104 (a)(13) indicate that requests for incidental take authorizations must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present in the action area.

Visual Monitoring

CWA will designate at least one biologically trained, on-site individual, approved in advance by NMFS, to implement the proposed mitigation measures that require real-time monitoring. The PSO(s) will monitor for marine mammals 60 minutes before, during, and 60 minutes after all survey activities and call for delay or shutdown if any marine mammal is observed approaching or within the 500-m exclusion zone.

CWA will also provide additional monitoring efforts to increase knowledge of marine mammal species in Nantucket Sound. At least one NMFS-approved PSO will conduct behavioral monitoring from the survey vessel at least twice a week to estimate take and evaluate the behavioral impacts that survey activities have on marine mammals outside of the 500-m exclusion zone. In addition, CWA will send out a separate vessel with a NMFS-approved PSO to collect data on species presence and behavior before surveys begin and once a month during survey activities.

PSOs will be provided with the equipment necessary to effectively monitor for marine mammals (*e.g.,* high-quality binoculars, compass, and range-finder) in order to determine if animals have entered into the harassment isopleths and to record species, behaviors, and responses to survey activity. PSOs must be able to effectively monitor the 500-m exclusion zone whenever the subbottom profilers are in use. Survey efforts will only take place during daylight hours and PSOs' visibility must not be obscured by fog, lighting conditions, *etc.*

Hydroacoustic Monitoring

In addition to visual monitoring, CWA will conduct hydroacoustic monitoring at the beginning of survey activities to verify the estimated Level A (180) and Level B (160) harassment isopleths.

Reporting

CWA will submit a report to NMFS within 90 days of expiration of the IHA or completion of surveying, whichever comes first. The report will provide full documentation of methods, results, and interpretation pertaining to all monitoring. More specifically, the report will include data from marine mammal sightings (*e.g.,* species, group size, behavior), any observed reactions to survey activities, distances between marine mammals and the vessel, and sound sources operating at time of sighting.

In the unanticipated event that the specified activity clearly causes the take of a marine mammal in a manner prohibited by the IHA, such as an injury (Level A harassment), serious injury, or mortality (*e.g.,* ship-strike, gear interaction, and/or entanglement), CWA shall immediately cease the specified activities and report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, at (301) 427–8401 and/or by email to *Michael.Payne@noaa.gov* and *ITP.Magliocca@noaa.gov* and the Northeast Regional Stranding Coordinator at (978) 281–9300 (*Mendy.Garron@noaa.gov*). The report must include the following information:

- Time, date, and location (latitude/longitude) of the incident;
- Name and type of vessel involved;
- Vessel's speed during and leading up to the incident;
- Description of the incident;
- Status of all sound source use in the 24 hours preceding the incident;
- Water depth;
- Environmental conditions (*e.g.,* wind speed and direction, Beaufort sea state, cloud cover, and visibility);
- Description of all marine mammal observations in the 24 hours preceding the incident;
- Species identification or description of the animal(s) involved;
- Fate of the animal(s); and
- Photographs or video footage of the animal(s) (if equipment is available).

Activities will not resume until NMFS is able to review the circumstances of the prohibited take. NMFS will work with CWA to determine what is

necessary to minimize the likelihood of further prohibited take and ensure MMPA compliance. CWA may not resume their activities until notified by NMFS via letter, email, or telephone.

In the event that CWA discovers an injured or dead marine mammal, and the lead PSO determines that the cause of the injury or death is unknown and the death is relatively recent (*i.e.,* in less than a moderate state of decomposition as described in the next paragraph), CWA will immediately report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, at (301) 427–8401 and/or by email to *Michael.Payne@noaa.gov* and *ITP.Magliocca@noaa.gov* and the Northeast Regional Stranding Coordinator at (978) 281–9300 (*Mendy.Garron@noaa.gov*). The report must include the same information identified in the paragraph above. Activities may continue while NMFS reviews the circumstances of the incident. NMFS will work with CWA to determine whether modifications in the activities are appropriate.

In the event that CWA discovers an injured or dead marine mammal, and the lead PSO determines that the injury or death is not associated with or related to the activities authorized in the IHA (*e.g.,* previously wounded animal, carcass with moderate to advanced decomposition, or scavenger damage), CWA will report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, at (301) 427–8401 and/or by email to *Michael.Payne@noaa.gov* and *ITP.Magliocca@noaa.gov* and the Northeast Regional Stranding Coordinator at (978) 281–9300 (*Mendy.Garron@noaa.gov*), within 24 hours of the discovery. CWA will provide photographs or video footage (if available) or other documentation of the stranded animal sighting to NMFS.

Estimated Take by Incidental Harassment

Except with respect to certain activities not pertinent here, the MMPA defines ''harassment'' as:

> any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].

Only take by Level B harassment is anticipated to be authorized as a result of the specified activity. Acoustic stimuli (*i.e.,* increased underwater sound) generated during the operation of the subbottom profilers may have the potential to cause marine mammals in the survey area to be exposed to sounds at or greater than 160 dB or cause temporary, short-term changes in behavior. Take by injury, serious injury, or mortality is neither anticipated nor authorized. NMFS has determined that the required mitigation and monitoring measures will minimize any potential risk for injury or mortality.

A detailed discussion of the methods used to calculate marine mammal densities and take estimates in the survey area was included in the application and the notice for the proposed IHA (76 FR 56735, September 14, 2011). In summary, sightings per unit effort (SPUE) data were used to estimate species density within the survey area and take estimates were calculated by multiplying the density values (n) measured in individuals per square kilometers, by the area of the zone of influence in square kilometers, times the total number of survey days (d = 137). The zone of influence was calculated as a function of the distance a survey vessel with deployed boomer would travel in one survey day and the area around the boomer where sound levels reach or exceed 160 dB.

To be conservative, CWA requested incidental take based on the highest estimated possible species exposures to potentially disturbing levels of sound from the boomer. No marine mammals are expected to be exposed to injurious levels of sound in excess of 180 dB during survey activities. NMFS is authorizing the Level B harassment of 11 minke whales, 231 Atlantic white-sided dolphins, 138 harbor porpoises, 398 gray seals, and 99 harbor seals. These numbers are extremely conservative because the highest density estimates were used and mitigation measures (such as the 500-m exclusion zone, marine mammal monitoring, and ramp up procedures) were not considered during calculations. More specifically, CWA's 500-m exclusion zone means that they will be shutting down before an animal ever enters the Level B harassment isopleth (444 m), so take numbers should be notably less. The authorized take numbers indicate the maximum number of animals expected to occur within the largest Level B harassment isopleth (444 m) and take into account the possibility that an animal may not be seen before it enters the 500-m exclusion zone. Estimated and proposed level of take of each species is less than one percent of each affected stock and therefore is considered small in relation to the stock estimates previously set forth.

Negligible Impact and Small Numbers Analysis and Determination

NMFS has defined ''negligible impact'' in 50 CFR 216.103 as '' * * * an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.'' In making a negligible impact determination, NMFS considers a number of factors which include, but are not limited to, number of anticipated injuries or mortalities (none of which would be authorized here), number, nature, intensity, and duration of Level B harassment, and the context in which takes occur (for instance, will the takes occur in an area or time of significance for marine mammals, or are takes occurring to a small, localized population?).

As described above, marine mammals will not be exposed to activities or sound levels which will result in injury (for instance, PTS), serious injury, or mortality. Anticipated impacts of survey activities on marine mammals are temporary behavioral changes due to avoidance of the area. All marine mammals in the vicinity of survey operations will be transient as no known breeding, calving, pupping, nursing, or haul-outs overlap with the survey area. The closest pinniped haul-outs are 23.5 km (12.7 NM) and 13.7 km (7.4 NM) away on Monomoy Island and Muskeget Island, respectively. Marine mammals approaching the survey area will likely be traveling or opportunistically foraging. The amount of take authorized is considered small (less than one percent) relative to the estimated populations of 8,987 minke whales, 63,368 Atlantic white-sided dolphins, 89,504 harbor porpoises, 250,000 gray seals, and 99,340 harbor seals. No affected marine mammals are listed under the ESA or considered strategic under the MMPA. Marine mammals are expected to avoid the survey area, thereby reducing exposure and impacts. No disruption to reproductive behavior is anticipated and there is no anticipated effect on annual rates of recruitment or survival of affected marine mammals.

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the mitigation and monitoring measures, NMFS determines that CWA's survey activities will result in the incidental take of small numbers of marine

mammals, by Level B harassment, and that the total taking will have a negligible impact on the affected species or stocks.

Impact on Availability of Affected Species for Taking for Subsistence Uses

There are no relevant subsistence uses of marine mammals implicated by this action.

Endangered Species Act (ESA)

No marine mammal species listed under the ESA are anticipated to occur within the action area. Therefore, section 7 consultation under the ESA is not required.

National Environmental Policy Act (NEPA)

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), as implemented by the regulations published by the Council on Environmental Quality (40 CFR parts 1500–1508), and NOAA Administrative Order 216–6, NMFS prepared an Environmental Assessment (EA) to consider the direct, indirect, and cumulative effects to marine mammals and other applicable environmental resources resulting from issuance of a 1-year IHA to CWA for the take of marine mammals incidental to a high resolution geophysical survey in Nantucket Sound, Massachusetts. The EA will be made available on the NMFS Web site listed in the beginning of this document concurrently with this notice.

Dated: December 20, 2011.

James H. Lecky,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2011–33167 Filed 12–23–11; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

United States Patent and Trademark Office

[Docket No.: PTO–C–2011–0080]

National Medal of Technology and Innovation Nomination Evaluation Committee

AGENCY: United States Patent and Trademark Office, Commerce.

ACTION: Notice and request for comments.

SUMMARY: The Department of Commerce (United States Patent and Trademark Office) is requesting nominations of individuals to serve on the National Medal of Technology and Innovation Nomination Evaluation Committee. The United States Patent and Trademark Office will consider all timely nominations received in response to this notice as well as from other sources.

DATES: To ensure full consideration, nominations must be postmarked, faxed or electronically transmitted no later than January 26, 2012.

ADDRESSES: Nominations must be submitted to: Program Manager, National Medal of Technology and Innovation Program, United States Patent and Trademark Office, P.O. Box 1450, Alexandria, Virginia 22313–1450. Nominations also may be submitted via fax: (571) 273–0340 or by electronic mail to: *nmti@uspto.gov.*

FOR FURTHER INFORMATION CONTACT: Steven Berk, Program Manager, National Medal of Technology and Innovation Program, United States Patent and Trademark Office, P.O. Box 1450, Alexandria, Virginia 22313–1450, telephone (571) 272–8400, or electronic mail: *nmti@uspto.gov.*

SUPPLEMENTARY INFORMATION:

Background

The committee was established in accordance with the Federal Advisory Committee Act (FACA) (Title 5, United States Code, Appendix 2). The following provides information about the committee and membership:

- Committee members are appointed by and serve at the discretion of the Secretary of Commerce. The committee provides advice to the Secretary on the implementation of Public Law 96–480 (15 U.S.C. 3711), as amended August 9, 2007.
- The committee functions solely as an advisory body under the FACA. Members are appointed to the approximately 12-member committee for a term of three years. Each member will be reevaluated at the conclusion of the three-year term with the prospect of reappointment to one additional term, pending advisory committee needs and the Secretary's concurrence. Selection of membership is made in accordance with applicable Department of Commerce guidelines.
- Members are responsible for reviewing nominations and making recommendations for the Nation's highest honor for technological innovation, awarded annually by the President of the United States. Members of the committee must have an understanding of, and experience in, developing and utilizing technological innovation and/or be familiar with the education, training, employment and management of technological manpower.
- The Department is seeking additional nominations of candidates from small, medium-sized, and large businesses and academia, with expertise in the following sub-sectors of the technology enterprise: Medical Innovations/Bioengineering and Biomedical Technology; Technology Management/Computing/IT/Manufacturing Innovation; Technological Manpower/Workforce Training/Education. Under the FACA, membership on a committee must be balanced in background and expertise. In order to maximize the balance of background and expertise, nominations of individuals with backgrounds in the following SPECIAL EMPHASIS areas are particularly sought: Microbiology, Medical Science, Energy Sector, General Engineering, and Environmental Sciences.
- Committee members generally are Chief Executive Officers or former Chief Executive Officers; former winners of the National Medal of Technology and Innovation; presidents or distinguished faculty of universities; or senior executives of non-profit organizations. As such, they not only offer the stature of their positions but also possess intimate knowledge of the forces determining future directions for their organizations and industries. The committee as a whole is balanced in representing geographical, professional, and diverse interests.

Nomination Information

- Nominees must be United States citizens, must be able to fully participate in meetings pertaining to the review and selection of finalists for the National Medal of Technology and Innovation, and must uphold the confidential nature of an independent peer review and competitive selection process.
- The United States Patent and Trademark Office is committed to equal opportunity in the workplace and seeks a broad-based and diverse committee membership.

Dated: December 15, 2011.

David J. Kappos,

Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.

[FR Doc. 2011–33147 Filed 12–23–11; 8:45 am]

BILLING CODE 3510–16–P

COMMODITY FUTURES TRADING COMMISSION

Agency Information Collection Activities Under OMB Review

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice.

SUMMARY: The Commodity Futures Trading Commission (CFTC) is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.,* Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on the rule requiring notification of pending legal proceedings pursuant to 17 CFR 1.60.

DATES: Comments must be submitted on or before February 27, 2012.

FOR FURTHER INFORMATION CONTACT: Lynn A. Bulan, Office of General Counsel, U.S. Commodity Futures Trading Commission, 1155 21st Street NW., Washington, DC 20581, (202) 418–5143; fax: (202) 418–5567; email: *lbulan@cftc.gov* and refer to OMB Control No. 3038–0033.

SUPPLEMENTARY INFORMATION: Under the PRA, Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information that they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA, 44 U.S.C. 3506(c)(2)(A), requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, the CFTC is publishing notice of the proposed collection of information listed below.

With respect to the following collection of information, the CFTC invites comments on:

- Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have a practical use;
- The accuracy of the Commission's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Ways to enhance the quality, usefulness, and clarity of the information to be collected; and
- Ways to minimize the burden of collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology; e.g. permitting electronic submission of responses.

Notification of Pending Legal Proceedings Pursuant to 17 CFR 1.60, OMB Control Number 3038–0033–Extension

The rule is designed to assist the Commission in monitoring legal proceedings involving the responsibilities imposed on contract markets and their officials and futures commission merchants (FCMs) and their principals by the Commodity Exchange Act, or otherwise.

The Commission's rules require FCMs and introducing brokers: (1) To provide their customers with standard risk disclosure statements concerning the risk of trading commodity interests; and (2) to retain all promotional material and the source of authority for information contained therein. The purpose of these rules is to ensure that customers are advised of the risks of trading commodity interests and to avoid fraud and misrepresentations. In addition, the Commission's rules impose obligations on contract markets that are designed to avoid manipulation and fraud. In order to ensure compliance with these rules, the Commission requires the information whose collection and dissemination is required under 17 CFR 1.60.

The Commission estimates the burden of this collection of information as follows:

ESTIMATED ANNUAL REPORTING BURDEN

17 CFR Section	Annual number of respondents	Total annual respondents	Hours per response	Total hours
1.60	108	1	.20	.20

There are no capital costs or operating and maintenance costs associated with this collection.

Issued in Washington, DC on December 20, 2011, by the Commission.

David A. Stawick,

Secretary of the Commission.

[FR Doc. 2011–33179 Filed 12–23–11; 8:45 am]

BILLING CODE P

COURT SERVICES AND OFFENDER SUPERVISION AGENCY FOR THE DISTRICT OF COLUMBIA

Senior Executive Service; Performance Review Board; Members

AGENCY: Court Services and Offender Supervision Agency for the District of Columbia.

ACTION: Notice.

SUMMARY: Section 4314(c) of Title 5, U.S.C. (as amended by the Civil Service Reform Act of 1978) requires each agency to establish, in accordance with regulations prescribed by the Office of Personnel Management, one or more Performance Review Boards (PRB) to review, evaluate and make a final recommendation on performance appraisals assigned to individual members of the agency's Senior Executive Service. The PRB established for the Court Services and Offender Supervision Agency (CSOSA), including the District of Columbia Pretrial Services Agency, an independent entity within CSOSA, also makes recommendations to the agency head regarding SES performance awards, rank awards and bonuses. Section 4314(c)(4) requires that notice of appointment of Performance Review Board members be published in the **Federal Register**.

The following persons have been appointed to serve as members of the Performance Review Board for the Court Services and Offender Supervision Agency: Thomas Williams, Jasper Ormond, Cedric Hendricks, James Williams, Linda Mays, William Kirkendale, Susan Shaffer, Clifford Keenan, and Leslie Cooper.

FOR FURTHER INFORMATION CONTACT: Tonya Turner, Deputy Associate Director for Human Resources, Court Services and Offender Supervision Agency, 655 15th Street NW., Suite 800, Washington, DC 20005, (202) 220–5477.

Dated: December 20, 2011.

Cedric Hendricks,

Acting Director.

[FR Doc. 2011–33006 Filed 12–21–11; 4:15 pm]

BILLING CODE 3129–01–M

DEPARTMENT OF DEFENSE

Office of the Secretary

Notice of Intent To Expand Implementation of the TRICARE® Program in Alaska

AGENCY: Office of the Assistant Secretary of Defense for Health Affairs, DoD.

ACTION: Notice.

SUMMARY: The Office of the Assistant Secretary of Defense for Health Affairs announces the intent to expand implementation of the TRICARE Program in Alaska. The expansion will require the Managed Care Support Contractor to develop and operate a TRICARE civilian preferred provider network under 32 CFR 199.17(p) within the Anchorage Prime Service Area of Alaska. Eligible TRICARE beneficiaries will be permitted to enroll in Prime with assignment to Military Treatment Facility (MTF) Primary Care Managers (PCMs) consistent with established priorities provided in 32 CFR 199.17(c) or assignment to a PCM within the TRICARE civilian preferred provider network. The initial expansion included the Prime Service Areas around Fort Wainwright and Eielson Air Force Base.

Under 32 Code of Federal Regulations (CFR) 199.1(b), the Director had previously limited the program in Alaska. Subsequently through the notice of November 3, 2010, *http://www.access.gpo.gov/su_docs/fedreg/a101103c.html,* the limitation was partially revoked, and now the Director is revoking another part of the prior limitation in Alaska and intends to provide the benefit under 32 CFR 199.17 (p).

FOR FURTHER INFORMATION CONTACT: LTC Stephen Oates, TRICARE Policy and Operations Directorate, TRICARE Management Activity, 5111 Leesburg Pike, Suite 810, Falls Church, VA 22041, telephone (703) 681–8711.

Dated: December 21, 2011.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2011–33067 Filed 12–23–11; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Extension of Autism Services Demonstration Project for TRICARE Beneficiaries Under the Extended Care Health Option

AGENCY: Department of Defense.

ACTION: Notice of demonstration.

SUMMARY: This notice provides a 2-year extension of the Department of Defense Enhanced Access to Autism Services Demonstration Project under the Extended Care Health Option for beneficiaries diagnosed with an Autism Spectrum Disorder (ASD). Under the demonstration, the Department implemented a provider model that allows reimbursement for Intensive Behavioral Interventions (IBI) services, in particular, Applied Behavior Analysis, rendered by providers who are not otherwise eligible for reimbursement.

DATES: The demonstration will continue through March 14, 2014.

ADDRESSES: TRICARE Management Activity (TMA), Health Plan Operations, 5111 Leesburg Pike, Suite 810, Falls Church, VA 22041.

FOR FURTHER INFORMATION CONTACT: For questions pertaining to this demonstration project, please contact Mr. Richard Hart at (703) 681–0047.

SUPPLEMENTARY INFORMATION: On December 4, 2007, the Department of Defense published a Notice in the **Federal Register** (FR) (72 FR 68130) of a TRICARE demonstration to increase access to IBI services. The purpose of the demonstration is to allow the Department to determine whether such a provider model increases access to services, the services are reaching those most likely to benefit from them, the quality of the services rendered meets the standard of care currently accepted by the community of providers, and whether State requirements for licensure or certification of providers of IBI services, where such exists, are being met.

The effective date was 60 days following publication of the Notice, and the demonstration was implemented on March 15, 2008 for a period of 2 years.

Recognizing that the subject of ASDs is complex, in particular, with respect to the number of individuals diagnosed with ASD, the treatment of ASD that generally includes several years of behavior modification through educational services, and the ability of the provider community to increase the number of qualified providers, the Department published a Notice in the **Federal Register** (FR) (75 FR 8928) on February 26, 2010 that extended the Demonstration through March 14, 2012. The Department has determined that continuation of the demonstration for an additional 2 years is both in the best interest of TRICARE beneficiaries diagnosed with an ASD, and necessary to fully evaluate the effectiveness of the delivery model employed by the demonstration. This will provide the Secretary with sufficient information to make a formal decision regarding the use of that delivery model. The demonstration continues to be authorized by Title 10, United States Code, Section 1092.

Dated: December 21, 2011.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2011–33064 Filed 12–23–11; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Mandatory Declassification Review Addresses

AGENCY: Department of Defense.

ACTION: Notice.

SUMMARY: Pursuant to the Information Security Oversight Office's Classified National Security Information Directive No. 1, this notice provides Department of Defense addresses to which Mandatory Declassification Review requests may be sent. This notice benefits the public in advising them where to send such requests for declassification review.

FOR FURTHER INFORMATION CONTACT: Mr. Robert Storer, (571) 372–0483.

SUPPLEMENTARY INFORMATION: The following chart identifies the offices to which mandatory declassification review requests should be addressed:

(1) *OSD and the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff.* Department of Defense, Washington Headquarters Services, Records and Declassification Division, Suite 02F09–02, 4800 Mark Center Drive, Alexandria, Va, 22350–3100.

Exception: DoD Inspector General. DoD Office of Inspector General, 400 Army Navy Drive, Arlington, VA 22202–4704.

(2) *Department of the Army.* U.S. Army Declassification Activity, Attention: AHRC–RDD, 8850 Richmond Highway, Suite 300, Alexandria, VA 22309.

(3) *Department of the Navy.*

(i) Department of the Navy, Chief of Naval Operations, CNO N09N2, 2000 Navy Pentagon, Washington, DC 20350–2000. (Collateral MDR).

(ii) Department of Navy, Chief of Naval Operations, CNO N2/N6, 2000, Navy Pentagon, Washington, DC 20350–2000. (Sensitive Compartmented Information MDR).

(4) *Department of the Air Force.* Department of the Air Force, HAF/IMIO (MDR), 1000 Air Force Pentagon, Washington, DC 20330–1000.

(5) *United States Marine Corps.* Commandant of the Marine Corps, HQMC Code PP&O, Security Division (PS), 3000 Marine Corps Pentagon, Room 4A324, Washington, DC 20350–3000.

(6) *Defense Advanced Research Projects Agency.* Defense Advanced Research Projects Agency, 3701 N. Fairfax Drive, Arlington, VA 22203–1714.

(7) *Defense Contract Audit Agency.* Director, Defense Contract Audit Agency, Attention: CPS, 8725 John J. Kingman Road, Suite 2135, Fort Belvoir, VA 22060–6219.

(8) *Defense Information Systems Agency.* Defense Information Systems Agency, Attention: Security Division, MPS 6, 5111 Leesburg Pike, Suite 100, Falls Church, VA 22041.

(9) *Defense Intelligence Agency.* Defense Intelligence Agency, Attention: DAN–1A (FOIA), Washington, DC 20340–5100.

(10) *Defense Logistics Agency.* Defense Logistics Agency, Attention: DLA/DSS–S, 8725 John J. Kingman Road, Suite 2533, Fort Belvoir, VA 22060–6221.

(11) *Defense Security Service.* Defense Security Service, Office of FOIA & Privacy, 1340 Braddock Place, Alexandria, VA 22314–1651.

(12) *Defense Threat Reduction Agency.* Defense Threat Reduction Agency, Attention: SCR, 8725 John J. Kingman Road, Fort Belvoir, VA 22060–6201.

(13) *Missile Defense Agency.* Missile Defense Agency, Attention: MDA/DS, 7100 Defense Pentagon, Washington, DC 20301–7100.

(14) *National Geospatial-Intelligence Agency.* National Geospatial-Intelligence Agency, Mail Stop D–10, 4600 Sangamore Road, Bethesda, MD 20816–5003.

(15) *National Reconnaissance Office.* National Reconnaissance Office, NRO–MSO–ASG–IMSC–IART', 14675 Lee Road, Chantilly, VA 20151–1715.

(16) *National Security Agency/Central Security Service.* National Security Agency, Declassification Office, DJP5, 9800 Savage Road, Suite 6884, Fort George G. Meade, MD 20755–6884.

(17) *North American Aerospace Defense Command.* HQ NORAD/CSO, 250 Vandenberg St. Ste B016, Peterson AFB, CO 80914.

(18) *U.S. Africa Command.* US Africa Command, Unit 29951, ATTN: COS–FOIA, APO AE 09751.

(19) *U.S. Central Command.* U.S. Central Command, Attention: CCJ6–RDD, 7115 South Boundary Blvd., MacDill AFB, FL 33621–5101.

(20) *U.S. European Command.* U.S. European Command, Attention: ECJ1–AX, Unit 30400, APO AE 09131.

(21) *U.S. Joint Forces Command.* U.S. Joint Forces Command, Code J02SM, 1562 Mitscher Ave., Suite 200, Norfolk, VA 23511–2488.

(22) *U.S. Northern Command.* U.S. Northern Command, HQ USNORTHCOM/CSO, 250 Vandenberg Street, Suite B016, Peterson AFB, CO 80914–3804.

(23) *U.S. Pacific Command.* U.S. Pacific Command, Attention: J151 FOIA, Box 64017, Camp Smith, HI 96861–4017.

(24) *U.S. Southern Command.* U.S. Southern Command, Attention: SCJ2–SM–CFO (FOIA)''. 3511 NW. 91st Avenue, Miami, FL 33172–1217.

(25) *U.S. Special Operations Command.* U.S. Special Operations Command, Attention: SOCS–SJS–SI (FOIA), 7701 Tampa Point Blvd., MacDill AFB, FL 33621–5323.

(26) *U.S. Strategic Command.* U.S. Strategic Command, Attention: CS50, 901 SAC Blvd., STE 1C17, Offutt AFB, NE 68113–6000.

(27) *U.S. Transportation Command.* US Transportation Command, Chief, Command Information Management, ATTN: TCCSIM, 508 Scott Drive, Scott AFB IL, 62225–5357.

Dated: December 21, 2011.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2011–33063 Filed 12–23–11; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Reserve Forces Policy Board (RFPB); Member Solicitation

AGENCY: Office of the Secretary of Defense Reserve Forces Policy Board, Department of Defense.

ACTION: Notice of Advisory Committee Member Solicitation.

SUMMARY: Pursuant to the Federal Advisory Committee Act of 1972 (5 U.S.C., Appendix, as amended), the Sunshine in the Government Act of 1976 (5 U.S.C. 552b, as amended), and 41 CFR 102–3.150, the Department of Defense announces the following Federal advisory committee member solicitation of the Reserve Forces Policy Board (RFPB).

FOR FURTHER INFORMATION CONTACT: LtCol Ken Olivo, Designated Federal Officer, (703) 697–4486 (Voice), (703) 693–5371 (Facsimile), *RFPB@osd.mil.* Mailing address is Reserve Forces Policy Board, 7300 Defense Pentagon, Washington, DC 20301–7300. Web site: *http://ra.defense.gov/rfpb/.*

SUPPLEMENTARY INFORMATION: As specified in Section 10301, Title 10, U.S. Code, the Reserve Forces Policy Board serves ''as an independent adviser to the Secretary of Defense to provide advice and recommendations to the Secretary of Defense on strategies, policies, and practices designed to improve and enhance the capabilities, efficiency, and effectiveness of the reserve components.'' The Board consists of 20 members. This includes ten persons appointed or designated by the Secretary of Defense, each of whom must be a United States citizen having significant knowledge of and experience in policy matters relevant to national security and reserve component matters and must be one of the following pursuant to 10 U.S.C. 10301(c)(6):

''(A) An individual not employed in any Federal or State department or agency.

(B) An individual employed by a Federal or State department or agency.

(C) An officer of a regular component of the armed forces on active duty, or an officer of a reserve component of the armed forces in an active status, who—

(i) Is serving or has served in a senior position on the Joint Staff, the headquarters staff of a combatant command, or the headquarters staff of an armed force; and

(ii) has experience in joint professional military education, joint qualification, and joint operations matters.''

The vacancy to be filled on the Board is one of those ten positions.

The Federal Advisory Committee Act (FACA) of 1972 (5 U.S.C. Appendix, as amended) and the governing regulations (41 CFR 102–305 through 102–30175) provide the basis for and guidance concerning the management and operations of Federal advisory committees. Typically, advisory bodies subject to FACA require open, preannounced meetings; public access to discussions, deliberations, records and documents; opportunity for the

public to provide, at a minimum, written comments; fairly balanced membership; and evaluation of conflicts of interests for certain members. Section 5(b)(2) of the FACA requires ''* * * the membership of the advisory committee to be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee.''

Forward Nominations for Membership: This notice is a solicitation to fill a vacancy on the board. To be considered for nomination please forward a biography of the nominee describing the professional background and qualifications meeting the above stated criteria. Submissions may be by email: *RFPB@osd.mil,* or by (703) 693–5371 (Facsimile-FAX) to the Reserve Forces Policy Board's Designated Federal Officer no later than the close of business Friday, January 27, 2012.

Note: Nominees must be U.S. citizens and cannot be registered federal lobbyists. Individuals appointed by the Secretary of Defense to serve on the Reserve Forces Policy Board will be appointed as experts and consultants under the authority of 5 U.S.C. 3109 to serve as special governmental employees and be required to comply with all Department of Defense ethics requirements, to include the filing of confidential financial disclosure statements. Nominees must hold or be able to qualify for a security clearance at the Secret level. In addition, those appointed will serve without compensation except for travel and per diem in conjunction with official Board business.

Dated: December 21, 2011.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2011–33070 Filed 12–23–11; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

TRICARE Evaluation of Centers for Medicare & Medicaid Services Approved Laboratory Developed Tests Demonstration Project

AGENCY: Department of Defense.

ACTION: Notice of Demonstration.

SUMMARY: This notice is to advise interested parties of a Military Health System (MHS) demonstration project under the authority of Section 1092, Chapter 55, Title 10 of the United States Code (U.S.C.), entitled TRICARE Evaluation of Centers for Medicare & Medicaid Services Approved Laboratory Developed Tests Demonstration Project. The demonstration project is intended to determine whether it is feasible for the Department of Defense (DoD) to review Centers for Medicare and Medicaid Services (CMS) approved laboratory developed tests (LDTs), not yet examined by the United States Food and Drug Administration (FDA), to determine if they meet TRICARE requirements for safety and effectiveness according to the hierarchy of reliable evidence (32 CFR 199.2(b)) and allow those that do to be covered as a benefit under the TRICARE Program. The LDTs for this demonstration would be limited to only those that significantly inform clinical decision making for surveillance, surgical interventions, chemotherapy, or radiation therapy for cancer. The demonstration project will provide a valuation of the potential improvement of the quality of healthcare services for TRICARE beneficiaries who would not otherwise had access to these tests. In addition, the demonstration project will evaluate the need to modify 32 CFR 199.4(g)(15)(i)(A) to allow coverage for CMS approved LDTs.

Interested LDT device manufacturers, or individual (single) laboratories developing their own proprietary tests that have a CMS National Coverage Determination (NCD) or Local Coverage Determination (LCD) who desire the DoD to consider their tests for coverage under the TRICARE Program, are encouraged to submit LDTs for consideration. Submissions must include the LDT description and complete documentation (including the CMS-assigned determination number) proving CMS National Coverage Determination (NCD) or Local Coverage Determination (LCD). Submissions will only be accepted for those LDTs which are CMS approved, but have not received FDA clearance or approval LDTs will be prioritized based on the combination of potential high utilization and potential high clinical impact on TRICARE beneficiaries. If no submission is received for a LDT and TMA is aware that a NCD or LCD exists, TMA may elect to include the LDT in the prioritization process. Relevant administrative data on number of diagnoses of specific oncological diseases, procedures, treatments, and other requested data and information will be used in the prioritization process. The prioritized list will be sent to the Director, TMA for approval. The approved list will then be reviewed in numerical order beginning with the test listed as having the highest priority. Those selected for review will be evaluated to determine whether they meet the TRICARE hierarchy of reliable evidence for safety and effectiveness as described in 32 CFR 199.4(g)(15). LDTs determined to meet TRICARE criteria for safety and efficacy will be recommended to the Director, TMA for approval for cost-sharing during the demonstration period.

DATES: This demonstration will be effective 30 days after publication in the **Federal Register**. This demonstration will remain in effect for three years.

ADDRESSES: TRICARE Management Activity (TMA), Office of the Chief Medical Officer, Attn: HB&RM 5111 Leesburg Pike, Suite 810, Falls Church, VA 22041–3206.

FOR FURTHER INFORMATION CONTACT: Timothy Stockdale, Office of the Chief Medical Officer, TRICARE Management Activity, telephone (703) 681–0075.

SUPPLEMENTARY INFORMATION:

A. Background

According to 32 Code of Federal Regulation (CFR) 199.4(G)(15)(i)(a) the TRICARE Management Activity (TMA) may not cost-share medical devices including laboratory developed tests (LDTs) if the tests are non-FDA approved, that is they have not received U.S. Food and Drug Administration (FDA) marketing 510(k) clearance or premarket approval. Under the current regulation cited above, LDT's that have been identified as non-FDA approved are summarily denied. In contrast The Centers for Medicare & Medicaid Services (CMS), which is not constrained by any similar regulation, has a policy that provides a mechanism for the review and payment of LDTs meeting the CMS standard of reasonable and necessary meaning it is safe and effective, not experimental or investigational, and appropriate.

An LDT is a test developed by a single clinical laboratory that provides testing to the public but does not sell the lab kit to other labs. In the past, these tests were relatively simple tests used to diagnose or monitor diseases and other conditions within a single laboratory usually at a local large hospital or academic medical center. As a result the FDA has utilized enforcement discretion (where the FDA does not enforce some or all applicable laws and regulations on certain categories of products) of LDTs and has taken no action to remove them from the marketplace.

The 1976 Device Amendments modified the Federal Food, Drug, and Cosmetic Act (FFDCA) to provide for the regulation of medical devices. These medical devices are defined broadly in section 201(h) of 21 U.S.C. 321 to include: ''an instrument, apparatus, implement, machine, continuance,

implant, in vitro reagent, or similar or related articles, including any component, part or accessory which is * * * intended for use in the diagnosis or disease or other conditions, or in the cure, mitigation, treatment or prevention of disease.'' Medical devices include laboratory tests also known as in vitro diagnostics (IVDs).

The FDA authority over IVDs, which includes LDTs, is defined in 21 CFR 809.33 as: ''those reagents, instruments, and systems intended for use in diagnosis of disease or other conditions, including a determination of the state of health, in order to cure, mitigate, treat, or prevent disease or its sequelae. Such products are intended for use in the collection, preparation, and examination of specimens taken from the human body.'' The FDA has stated that clinical laboratories that develop LDTs are acting as manufacturers of medical devices and are subject to FDA jurisdiction under the FFDCA. As noted, the FDA has chosen to exercise its ''enforcement discretion'' over many LDTs and these tests are routinely sold without FDA approval.

The Analytic Specific Reagents rule was published in 1997 (21 CFR 864.4020) where FDA regulates the primary active reagents of laboratory developed tests rather than the LDTs themselves. The intent was to ensure the quality of the test components and to continue enforcement discretion for LDTs.

During the 2000's LDTs were developed and becoming more complex at an increasingly fast pace. In response FDA issued draft guidance relating to In Vitro Diagnostic Multivariate Index Assays, a particularly complex category of tests in 2007. A final rule has yet to be published. Recently in July 2011, the FDA released draft guidance on In Vitro Companion Diagnostic Devices which are devices that provide information that is essential for the safe and effective use of a corresponding therapeutic agent.

Laboratories are assessed and accredited under quality standards set by CMS under the Clinical Laboratory Improvement Amendments (CLIA) of 1988. CMS regulates laboratories that use LDTs as well as FDA approved tests. Laboratories performing moderate or high complexity tests are subject to specific regulatory standards governing certification, personnel, proficiency testing, patient test management, quality assurance, quality control, and inspections. CLIA certification and periodic inspections ensure the analytical validity of laboratory tests, including LDTs. Analytical validity refers to how well a test performs in the laboratory; that is how well the test measures the properties or characteristics it is intended to measure.

In contrast to TMA, CMS regulations do not have a specific requirement that devices be FDA approved. As a result CMS policy provides a mechanism for the review and payment of non-FDA approved LDTs (Section 522 of the Benefits Improvement and Protection Act). Non-FDA approved LDTs which meet CMS's standards are approved through its National Coverage Determination (NCD) or Local Coverage Determination (LCD) process. Once a LDT receives a LCD, it is considered a nationwide Medicare covered benefit.

B. Demonstration Project Description

A demonstration project will be initiated by the TMA to test whether CMS approved LDTs which have not received FDA medical device 510(k) clearance or premarket approval (therefore considered non-FDA approved) are safe and effective for cost-sharing for TRICARE beneficiaries. The LDTs for this demonstration would be limited to only those that significantly inform clinical decision-making for surveillance, surgical intervention, chemotherapy, or radiation therapy for cancer. The demonstration project will be effective 30 days after publication in the **Federal Register** and will continue for three years from the effective date of the original demonstration. The demonstration project will establish a process for TRICARE to evaluate the subset of non-FDA approved LDTs currently covered by a CMS NCD or LCD.

Upon publication of this **Federal Register** notification, TMA will solicit submissions from LDT device manufacturers and individual (single) laboratories which develop their own proprietary laboratory developed tests requests for DoD coverage of their LDTs. LDTs with current FDA 510(k) clearance or premarket approval will not be considered for this demonstration project; but will continue to be considered for coverage under the current routine coverage determination process of the TRICARE Program. Submissions must include evidence of CMS LCD or NCD approval and a statement from the manufacturer or laboratory attesting that the LDT has not received FDA medical device clearance or approval for marketing. CLIA certification is also required and a copy of the certificate should be included. If a submission is not received for an eligible LDT, TMA may elect to add the LDT to the list for consideration; but a manufacturer should not assume that their product will be considered without a submission. Submissions will be accepted for 90 calendar days from the date of publication of the demonstration project in the **Federal Register**.

All submissions will be reviewed by the Department of Defense (DoD) Laboratory Joint Working Group (LJWG), appointed by the Director, TMA. The LJWG team will be comprised of government clinical and policy professionals (DoD employees or active duty service members) to include; medical specialists, clinical laboratory medicine specialists, and medical benefits specialists. The LJWG will prioritize the list of LDTs based on the potential high utilization and potential high clinical impact on TRICARE beneficiaries. Administrative information from DoD clinical information systems relating to number of diagnoses of specific oncological diseases, procedures, treatments, and other requested data and information will be used in the prioritization process. LDTs used for non-covered conditions or tests related to unproven treatments will not be eligible for coverage and thus will not be recommended by the LJWG.

The prioritized list will be submitted to the Director, TMA for approval of the test as well as its priority placement on the list. Once an approved list has been obtained, a health care technology assessment and review for analytical validity, clinical validity, and clinical utility will be conducted. All health care technology assessments will be based on the TRICARE hierarchy of reliable evidence, as defined below, for criteria for safety and efficacy. CLIA certification will meet the requirement of analytical validity. Clinical validity and clinical utility are defined in the Agency of Healthcare Research and Quality (AHRQ) report titled, ''Quality, Regulation and Clinical Utility of Laboratory-developed Molecular Tests, Project ID: LABC0707. In this report clinical validity is defined as: ''test characteristics (sensitivity, specificity, predictive values, and likelihood ratios) in other words, the accuracy with which a test predicts the presence or absence of a clinical condition or predisposition. Clinical utility is defined as: ''whether the results of the test can be used to pursue effective treatment or provide other concrete clinical benefit,'' that is the usefulness of the test and the value of the information to medical practice. These standards will be used in determining if an LDT meets the requirements for clinical validity and clinical utility.

The LJWG will conduct a review of the LDT using the evidence which

meets the hierarchy of reliable evidence as well as the evidence outlined above which meet the requirements for analytical validity, and clinical validity and utility. The definition of reliable evidence which will be used by the LJWG is defined in 32 CFR 199.2(b) and includes: ''(i) Well-controlled trials of clinically meaningful endpoints, published in refereed medical literature, (ii) Published formal technology assessments, (iii) Published reports of national medical policy organization positions, (iv) Published national professional associations, and (v) Published reports of national expert opinion organizations.'' The hierarchy of reliable evidence of proven medical effectiveness, established by (i) through (v) of this paragraph, is the order of the relative weight to be given to any particular source. With respect to clinical studies, only those reports and articles containing scientifically valid data and published in the refereed medical and scientific literature shall be considered as meeting the requirements of reliable evidence. Specifically not included in the meaning of reliable evidence are reports, articles, or statements by providers or groups of providers containing only abstracts, anecdotal evidence or personal professional opinions. Also not included in the meaning of reliable evidence is the fact that a provider or a number of providers have elected to adopt a drug, device, or medical treatment or procedure as their personal treatment or procedure of choice or standard of practice. By majority vote the LJWG would recommend approval or disapproval to the Director, TMA. Approved LDTs would be available for cost-sharing with TRICARE beneficiaries.

C. Final Coverage Decisions

LDTs (evaluated under the demonstration project) determined by the JLWG to meet the TRICARE hierarchy of evidence for safety and effectiveness will be recommended to the Director, TMA for decision for acceptance for cost-sharing during the demonstration period. LDTs approved by the Director, TMA for cost-sharing will follow existing processes for inclusion as a TRICARE benefit. Additional information on payment methodologies will be included in the operational procedures for this Demonstration and will be published in the TRICARE Operations Manual found at *http://manuals.tricare.osd.mil/.*

D. Implementation

The demonstration is effective 30 days after publication in the **Federal Register** and will continue for a period of three years from the date of the original demonstration unless terminated earlier by the Director, TMA. LDTs approved by the Director, TMA during the demonstration period will become available for cost-sharing for qualified TRICARE beneficiaries during the demonstration period. Should the FDA issue final guidance on and or enforcement of the requirement for prior marketing approval, the Director TMA will terminate the demonstration and the DoD will ensure compliance with applicable federal law and regulations.

E. Evaluation

An evaluation will be conducted during the third year of the demonstration period to determine how many TRICARE approved LDTs were provided to beneficiaries across all TRICARE Regions. The evaluation will also include a review of the LDT review and recommendation process. These results of the evaluation will provide a valuation of the potential improvement of the quality of healthcare services for beneficiaries who would not otherwise had access to these safe and effective tests. Based on the utilization results, a decision will be made to modify 32 CFR 199.4(g)(15)(i)(A) to remove the restriction for non-FDA approved devices and allow TRICARE cost-sharing of CMS approved LDTs determined to meet the TRICARE criteria for safety and effectiveness.

Dated: December 21, 2011.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2011–33066 Filed 12–23–11; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

TRICARE Prime Urgent Care Demonstration Project

AGENCY: Department of Defense.

ACTION: Notice of demonstration.

SUMMARY: This notice is to advise interested parties of a Military Health System (MHS) Demonstration project under the authority of title 10, U.S. Code, section 1092, entitled Department Of Defense TRICARE Prime Urgent Care Demonstration Project. The demonstration project is intended to test whether allowing four visits to an urgent care center without requiring a referral from the Primary Care Manager (PCM) will improve access to urgent care including minor illness or injury for Active Duty Family Members enrolled in TRICARE Prime or TRICARE Prime Remote while reducing the overall costs of such care to the DoD. The Department currently has a demonstration to test this same provision for U.S. Coast Guard personnel. However, this demonstration is being conducted outside of the Coast Guard population in order to be able to evaluate the impact on ADFMs who tend to be a more mobile population than the Coast Guard members and their families. Current data indicates that the ADFMs frequently need urgent care while traveling to new duty stations for permanent orders or training and when traveling to temporary locations while a member is deployed. Under the demonstration, ADFMs who are enrolled in TRICARE Prime or TRICARE Prime Remote would be allowed to self-refer, without an authorization, to a TRICARE network provider such as an Urgent Care Clinic (UCC) or Convenience Center for up to four urgent care visits per year. No referral from their PCM or authorization by a Health Care Finder will be required and no Point of Service (POS) deductibles and cost shares shall apply to these four unmanaged visits. The ADFMs will be required to notify their PCM of any urgent/acute care visits to other than their PCM within 24 hours of the visit and schedule any follow-up treatment that might be indicated with their PCM. If more than the four (4) authorized urgent care visits are used, or if the beneficiary seeks care from a non TRICARE network or non TRICARE authorized provider, POS deductibles and cost shares as required by Title 32, Code of Federal Regulations, Section 199.17 (n)(3) may apply. Referral requirements for specialty care and inpatient authorizations will remain as currently required by MHS policy. At the conclusion of the demonstration, data will be analyzed to determine if use of this ability to seek urgent care without a referral is used more or less frequently by a more mobile population than a stable population in order to determine whether the overall costs to the government have decreased due to a reduced usage of emergency care facilities by this same population.

DATES: This demonstration will be effective 60 days from the date of this notice in the **Federal Register** for a period of thirty-six (36) months.

ADDRESSES: TRICARE Management Activity (TMA), Health Plan Operations, 5111 Leesburg Pike, Suite 810, Falls Church, VA 22041.

FOR FURTHER INFORMATION CONTACT: For questions pertaining to this

demonstration project, please contact Ms. Shane Pham at (703) 681–0039.

SUPPLEMENTARY INFORMATION:

a. Background

Access for acute episodic primary care continues to be in high demand by TRICARE Prime beneficiaries. The current regulations require that if a Prime beneficiary seeks care from a provider other than their Primary Care Manager (PCM), they must first obtain a referral. Otherwise, the care will be covered under the point-of-service option at greater out-of-pocket cost to the Prime beneficiary. This includes urgent care which TRICARE defines as medically necessary treatment for an illness or injury that would not result in further disability or death if not treated immediately but that requires professional attention within 24 hours. On the other hand, emergency care defined as a medical, maternity or psychiatric condition that would lead a ''prudent layperson'' (someone with average knowledge of health and medicine) to believe that a serious medical condition existed, or the absence of medical attention would result in a threat to his or her life, limb or sight and requires immediate medical treatment or which has painful symptoms requiring immediate attention to relieve suffering, does not require an authorization. Often when a Prime beneficiary needs urgent care after hours or when the PCM does not have available appointments, the Prime beneficiary will seek care from civilian sources such as emergency rooms (ER). While many Prime beneficiaries pay no out-of pocket costs for ER services, the average cost for an ER visit is much higher than an urgent care visit. In many cases, using the ER is not necessary, and a patient's condition can be treated through urgent care. Additionally for our ADFMs in transition, the Department has seen a higher incident of ER usage by this population. It appears that the difficulty in contacting the PMS while traveling or in a new location may result in the beneficiary's higher hospital ER services for care that might be suitably be obtained at an urgent care center.

In 2010, we examined the degree to which ADFMs used ERs for the top 14 medical conditions for which they sought care. We found that ADFM military treatment facility enrollees received about 7 percent of their visits from ERs while civilian prime enrollees received 4 percent of their care from emergency rooms. Because many of the top 14 conditions are acute in nature, we consider the ADFMs' use of ERs to be too high.

b. Implementation

This demonstration will be effective 60 days from the date of this notice in the **Federal Register** for a period of thirty-six (36) months.

c. Evaluation

The results of this Demonstration will allow a focused study of the impact of this process on: (1) The reduction of ER utilization and resulting costs, (2) assessment of the availability and accessibility of less expensive acute care services such as UCCs, (3) reduction of administrative processes. The evaluation/analysis of the demonstration would use Fiscal Year 2011 as the base line with follow-up data analysis conducted at each 6-month interval throughout the 36 month period to monitor of ER and TRICARE authorized UCC utilization workload and cost (claims data). Success of the demonstration would be determined by consistent shifts in health care utilization from ERs to a TRICARE authorized UCCs by 15–20%. A less than 5% shift in utilization from the ER to a TRICARE authorized UCCs would be considered insignificant.

Dated: December 21, 2011.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2011–33065 Filed 12–23–11; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Army

[Docket ID USA–2007–0014]

Proposed Collection; Comment Request

AGENCY: Army Corps of Engineers, Engineer Research and Development Center/Construction Engineering Research Laboratory (ERDC/CERL), DoD.

ACTION: Notice.

In compliance with Section 3506(c)(2)(A) of the *Paperwork Reduction Act of 1995,* the U.S. Army Corps of Engineers—ERDC/CERL announces a proposed new public information collection and seeks public comment on the provisions thereof. Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed information collection; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by February 27, 2012.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

- *Federal eRulemaking Portal*: *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Federal Docket Management System Office, 1160 Defense Pentagon, Washington, DC 20301–1160.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to: Larry Pater, Ph.D., P.E., Program/Project Manager, Noise R&D, U.S. Army Engineer Research and Development Center (ERDC), Construction Engineering Research Laboratory (CERL), 2902 Farber Drive, Champaign, IL 61821.

Title and OMB Number: Assessing Human Response to Military Impulse Noise; OMB Control Number 0710—0015.

Needs and Uses: The information collection requirement is necessary to obtain information on the relationship between community annoyance and complaints, related to impulsive noise from military installations. The information will provide the necessary tools and guidance for military installations to effectively balance the need for training operations at military installations with public safety and welfare. Participation by respondents is strictly voluntary, and the surveys are intended solely (or primarily) to ensure that facilities can adequately respond to any concerns the public may have.

Affected Public: Individuals and households.

Annual Burden Hours

Year 1 (2007): 37.5 hours.
Year 2 (2008): 1,575 hours.
Year 3 (2009): 700 hours.
Year 4 (2010): 1,287.5 hours.
Year 5 (2011): 412.5 hours.
Total Number of Burden Hours for 5 Years: 4,012.5 hours.

Number of Respondents

Year 1 (2007): 75.
Year 2 (2008): 1,575.
Year 3 (2009): 575.
Year 4 (2010): 725.
Year 5 (2011): 25.
Total Number of Respondents for 5 Years: 2,975.

Responses per Respondent

Year 1

- 1 response for 50 Qualitative Personal Interview respondents in three locations (30 minutes per interview equaling 25 hours).
- 1 response for 25 baseline interviews for the respondents participating in the In-situ study at location #1 (30 minutes per interview equaling 12.5 hours).

Total Responses for Year 1: 75.

Year 2

- 16,750 (estimated) responses for 25 In-situ survey participants (670 responses per person) at location #1 (3 minutes per response equaling 837.5 hours).
- 1,225 responses for 1,050 General Community Survey (cross-sectional sample) respondents (30 minutes per survey equaling 612.5 hours).
  - 2 responses for 175 panel survey respondents at Site #1.
  - 1 response for 525 cross-sectional survey respondents at Site #1.
  - 1 response for 175 panel survey respondents at Site #2.
  - 1 response for 175 cross-sectional survey respondents at Site #2.
- 1 response for 500 complaint survey respondents (15 minutes per survey = 125 hours).

Total Responses for Year 2: 18,475.

Year 3

- 8,250 (estimated) responses for 25 In-situ survey respondents (330 responses per person) at location #1 (3 minutes per response equaling 412.5 hours).
- 1 response for 25 post measurement interviews for In-situ study participants at location #1 (30 minutes per interview equaling 12.5 hours).
- 1 response for 25 baseline interviews for the respondents participating in the In-situ study at location #2 (30 minutes per interview equaling 12.5 hours).
- 1 response for 525 General Community Survey respondents at Site #2 (30 minutes per survey equaling 262.5 hours).
  - 1 response for 175 panel survey respondents.
  - 1 response for 350 cross-sectional survey respondents.

Total Responses for Year 3: 8,825.

Year 4

- 16,750 (estimated) responses for 25 In-situ survey respondents (670 responses per person) at location #2 (3 minutes per response equaling 837.5 hours).
- 1 response for 25 post measurement interviews In-situ participants at location #2 (30 minutes per interview equaling 12.5 hours).
- 875 responses for General Community Survey at Site #3 (30 minutes per survey equaling 437.5 hours).
  - 2 responses for 175 panel survey respondents at Site #3.
  - 1 response for 525 cross-sectional survey respondents at Site #3.

Total Respones for Year 4: 17,650.

Year 5

- 8,250 (estimated) responses for 25 In-situ survey participants at Location #2 (330 responses per person) at location #2 (3 minutes per response equaling 412.5 hours).

Total Responses for Year 5: 8,250.
Total Number of Responses for 5 Years: 53,275.

Average Burden per Response

Qualitative Personal Interview: 30 minutes.
Baseline Interview: 30 minutes.
Post Measurement Interview: 30 minutes.
In-situ Survey: 3 minutes.
General Community Survey: 30 minutes.
Complaint Survey: 15 minutes.

Frequency of Responses

Qualitative Personal Interview: One time per installation.
Baseline Interview: One time per installation.
Post Measurement Interview: One time per installation.
In-situ Survey: On occasion for 12 months.

General Community Survey

Panel Sample: Two times per installation.
Cross-sectional sample: One time per installation.
Complaint Survey: One time per installation.

SUPPLEMENTARY INFORMATION:

Summary of Information Collection

Respondents are individuals living in the vicinity of selected military installations who regularly experience impulsive noise from explosions and heavy weapons blasts. Information collection includes several different surveys:

1. A qualitative personal interview to explore respondents experiences, understanding, and terminology to refine the survey questions (to be conducted at 2 installations).

2. An In-situ study where respondents are asked to respond to a brief set of 5–6 questions on a PDA whenever they experience an impulsive noise event (to be conducted at 2 installations).

3. A baseline interview for respondents participating in the In-situ study (to be conducted at 2 installations).

4. A post measurement interview for respondents participating in the In-situ study (to be conducted at 2 installations).

5. A general community survey to gather responses to questions about the impact of impulsive noise events from a large representative sample of community residents (to be conducted at 3 installations).

6. A complaint survey that gathers data on response to a specific noise event for which one or more complaints are received by the military installation. For each recorded noise complaint, a sample of 10 households in the immediate vicinity of the complainant, as well as the complainant will be surveyed (to be conducted at 1 installation).

The study will involve communities surrounding 3 different military installations to ensure the results and dose-response models can be generalized and applied to other U.S. military installations.

Participation by respondents is strictly voluntary, and the surveys are intended solely (or primarily) to ensure that facilities can adequately respond to any concerns the public may have.

Dated: December 21, 2011.

Aaron Siegel,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2011–33095 Filed 12–23–11; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Navy

Revised Notice of Intent To Prepare an Environmental Impact Statement for Military Training Activities at the Naval Weapons Systems Training Facility Boardman, OR, and Notice of Request for Public Scoping Comments

AGENCY: Department of the Navy, DoD.

ACTION: Notice.

SUMMARY: This notice is to advise the public that the Department of the Navy (DoN) is revising the scope for the Environmental Impact Statement (EIS) for continued and increased training activities on Naval Weapons Systems Training Facility (NWSTF) Boardman, Oregon, and to invite the public to provide comments for consideration during preparation of the revised EIS.

This revised Notice of Intent has been published because since the October 5, 2010 publication of the original Notice of Intent in the **Federal Register** (75 FR 61452), the DoN is modifying its proposed action to include the addition of new Special Use Airspace in the form of a Military Operations Area (MOA). This new MOA would preserve required training capabilities at NWSTF Boardman that are necessary to maintain military readiness. Additional information concerning the proposed new MOA, including a map, is available on the NWSTF Boardman EIS Web page located at: *http://www.NWSTFBoardmanEIS.com.*

FOR FURTHER INFORMATION CONTACT: Mrs. Amy Burt, Naval Facilities Engineering Command Northwest, 1101 Tautog Circle, Suite 203, Silverdale, Washington, 98315–1101, Attn: NWSTF Boardman Project Manager.

SUPPLEMENTARY INFORMATION: The overall strategic mission of NWSTF Boardman is to support naval and joint services operational readiness by providing a suitable range within the geographical vicinity for Commander, U.S. Pacific Fleet and Oregon National Guard forces in the northwest. The development of structures of significant height on lands beneath the existing Special Use Airspace associated with NWSTF Boardman has resulted, and may continue to result, in the potential loss of ability to train at the range. To alleviate this situation, the DoN is proposing to add a new MOA to the northeast of the existing Special Use Airspace at NWSTF Boardman for the purpose of preserving training capabilities at the range that are necessary to maintain military readiness, including the capability to continue low altitude training. Adding the MOA would be consistent with the DoN's proposed action at NWSTF Boardman announced on October 5, 2010, which included range enhancements and changes to training activities, capacities, and facilities as they currently exist.

The new Boardman Northeast MOA would have two parts, A and B, with the current Boardman Air Traffic Control Assigned Airspace (ATCAA) being extended to include the area above the new MOA and to facilitate scheduling use of the airspace. The floor of MOA A would begin at 500 feet Above Ground Level (AGL) and extend upwards to, but not including, 4,000 feet above Mean Sea Level (MSL). MOA A would overlap a portion of existing Restricted Airspace R–5706 that starts at 3,500 feet MSL and underlie the existing MOA (Boardman MOA) that starts at 4,000 feet MSL to the northeast of the NWSTF Boardman property. The floor of MOA B airspace would begin at 4,000 feet MSL and extend upwards to, but not including, 18,000 feet MSL, and would abut the existing Boardman MOA. The dimensions of the Boardman Northeast MOA would be approximately 11 nautical miles west to east and approximately five nautical miles north to south. The extension of the ATCAA would be approximately six nautical miles west to east and approximately five nautical miles north to south.

Hours of operations for the new MOA would be the same as the existing Boardman MOA, 7:30 a.m. to 11:59 p.m. Monday through Friday and at other times by notice to Airman six hours in advance. Civilian or other nonparticipating air traffic flying with an air traffic control clearance and under instrument flight rules (IFR) will be restricted from entering the Northeast MOA when it is in use by the military. Civilian or other nonparticipating air traffic flying under visual flight rules (VFR) would be informed of Northeast MOA activation and advised to avoid the area; however, it is not compulsory that civilian or other nonparticipating air traffic flying under VFR, or under IFR without air traffic control clearance, remain clear of the area.

The Boardman ATCAA would permit the continuation of flight activities above the new MOA and 18,000 feet MSL. Aircraft flying under VFR will not be permitted to enter the Boardman ATCAA when active. The ATCAA is not depicted on aeronautical charts.

The proposed Northeast MOA would be established by the Federal Aviation Administration (FAA) according to authority given to the FAA under 49 U.S. Code (U.S.C.) Section 40103. In regulations found at 14 CFR 73.1 *et seq.* and FAA Joint Order 7400.2H, Procedures for Handling of Airspace, FAA sets forth the procedures for establishing various types of Special Use Airspace, including MOAs. According to FAA Order 1050.1E, Change 1, Environmental Impacts: Policies and Procedures, and a Memorandum of Understanding (MOU) between the Department of Defense and FAA signed October 4, 2005, since the DoN proposes the designation of the MOA, DoN will serve as lead agency under the National Environmental Policy Act and invite FAA as a cooperating agency. That MOU indicates that ''the resultant environmental documents of the lead agency are accepted and used in decisions and planning by all agencies involved with the proposed action.'' Therefore, once the EIS is complete and DoN has made its decision on whether to proceed with a designation request, the FAA will then proceed with their airspace designation process, described in the above-mentioned authorities.

The new MOA would be analyzed in Alternatives 1 and 2, both of which would support an increase in training activities. In addition to the new MOA, Alternative 1 would include force structure changes associated with the introduction of new weapon systems, vehicles and aircraft, in addition to accommodating training activities currently conducted on the range. Alternative 1 would also include the implementation of range enhancements to allow NWSTF Boardman to comply with DoN and National Guard requirements to enable military personnel to qualify on weapon systems. These required range enhancements could include the construction of a Multi-Purpose Machine Gun Range, a Digital Multi-Purpose Training Range, a Convoy Live Fire Training Range, a Demolition Training Range and construction of a joint range operations center/Unmanned Aerial System (UAS) maintenance building and UAS landing strip.

Alternative 2 would consist of all elements of Alternative 1 plus the addition of a second Convoy Live Fire Training Range and construction of a separate range operations center building, independent of the UAS maintenance building and UAS landing strip. The No Action Alternative remains unchanged.

The DoN is reopening the scoping period to identify new community concerns and local issues to be addressed in the EIS as a result of the proposal to request establishment of a

new MOA at NWSTF Boardman. Scoping comments previously submitted following publication of the original October 5, 2010 Notice of Intent are still valid and need not be resubmitted. The DoN encourages Federal, state, and local agencies, Federally Recognized Native American Tribes, the public and all interested persons to provide written or electronic comments to the DoN to identify any new specific environmental issues or topics of environmental concern related to the DoN's proposal to include designation of a new MOA as part of the proposed action.

Written comments must be postmarked no later than January 26, 2012. Comments should be mailed to Mrs. Amy Burt, Naval Facilities Engineering Command, Northwest, 1101 Tautog Circle, Suite 203, Silverdale, Washington 98315–1101, Attn: NWSTF Boardman EIS Project Manager. Comments may also be submitted on the project Web site, *www.NWSTFBoardmanEIS.com.*

Dated: December 16, 2011.

L.M. Senay,

Lieutenant, Office of the Judge Advocate General, U.S. Navy, Alternate Federal Register Liaison Officer.

[FR Doc. 2011–33086 Filed 12–23–11; 8:45 am]

BILLING CODE 3810–FF–P

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests

AGENCY: Department of Education.

ACTION: Comment request.

SUMMARY: The Department of Education (the Department), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the reporting burden on the public and helps the public understand the Department's information collection requirements and provide the requested data in the desired format. The Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management, Office of Management, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before February 27, 2012.

ADDRESSES: Comments regarding burden and/or the collection activity requirements should be electronically mailed to *ICDocketMgr@ed.gov* or mailed to U.S. Department of Education, 400 Maryland Avenue SW., LBJ, Washington, DC 20202–4537. Please note that written comments received in response to this notice will be considered public records.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35) requires that Federal agencies provide interested parties an early opportunity to comment on information collection requests. The Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management, publishes this notice containing proposed information collection requests at the beginning of the Departmental review of the information collection. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: December 19, 2011.

Darrin King,

Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management.

Federal Student Aid

Type of Review: Extension.

Title of Collection: Student Assistance General Provisions—Subpart I—Immigration—Status Confirmation.

OMB Control Number: 1845–0052.

Agency Form Number(s): N/A.

Total Estimated Number of Annual Responses: 143,332.

Total Estimated Annual Burden Hours: 17,917.

Abstract: Collection of this information is used for status confirmation which reduces the potential of fraud and abuse caused by ineligible aliens receiving federally subsidized student financial assistance under Title IV of the Higher Education Act of 1965, as amended. The respondent population is institutions of higher education who must submit a United States Citizenship and Immigration Services Form G0845 when automated secondary confirmation of the applicant's immigration match status fails, and individuals who must submit evidence of eligibility to receive Title IV financial assistance.

Copies of the proposed information collection request may be accessed from *http://edicsweb.ed.gov,* by selecting the ''Browse Pending Collections'' link and by clicking on link number 4766. When you access the information collection, click on ''Download Attachments'' to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to *ICDocketMgr@ed.gov* or faxed to (202) 401–0920. Please specify the complete title of the information collection and OMB Control Number when making your request.

Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–(800) 877–8339.

[FR Doc. 2011–33050 Filed 12–23–11; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Notice of Submission for OMB Review

AGENCY: Department of Education.

ACTION: Comment request.

SUMMARY: The Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management, invites comments on the submission for OMB review as required by the Paperwork Reduction Act of 1995 (Pub. L. 104–13).

DATES: Interested persons are invited to submit comments on or before January 26, 2012.

ADDRESSES: Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Education Desk Officer, Office of Management and Budget, 725 17th Street NW., Room 10222, New Executive Office Building, Washington, DC 20503, be faxed to (202) 395–5806 or emailed to *oira_submission@omb.eop.gov* with a cc: to *ICDocketMgr@ed.gov.* Please note that written comments received in response to this notice will be considered public records.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested

Federal agencies and the public an early opportunity to comment on information collection requests. The OMB is particularly interested in comments which: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Dated: December 20, 2011.

Darrin King,

Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management.

Office of Elementary and Secondary Education

Type of Review: Extension.

Title of Collection: 21st Century Community Learning Centers Annual Performance Report.

OMB Control Number: 1810–0668.

Agency Form Number(s): N/A.

Frequency of Responses: Annually.

Affected Public: State, Local and Tribal Government.

Total Estimated Number of Annual Responses: 1,400.

Total Estimated Annual Burden Hours: 36,400.

Abstract: The purpose of the 21st Century Community Learning Centers program (21st CCLC program), as reauthorized under Title IV, Part B, of the No Child Left Behind Act of 2001, 4201 et seq., (20 U.S. Code 7171 *et seq.*), is to provide expanded academic enrichment opportunities for children attending low-performing schools. To reflect the changes in the authorization and administration of the 21st CCLC program and to comply with its reporting requirements, the U.S. Department of Education (ED) is requesting authorization for the collection of data through Web-based, data-collection modules, the Annual Performance Report, the Grantee Profile, the Competition Overview, and the State Activities module, which collectively will be housed in an application called the 21st CCLC Profile and Performance Information Collection System. The data will continue to be used to fulfill ED's requirement under the Government Performance and Results Act to report to Congress annually on the implementation and progress of 21st CCLC projects and the use of state administrative and technical assistance funds allocated to the states to support the program. The data collection will also provide State Educational Agency (SEA) liaisons with needed descriptive data about their grantees and allow SEA liaisons to conduct performance monitoring and identify areas of needed technical assistance.

Copies of the information collection submission for OMB review may be accessed from the RegInfo.gov Web site at *http://www.reginfo.gov/public/do/PRAMain* or from the Department's Web site at *http://edicsweb.ed.gov,* by selecting the ''Browse Pending Collections'' link and by clicking on link number 4738. When you access the information collection, click on ''Download Attachments ''to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to the Internet address *ICDocketMgr@ed.gov* or faxed to (202) 401–0920. Please specify the complete title of the information collection and OMB Control Number when making your request.

Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–(800) 877–8339.

[FR Doc. 2011–33051 Filed 12–23–11; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

National Advisory Committee on Institutional Quality and Integrity: Notice of Membership

AGENCY: National Advisory Committee on Institutional Quality and Integrity, Office of Postsecondary Education, Department of Education.

What is the purpose of this notice?

The purpose of this notice is to list the members of the National Advisory Committee on Institutional Quality and Integrity (NACIQI). This notice is required under Section 114(e)(1) of the Higher Education Act (HEA) of 1965, as amended.

What is the role of NACIQI?

The NACIQI is established under Section 114 of the HEA, and is composed of 18 members appointed—

(A) On the basis of the individuals' experience, integrity, impartiality, and good judgment;

(B) From among individuals who are representatives of, or knowledgeable concerning, education and training beyond secondary education, representing all sectors and types of institutions of higher education; and,

(C) On the basis of the individuals' technical qualifications, professional standing, and demonstrated knowledge in the fields of accreditation and administration of higher education.

The NACIQI meets at least twice a year and provides recommendations to the Secretary of Education pertaining to:

- The establishment and enforcement of the standards of accrediting agencies or associations under subpart 2 of part H of Title IV, HEA.
- The recognition of specific accrediting agencies or associations.
- The preparation and publication of the list of nationally recognized accrediting agencies and associations.
- The eligibility and certification process for institutions of higher education under Title IV of the HEA.
- The relationship between (1) accreditation of institutions of higher education and the certification and eligibility of such institutions, and (2) State licensing responsibilities with respect to such institutions.
- Any other advisory functions relating to accreditation and institutional eligibility that the Secretary may prescribe by regulation.

What are the terms of office for the Committee members?

The term of office of each member is six years, except that the terms of office for the initial members of the Committee shall be three years for members appointed by the Secretary; four years for members appointed by the Speaker of the House of Representatives; and six years for members appointed by the President Pro Tempore of the Senate. Any member appointed to fill a vacancy occurring prior to the expiration of the term for which the member's predecessor was appointed is appointed for the remainder of the term.

Who are the current members of the Committee?

The current members of the NACIQI are:

Members Appointed By Secretary of Education Arne Duncan With Terms Expiring September 30, 2013

- Jamienne S. Studley, J.D., NACIQI Chair, President and Chief Executive Officer (CEO), Public Advocates, Inc., San Francisco, California.

- Susan D. Phillips, Ph.D., NACIQI Reauthorization Subcommittee Chair, Provost and Vice President for Academic Affairs, The State University of New York at Albany, Albany, New York.
- Earl Lewis, Ph.D., Provost and Executive Vice President for Academic Affairs, Emory University, Atlanta, Georgia.
- Beter-Aron Shimeles, Student Member, Bay Area Fellow for Peer Health Exchange, Occidental College, Los Angeles, California.
- Frank H. Wu, J.D., Chancellor and Dean, University of California, Hastings College of the Law, San Francisco, California.
- Federico Zaragoza, Ph.D., Vice Chancellor of Economic and Workforce Development, Alamo Community College District, San Antonio, Texas.

Members Appointed by Speaker of the House of Representatives With Terms Expiring September 30, 2014

- Arthur J. Rothkopf, J.D., NACIQI Vice-Chair, President Emeritus, Lafayette College, Easton, Pennsylvania. (Mr. Rothkopf resides in Washington, DC).
- Arthur Keiser, Ph.D., Chancellor, Keiser University, Fort Lauderdale, Florida.
- William E. Kirwan, Ph.D., Chancellor, University System of Maryland, College Park, Maryland.
- William Pepicello, Ph.D., President, University of Phoenix, Phoenix, Arizona.
- Carolyn G. Williams, Ph.D., President, City University of New York Bronx Community College, Bronx, New York.
- George T. French, Jr., Ph.D., President, Miles College, Fairfield, Alabama.

Members Appointed by President Pro Tempore of the Senate With Terms Expiring September 30, 2016

- Bruce Cole, Ph.D., Senior Fellow, Hudson Institute, Washington, DC.
- Wilfred McClay, Ph.D., SunTrust Bank Chair of Excellence in Humanities, University of Tennessee at Chattanooga, Chattanooga, Tennessee.
- Anne D. Neal, J.D., President, American Council of Trustees and Alumni, Washington, DC.
- Cameron C. Staples, J.D., President and Chief Executive Officer (CEO), New England Association of Schools and Colleges, Bedford, Massachusetts.
- Larry N. Vanderhoef, Ph.D., Chancellor Emeritus, University of California-Davis, Davis, California.
- Vacancy.

How can I obtain additional information?

If you have any specific questions about the NACIQI, please contact Kay Gilcher, Director, Accreditation Group, telephone (202) 502–7693, fax (202) 219–7005, email: *Kay.Gilcher@ed.gov*, between 9 a.m. and 5 p.m., Monday through Friday.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available via the Federal Digital System at *http://www.gpo.gov/fdsys*. At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF). To use PDF, you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at: *http://www.federalregister.gov*. Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Dated: December 20, 2011.

Arne Duncan,

Secretary of Education.

[FR Doc. 2011–33113 Filed 12–23–11; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

[FE Docket No. 11–141–LNG]

Carib Energy (USA) LLC; Application for Long-Term Authorization To Export Domestically Produced Liquefied Natural Gas for a 25-Year Period

AGENCY: Office of Fossil Energy, DOE.

ACTION: Notice of application.

SUMMARY: The Office of Fossil Energy (FE) of the Department of Energy (DOE) gives notice of receipt of an application (Application), filed on October 20, 2011 by Carib Energy (USA) LLC (Carib), requesting long-term, multi-contract authorization to export up to a total of 120,000 gallons per day of domestically produced liquefied natural gas (LNG) (equivalent to approximately 3.44 Billion cubic feet (Bcf) of natural gas per year) over a twenty-five year period, commencing on the earlier of the date of first export or five years from the date the requested authorization is granted. The Application states that the LNG would be exported from ports of export in the southeastern United States, which may include Jacksonville, FL, West Palm Beach, FL, Miami, FL, Tampa, FL, Mobile, AL, Gulfport, MS, Savannah, GA, New Orleans, LA, Houston, TX, Galveston, TX, and Pensacola, FL, to any country with which the United States has not entered into a free trade agreement (FTA) providing for national treatment for trade in natural gas located within South America, Central America or the Caribbean that has, or in the future will have, the capacity to import LNG via use of approved ISO IMO7/TVAC–ASME LNG containers (ISO containers) transported on ocean-going carriers, and with which trade is not prohibited by United States law or policy. The Application was filed under section 3 of the Natural Gas Act (NGA), as amended by section 201 of the Energy Policy Act of 1992. Protests, motions to intervene, notices of intervention, and written comments are invited.

DATES: Protests, motions to intervene or notices of intervention, as applicable, requests for additional procedures, and written comments are to be filed using procedures detailed in Public Comment Procedures below no later than 4:30 p.m., eastern time, February 27, 2012.

ADDRESSES: *Electronic Filing on the Federal eRulemaking Portal under FE Docket No. 11–141–LNG: http://www.regulations.gov.*

Electronic Filing by email: fergas@hq.doe.gov.

Regular Mail

U.S. Department of Energy (FE–34), Office of Natural Gas Regulatory Activities, Office of Fossil Energy, P.O. Box 44375, Washington, DC 20026–4375.

Hand Delivery or Private Delivery Services (*e.g.*, FedEx, UPS, *etc.*)

U.S. Department of Energy (FE–34), Office of Natural Gas Regulatory Activities, Office of Fossil Energy, Forrestal Building, Room 3E–042, 1000 Independence Avenue SW., Washington, DC 20585.

FOR FURTHER INFORMATION CONTACT:

Larine Moore or Marc Talbert, U.S. Department of Energy (FE–34), Office of Natural Gas Regulatory Activities, Office of Fossil Energy, Forrestal Building, Room 3E–042, 1000 Independence Avenue SW., Washington, DC 20585, (202) 586–9478; (202) 586–7991.

Edward Myers, U.S. Department of Energy, Office of General Counsel, Fossil Energy and Energy Efficiency, Forrestal Building, Room 6B–159,

1000 Independence Ave. SW., Washington, DC 20585, (202) 586–3397.

SUPPLEMENTARY INFORMATION:

Background

Carib is a Delaware limited liability company with its principal place of business in Coral Springs, Florida. Stock in Carib is held equally by Everything for Gas International LLC d/b/a EFG Industries, a Florida limited liability company based in Coral Springs, Florida (EFG) and Argosy Transportation Group Inc., a Texas limited liability company based in Bellaire, Texas (Argosy). The Application states that EFG has more than 31 years experience in the liquefied petroleum gas (LPG) industry on an international level, engineering, designing, and installing LPG plant, terminals, and transporters, and supplying LPG equipment, including storage and transportation tanks. The Application further states that Argosy is an asset-based marine transport company specializing in solutions for shippers of break-bulk, heavy-lift and project cargo and that its management has more than 30 combined years experience in the marine transportation industry. On July 27, 2011, DOE/FE issued Order No. 2993, which granted Carib long-term, multi-contract authorization to export domestically produced LNG in an amount up to the equivalent of 11.53 Bcf of natural gas per year over a twenty-five year period to nations in Central America, South America, or the Caribbean with which the United States has entered into FTAs providing for the national treatment for trade in natural gas. The authorization issued in Order No. 2993 is to commence on the earlier of the date of first export or July 27, 2016.

Current Application

In the instant Application, Carib seeks long-term, multi-contract authorization to export domestically produced LNG up to the equivalent of 3.44 Bcf of natural gas per year for a period of twenty-five years beginning on the earlier of the date of first export or five years from the date the authorization is granted by DOE/FE. Carib requests that such long-term authorization provide for export from ports of export in the southeastern Unites States, which may include Jacksonville, FL, West Palm Beach, FL, Miami, FL, Tampa, FL, Mobile, AL, Gulfport, MS, Savannah, GA, New Orleans, LA, Houston, TX, Galveston, TX, and Pensacola, FL, to any country located within South America, Central America, or the Caribbean with which the United States has not entered into an FTA providing for the national treatment for trade in natural gas that has, or in the future will have, the capacity to import LNG via use of approved ISO LNG containers transported on ocean-going carriers, and with which trade is not prohibited by United States law or policy. Carib states that the source of natural gas supply to be exported will be the robust and liquid United States natural gas market.

In its Application, Carib requests approval of exports to non-FTA countries of LNG purchased under the purchase and sale arrangement described in the Letter of Intent (LOI) included as Appendix C to this Application. The LOI describes the term of the proposed arrangement, the counter-party, the maximum yearly gas volumes to be purchased, and the facility from which the LNG will be delivered (Facility), as well as a commitment from the counter-party that no Facility modifications or additions to the Facility will be required in order for the Facility to deliver LNG to Carib and for Carib to export LNG from the United States under the arrangement described in the LOI. Carib states that it will file the Master Agreement and any Transaction Confirmations, as defined in the LOI, with the DOE/FE under seal following their execution. Carib expects to begin exporting LNG under the Master Agreement and Transaction Confirmations by the first quarter of 2012.

The Application states that Carib plans to transport the LNG proposed for export from the Facility to the destination port over highways in 40-foot ISO containers that comply with all United States Department of Transportation regulations. Carib affirms that the third parties with which it will contract to handle transportation will comply with all Required Permits, including but not limited to any federal, state, and local permits relating to hazardous material and cryogenic handling regulations and requirements. Additionally, the Application states that all ISO containers will be tracked from the time of loading until delivery by a proprietary GPS tracking system.

According to the Application, deliveries from the Facility will take place throughout the year on a daily basis, spaced roughly equally, such that deliveries in any one day would not vary extremely from others. The Application states that physical limitations at the Facility ensure that will be the case and that, currently, no more than 120,000 gallons of LNG can be loaded from the Facility per day. Carib states that each container that it plans to use for LNG transport has a capacity of 10,200 gallons. Carib further states that truck traffic from the Facility under this arrangement, therefore, will be limited to no more than eleven trucks per day, or less than one truck per hour over a twelve-hour period.

Public Interest Considerations

In support of its Application, Carib states that pursuant to section 3 of the NGA, FE must authorize exports to a foreign country unless there is a finding that such exports ''will not be consistent with the public interest.'' [1] Carib states further, in evaluating an export application, FE applies the principles described in DOE Delegation Order No. 0204–111 which states that domestic need for natural gas shall be the primary focus of DOE when evaluating an export application.[2]

Carib states that United States consumers currently have access to substantial quantities of natural gas, as a result of, among other things, technological advances that have allowed for development of previously undeveloped reserves of domestic shale gas.[3] The Annual Energy Outlook 2010, prepared by the U.S. Energy Information Administration (EIA), forecasted shale gas production to increase to 2.85 Tcf by 2015 and 6.0 Tcf by 2035, representing 5.3% annual growth from 2008–2035.[4] EIA's Annual Energy Outlook 2011 more than doubled its estimate of technically recoverable shale gas reserves, and doubled its projected shale gas production to 12.0 Tcf by 2035.[5] Carib further states that large volumes of domestic shale gas reserves and its development and extraction, as well as continued low productions costs, will enable the United States to develop significant quantities of natural gas and LNG, which will be able to meet domestic demand for decades to come, and, as a result, also will provide an over-capacity of natural gas and LNG that would be available for export.

Carib states that it expects that its export of domestic LNG will encourage the development of jobs in the United States. Qualified domestic transportation companies will be used to transport the LNG from each Facility to port, thereby supporting those

[1] 15 U.S.C. 717b(a).

[2] *Sabine Pass Liquefaction, LLC*, DOE/FE Order 2961 (May 20, 2011) at 29.

[3] U.S. EIA, Annual Energy Outlook 2011, Executive Summary (2011), available at *http://www.eia.gov/forecasts/aeo/pdf/0383(2011).pdf.* (''2011 EIA Energy Outlook'').

[4] U.S. EIA, Annual Energy Outlook 2010 135, Table A–14 (2010), available at *http://www.eia.doe.gov/oiaf/aeo/pdf/0383(2010.pdf.*

[5] 2011 EIA Energy Outlook at Table 8.

businesses. Carib also states that as a growing company, it will also be creating jobs as its marketing and sale of LNG to new markets increases its need for additional sales and administrative staff.

Carib states that because the requested exports will have minimal effect on domestic natural gas supply based on current projections, and the DOE/FE has retained the ability to address changes in the domestic gas supply, if, in the future, there are unexpected changed circumstances, granting this Application for the requested term is consistent with the public interest.

Environmental Impact

Carib states that no modifications to the Facility would be required in order for it to export LNG, and accordingly, under Categorical Exclusion B5.7 of the National Environmental Policy Act (NEPA), approval of this Application would not constitute a federal action significantly affecting the human environment within the meaning of NEPA.

DOE/FE Evaluation

This export Application will be reviewed pursuant to section 3(a) of the NGA, as amended, and the authority contained in DOE Delegation Order No. 00–002.00L (April 29, 2011) and DOE Redelegation Order No. 00–002.04E (April 29, 2011). In reviewing this LNG export Application, DOE will consider domestic need for the natural gas, as well as any other issues determined to be appropriate, including whether the arrangement is consistent with DOE's policy of promoting competition in the marketplace by allowing commercial parties to freely negotiate their own trade arrangements. Parties that may oppose this Application should comment in their responses on these issues.

NEPA requires DOE to give appropriate consideration to the environmental effects of its proposed decisions. No final decision will be issued in this proceeding until DOE has met its NEPA responsibilities.

Public Comment Procedures

In response to this notice, any person may file a protest, comments, or a motion to intervene or notice of intervention, as applicable. Any person wishing to become a party to the proceeding must file a motion to intervene or notice of intervention, as applicable. The filing of comments or a protest with respect to the Application will not serve to make the commenter or protestant a party to the proceeding, although protests and comments received from persons who are not parties will be considered in determining the appropriate action to be taken on the Application. All protests, comments, motions to intervene or notices of intervention must meet the requirements specified by the regulations in 10 CFR part 590.

Filings may be submitted using one of the following methods: (1) Submitting comments in electronic form on the Federal eRulemaking Portal at *http://www.regulations.gov,* by following the on-line instructions and submitting such comments under FE Docket No. 11–141–LNG. DOE/FE suggests that electronic filers carefully review information provided in their submissions and include only information that is intended to be publicly disclosed; (2) emailing the filing to *fergas@hq.doe.gov* with FE Docket No. 11–141–LNG in the title line; (3) mailing an original and three paper copies of the filing to the Office Natural Gas Regulatory Activities at the address listed in **ADDRESSES**; or (4) hand delivering an original and three paper copies of the filing to the Office of Natural Gas Regulatory Activities at the address listed in **ADDRESSES**.

A decisional record on the Application will be developed through responses to this notice by parties, including the parties' written comments and replies thereto. Additional procedures will be used as necessary to achieve a complete understanding of the facts and issues. A party seeking intervention may request that additional procedures be provided, such as additional written comments, an oral presentation, a conference, or trial-type hearing. Any request to file additional written comments should explain why they are necessary. Any request for an oral presentation should identify the substantial question of fact, law, or policy at issue, show that it is material and relevant to a decision in the proceeding, and demonstrate why an oral presentation is needed. Any request for a conference should demonstrate why the conference would materially advance the proceeding. Any request for a trial-type hearing must show that there are factual issues genuinely in dispute that are relevant and material to a decision and that a trial-type hearing is necessary for a full and true disclosure of the facts.

If an additional procedure is scheduled, notice will be provided to all parties. If no party requests additional procedures, a final Opinion and Order may be issued based on the official record, including the Application and responses filed by parties pursuant to this notice, in accordance with 10 CFR 590.316.

The Application filed by Carib is available for inspection and copying in the Office of Natural Gas Regulatory Activities docket room, Room 3E–042, 1000 Independence Avenue SW., Washington, DC 20585. To the extent that FE determines that certain material included with the Application is confidential information not appropriate for release to the general public, procedures will be established on request from intervenors to make that information available for their inspection. The docket room is open between the hours of 8 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays. The Application and any filed protests, motions to intervene or notice of interventions, and comments will also be available electronically by going to the following DOE/FE Web address: *http://www.fe.doe.gov/programs/gasregulation/index.html.* In addition, any electronic comments filed will also be available at: *http://www.regulations.gov.*

Issued in Washington, DC, on December 19, 2011.

John A. Anderson,

Manager, Natural Gas Regulatory Activities, Office of Oil and Gas Global Security and Supply, Office of Fossil Energy.

[FR Doc. 2011–33168 Filed 12–23–11; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Northern New Mexico

AGENCY: Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Northern New Mexico. The Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires that public notice of this meeting be announced in the **Federal Register**.

DATES: Thursday, January 5, 2012, 3 p.m.–7 p.m.

ADDRESSES: Cities of Gold Conference Center, 10–A Cities of Gold Road, Santa Fe, New Mexico 87506.

FOR FURTHER INFORMATION CONTACT: Menice Santistevan, Northern New Mexico Citizens' Advisory Board (NNMCAB), 1660 Old Pecos Trail, Suite B, Santa Fe, NM 87505. Phone (505) 995–0393; Fax (505) 989–1752 or Email: *msantistevan@doeal.gov.*

SUPPLEMENTARY INFORMATION:

Purpose of the Board: The purpose of the Board is to make recommendations to DOE–EM and site management in the areas of environmental restoration, waste management, and related activities.

Tentative Agenda

3 p.m. Call to Order by Co-Deputy Designated Federal Officers (DDFO), Ed Worth and Lee Bishop

Welcome and Introductions, Ralph Phelps

3:15 p.m. Environmental Cleanup Priorities

3:45 p.m. Current Status of Los Alamos National Laboratory Cleanup

4:15 p.m. TRU Campaign

5 p.m. Consent Order Update

6 p.m. Public Comment Period, Ralph Phelps

7 p.m. Adjourn, Lee Bishop and Ed Worth

Public Participation: The EM SSAB, Northern New Mexico, welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Menice Santistevan in advance of the meeting at the telephone number listed above. Written statements may be filed with the Board either before or after the meeting. Individuals who wish to make oral statements pertaining to agenda items should contact Menice Santistevan at the address or telephone number listed above. Requests must be received prior to the meeting and reasonable provision will be made to include the presentation in the agenda. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Individuals wishing to make public comments will be provided a maximum of five minutes to present their comments. This notice is being published less than 15 days prior to the meeting day because critical information related to the board's work needs to be conveyed in a timely manner.

Minutes: Minutes will be available by writing or calling Menice Santistevan at the address or phone number listed above. Minutes and other Board documents are on the Internet at: *http://www.nnmcab.org/.*

Issued at Washington, DC, on December 22, 2011.

LaTanya R. Butler,

Acting Deputy Committee Management Officer.

[FR Doc. 2011–33291 Filed 12–23–11; 8:45 am]

BILLING CODE 6405–01–P

DEPARTMENT OF ENERGY

Office of Energy Efficiency and Renewable Energy

[Case No. CAC–038]

Publication of the Petition for Waiver From Samsung Electronics America, Inc. and Granting of the Interim Waiver From the Department of Energy Commercial Package Air Conditioner and Heat Pump Test Procedures

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Notice of petition for waiver, granting of application for interim waiver, and request for comments.

SUMMARY: This notice announces receipt of and publishes a petition for waiver from Samsung Electronics America, Inc. (Samsung). The petition for waiver (hereafter ''petition'') requests a waiver from the U.S. Department of Energy (DOE) test procedure applicable to commercial package air-source central air conditioners and heat pumps. The petition is specific to the variable capacity Digital Variable Multi (DVM) (commercial) multi-split heat pump models specified in Samsung's petition. Through this document, DOE: (1) Solicits comments, data, and information with respect to the Samsung petition; and (2) announces the grant of an interim waiver to Samsung from the existing DOE test procedure for the subject commercial multi-split air conditioners and heat pumps.

DATES: DOE will accept comments, data, and information with respect to the Samsung petition until, but no later than January 26, 2012.

ADDRESSES: You may submit comments, identified by case number ''CAC–038,'' by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Email: AS_Waiver_Requests@ee.doe.gov.* Include the case number [CAC–038] in the subject line of the message.
- *Mail:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, Mailstop EE–2J/1000 Independence Avenue SW., Washington, DC 20585–0121. Telephone: (202) 586–2945. Please submit one signed original paper copy.
- *Hand Delivery/Courier:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, 950 L'Enfant Plaza SW., Suite 600, Washington, DC 20024. Please submit one signed original paper copy.

Docket: For access to the docket to review the background documents relevant to this matter, you may visit the U.S. Department of Energy, 950 L'Enfant Plaza SW., Washington, DC, 20024; (202) 586–2945, between 9 a.m. and 4 p.m., Monday through Friday, except on Federal holidays. Available documents include the following items: (1) This notice; (2) public comments received; (3) the petition for waiver and application for interim waiver; and (4) prior DOE rulemakings and waivers regarding similar central air conditioning and heat pump equipment. Please call Ms. Brenda Edwards at the above telephone number for additional information.

FOR FURTHER INFORMATION CONTACT: Dr. Michael G. Raymond, U.S. Department of Energy, Building Technologies Program, Mail Stop EE–2J, Forrestal Building, 1000 Independence Avenue SW., Washington, DC 20585–0121. Telephone: (202) 586–9611. Email: *AS_Waiver_Requests@ee.doe.gov.*

Ms. Elizabeth Kohl, U.S. Department of Energy, Office of the General Counsel, Mail Stop GC–71, Forrestal Building, 1000 Independence Avenue SW., Washington, DC 20585–0103. Telephone: (202) 586–7796. Email: *Elizabeth.Kohl@hq.doe.gov.*

SUPPLEMENTARY INFORMATION:

I. Background and Authority

Title III of the Energy Policy and Conservation Act (EPCA) sets forth a variety of provisions concerning energy efficiency, including Part B of Title III, which establishes the ''Energy Conservation Program for Consumer Products Other Than Automobiles.'' (42 U.S.C. 6291–6309) Part C of Title III provides for a similar energy efficiency program titled ''Certain Industrial Equipment,'' which includes commercial air conditioning equipment, package boilers, water heaters, and other types of commercial equipment.[1] (42 U.S.C. 6311–6317)

Today's notice involves commercial equipment under Part C. Part C specifically includes definitions (42 U.S.C. 6311), test procedures (42 U.S.C.

[1] For editorial reasons, upon codification in the U.S. Code, Parts B and C were re-designated Parts A and A–1, respectively.

6314), labeling provisions (42 U.S.C. 6315), energy conservation standards (42 U.S.C 6313), and the authority to require information and reports from manufacturers (42 U.S.C. 6316). With respect to test procedures, Part C authorizes the Secretary of Energy (the Secretary) to prescribe test procedures that are reasonably designed to produce results that measure energy efficiency, energy use, and estimated annual operating costs, and that are not unduly burdensome to conduct. (42 U.S.C. 6314(a)(2))

For commercial package air-conditioning and heating equipment, EPCA provides that ''the test procedures shall be those generally accepted industry testing procedures or rating procedures developed or recognized by the Air-Conditioning and Refrigeration Institute [ARI] or by the American Society of Heating, Refrigerating and Air-Conditioning Engineers [ASHRAE], as referenced in ASHRAE/IES Standard 90.1 and in effect on June 30, 1992.'' (42 U.S.C. 6314(a)(4)(A)) Under 42 U.S.C. 6314(a)(4)(B), if the industry test procedure for commercial package air-conditioning and heating equipment is amended, EPCA directs the Secretary to amend the corresponding DOE test procedure unless the Secretary determines, by rule and based on clear and convincing evidence, that such a modified test procedure does not meet the statutory criteria set forth in 42 U.S.C. 6314(a)(2) and (3).

On December 8, 2006, DOE published a final rule adopting test procedures for commercial package air-conditioning and heating equipment, effective January 8, 2007. 71 FR 71340. Table 1 to Title 10 of the Code of Federal Regulations (10 CFR) 431.96 directs manufacturers of commercial package air conditioning and heating equipment to use the appropriate procedure when measuring energy efficiency of those products. For commercial package air-source equipment with capacities between 65,000 and 760,000 Btu/h, ARI Standard 340/360–2004 is the applicable test procedure.

DOE's regulations for covered products permit a person to seek a waiver from the test procedure requirements for covered commercial equipment if at least one of the following conditions is met: (1) The petitioner's basic model contains one or more design characteristics that prevent testing according to the prescribed test procedures; or (2) the prescribed test procedures may evaluate the basic model in a manner so unrepresentative of its true energy consumption as to provide materially inaccurate comparative data. 10 CFR 431.401(a)(1). Petitioners must include in their petition any alternate test procedures known to the petitioner to evaluate the basic model in a manner representative of its energy consumption. 10 CFR 431.401(b)(1)(iii). The Assistant Secretary for Energy Efficiency and Renewable Energy (Assistant Secretary) may grant a waiver subject to conditions, including adherence to alternate test procedures. 10 CFR 431.401(f)(4). Waivers remain in effect pursuant to the provisions of 10 CFR 431.401(g).

The waiver process also permits parties submitting a petition for waiver to file an application for interim waiver of the applicable test procedure requirements. 10 CFR 431.401(a)(2). The Assistant Secretary will grant an interim waiver request if it is determined that the applicant will experience economic hardship if the application for interim waiver is denied, if it appears likely that the petition for waiver will be granted, and/or the Assistant Secretary determines that it would be desirable for public policy reasons to grant immediate relief pending a determination on the petition for waiver. 10 CFR 431.401(e)(3). An interim waiver remains in effect for 180 days or until DOE issues its determination on the petition for waiver, whichever occurs first. It may be extended by DOE for an additional 180 days. 10 CFR 431.401(e)(4).

II. Petition for Waiver

On October 17, 2011, Samsung filed a petition for waiver from the test procedures at 10 CFR 431.96 applicable to the specified basic models of its commercial package air-source and water-source central air conditioners and heat pumps, as well as an application for interim waiver. Samsung's petition requested a waiver for the Samsung DVM multi-split heat pumps with capacities ranging from 72,000 Btu/h to 120,000 Btu/h. The applicable test procedure for these heat pumps is ARI 340/360–2004. Manufacturers are directed to use these test procedures pursuant to Table 1 of 10 CFR 431.96.

Samsung seeks a waiver from the applicable test procedures under 10 CFR 431.96 on the grounds that its DVM multi-split heat pumps contain design characteristics that prevent testing according to the current DOE test procedures. Specifically, Samsung asserts that the two primary factors that prevent testing of its DVM multi-split variable speed products are the same factors stated in the waivers that DOE granted to Mitsubishi Electric & Electronics America USA, Inc. (Mitsubishi) and other manufacturers for similar lines of commercial multi-split air-conditioning systems:

- Testing laboratories cannot test products with so many indoor units; and
- There are too many possible combinations of indoor and outdoor units to test.

See, e.g., 72 FR 17528 (April 9, 2007) (Mitsubishi); 76 FR 19069 (April 6, 2011) (Daikin); 76 FR 19078 (April 6, 2011) (Mitsubishi); 76 FR 31951 (June 2, 2011) (Carrier); 76 FR 50204 (August 12, 2011) (Fujitsu General Limited); 76 FR 65710 (October 24, 2011) (Mitsubishi).

The DVM systems have operational characteristics similar to the commercial multi-split products manufactured by other manufacturers. As indicated above, DOE has already granted waivers for these products. The DVM system consists of multiple indoor units connected to an air-cooled outdoor unit. These multi-splits are used in zoned systems where an outdoor or water-source unit can be connected with up to 10 separate indoor units, which need not be the same models. According to Samsung, the various indoor and outdoor models can be connected in a multitude of configurations, with many thousands of possible combinations. Consequently, Samsung requested that DOE grant a waiver from the applicable test procedures for its DVM product designs until a suitable test method can be prescribed.

III. Application for and Grant of Interim Waiver

On October 17, 2011, Samsung also submitted an application for an interim waiver from the test procedures at 10 CFR 431.96 for its DVM equipment. DOE determined that Samsung's application for interim waiver does not provide sufficient market, equipment price, shipments, and other manufacturer impact information to permit DOE to evaluate the economic hardship Samsung might experience absent a favorable determination on its application for an interim waiver. DOE understands, however, that if it did not issue an interim waiver, Samsung's products would not be tested and rated for energy consumption in the same manner as equivalent products for which DOE previously granted waivers. Furthermore, DOE has determined that it appears likely that Samsung's petition for waiver will be granted and that is desirable for public policy reasons to grant Samsung immediate relief pending a determination on the petition for waiver. DOE believes that it is likely Samsung's petition for waiver for the new DVM multi-split models will be

granted because, as noted above, DOE has previously granted a number of waivers for similar product designs. The two principal reasons supporting the grant of the previous waivers also apply to Samsung's DVM products: (1) Test laboratories cannot test products with so many indoor units; and (2) it is impractical to test so many combinations of indoor units with each outdoor unit. In addition, DOE believes that similar products should be tested and rated for energy consumption on a comparable basis. For these same reasons, DOE also determined that it is desirable for public policy reasons to grant immediate relief pending a determination on the petition for waiver.

Therefore, *it is ordered that:*

The application for interim waiver filed by Samsung is hereby granted for Samsung's DVM multi-split heat pumps, subject to the specifications and conditions below.

1. Samsung shall not be required to test or rate its DVM commercial multi-split products on the basis of the existing test procedures under 10 CFR 431.96, which incorporates by reference ARI 340/360–2004.

2. Samsung shall be required to test and rate its DVM commercial multi-split products according to the alternate test procedure as set forth in section IV, ''Alternate test procedure.''

The interim waiver applies to the following basic model groups:

Type	Model	Description	Cooling/Heating [Btu/h]
Outdoor Unit	RVXVHT075FE	Condensing unit heat pump	72,000/81,000
	RVXVHT100FE	Condensing unit heat pump	96,000/108,000
	RVXVHT125FE	Condensing unit heat pump	120,000/135,000
	RD075VRXFA	Condensing unit heat pump	72,000/81,000
	RD100VRXFA	Condensing unit heat pump	96,000/108,000
	RD125VRXFA	Condensing unit heat pump	120,000/135,000
Indoor Unit	AVXCMH032CE	4-Way Ceiling Cassette Heat pump	9,500/10,500
	AVXCMH040CE	4-Way Ceiling Cassette Heat pump	12,000/13,500
	AVXCMH052CE	4-Way Ceiling Cassette Heat pump	18,000/20,000
	AVXCMH060CE	4-Way Ceiling Cassette Heat pump	20,000/23,000
	AVXC4H052CE	4-Way Ceiling Cassette Heat pump	18,000/20,000
	AVXC4H072CE	4-Way Ceiling Cassette Heat pump	24,000/27,000
	AVXC4H100CE	4-Way Ceiling Cassette Heat pump	30,000/34,000
	AVXC4H110CE	4-Way Ceiling Cassette Heat pump	36,000/40,000
	AVXC4H145CE	4-Way Ceiling Cassette Heat pump	48,000/54,000
	AVXDSH020CE	Built-in Slim Duct(Low pressure)	6,000/7,000
	AVXDSH032CE	Built-in Slim Duct(Low pressure)	9,500/10,500
	AVXDSH040CE	Built-in Slim Duct(Low pressure)	12,000/13,500
	AVXDSH052CE	Built-in Slim Duct(Low pressure)	18,000/20,000
	AVXDSH072CE	Built-in Slim Duct(Low pressure)	24,000/27,000
	AVXDSH100CE	Built-in Slim Duct(Low pressure)	30,000/34,000
	AVXDSH110CE	Built-in Slim Duct(Low pressure)	36,000/40,000
	AVXDSH145CE	Built-in Slim Duct(Low pressure)	48,000/54,000
	AVXDUH100CE	Built-in Duct(Mid pressure)	30,000/34,000
	AVXDUH110CE	Built-in Duct(Mid pressure)	36,000/40,000
	AVXDUH145CE	Built-in Duct(Mid pressure)	48,000/54,000
	AVXWVH020CE	High Wall Mount Heat Pump	6,000/7,000
	AVXWVH032CE	High Wall Mount Heat Pump	9,500/10,500
	AVXWVH040CE	High Wall Mount Heat Pump	12,000/13,500
	AVXWVH052CE	High Wall Mount Heat Pump	18,000/20,000
	AVXWVH060CE	High Wall Mount Heat Pump	20,000/23,000
	AVXWNH020CE	High Wall Mount Heat Pump	6,000/7,000
	AVXWNH032CE	High Wall Mount Heat Pump	9,500/10,500
	AVXWNH040CE	High Wall Mount Heat Pump	12,000/13,500
	AVXWNH052CE	High Wall Mount Heat Pump	18,000/20,000
	AVXWNH060CE	High Wall Mount Heat Pump	20,000/23,000
	AVXCSH023CE	1-Way Ceiling Cassette Heat pump	7,500/8,500
	AVXCSH032CE	1-Way Ceiling Cassette Heat pump	9,500/10,500
	AVXCSH040CE	1-Way Ceiling Cassette Heat pump	12,000/13,500

This interim waiver is issued on the condition that the statements, representations, and documents provided by the petitioner are valid. DOE may revoke or modify this interim waiver at any time if it determines the factual basis underlying the petition for waiver is incorrect or the results from the alternate test procedure are unrepresentative of the basic models' true energy consumption characteristics.

DOE makes decisions on waivers and interim waivers for only those models specifically set out in the petition, not future models that may be manufactured by the petitioner. Samsung may submit a petition for waiver and request for grant of interim waiver, as appropriate, for additional models of commercial package air conditioners and heat pumps for which it seeks a waiver from the DOE test procedure. In addition, DOE notes that grant of an interim waiver or waiver does not release a petitioner from the certification requirements set forth at 10 CFR Part 429.

IV. Alternate Test Procedure

In responses to two petitions for waiver from Mitsubishi, DOE specified an alternate test procedure to provide a basis from which Mitsubishi could test and make valid energy efficiency representations for its R410A CITY MULTI products, as well as for its R22 multi-split products. Alternate test procedures related to the Mitsubishi petitions were published in the **Federal Register** on April 9, 2007. See 72 FR 17528 and 72 FR 17533. For reasons similar to those published in these prior

notices, DOE believes that an alternate test procedure is appropriate in this instance.

DOE understands that existing testing facilities have limited ability to test multiple indoor units simultaneously. This limitation makes it impractical for manufacturers to test the large number of possible combinations of indoor and outdoor units for some variable refrigerant flow zoned systems. We further note that after DOE granted a waiver for Mitsubishi's R22 multi-split products, ARI formed a committee to discuss testing issues and to develop a testing protocol for variable refrigerant flow systems. The committee has developed a test procedure that has been adopted by AHRI—''ANSI/AHRI 1230—2010: Performance Rating of Variable Refrigerant Flow (VRF) Multi-Split Air-Conditioning and Heat Pump Equipment'' and is referenced in ASHRAE 90.1–2010. ANSI/AHRI 1230–2010 is consistent with the alternate test procedure established in the commercial multi-split waivers that DOE has granted to Mitsubishi and several other manufacturers. ANSI/AHRI 1230–2010 uses a definition of ''tested combination'' that is substantially the same as the definition in the alternate test procedure in those waivers. DOE prescribed ANSI/AHRI 1230–2010 in decision and orders granted to Carrier Corporation (76 FR 31951, June 2, 2011), Fujitsu General Limited (76 FR 50204, August 12, 2011), and Mitsubishi (76 FR 65710, October 24, 2011).

Therefore, as a condition for granting this interim waiver to Samsung, DOE requires the use of ANSI/AHRI–1230–2010 with Addendum 1 as the alternate test procedure. This alternate test procedure will allow Samsung to test and make energy efficiency representations for its DVM products. As stated above, DOE has applied this alternate test procedure to other waivers for similar residential and commercial central air conditioners and heat pumps manufactured by other manufacturers.

V. Summary and Request for Comments

Through today's notice, DOE announces receipt of the Samsung petition for waiver from the test procedures applicable to the DVM commercial multi-split heat pump products specified in Samsung's petition. For the reasons articulated above, DOE also grants Samsung an interim waiver from those procedures. As part of this notice, DOE is publishing Samsung's petition for waiver in its entirety. The petition contains no confidential information. Furthermore, today's notice includes an alternate test procedure that Samsung is required to follow as a condition of its interim waiver.

DOE is interested in receiving comments on the issues addressed in this notice. Pursuant to 10 CFR 431.401(d), any person submitting written comments must also send a copy of such comments to the petitioner, pursuant to 10 CFR 431.401(d). The contact information for the petitioner is: Michael Moss, Director of Corporate Environmental Affairs, Samsung Electronics America, Inc., 18600 Broadwick Street, Rancho Dominguez, CA 90220. All submissions received must include the agency name and case number for this proceeding. Submit electronic comments in WordPerfect, Microsoft Word, Portable Document Format (PDF), or text (American Standard Code for Information Interchange (ASCII)) file format and avoid the use of special characters or any form of encryption. Wherever possible, include the electronic signature of the author. DOE does not accept telefacsimiles (faxes).

According to 10 CFR 1004.11, any person submitting information that he or she believes to be confidential and exempt by law from public disclosure should submit two copies: one copy of the document including all the information believed to be confidential, and one copy of the document with the information believed to be confidential deleted. DOE will make its own determination about the confidential status of the information and treat it according to its determination.

Issued in Washington, DC, on December 20, 2011.

Kathleen B. Hogan,

Deputy Assistant Secretary for Energy Efficiency, Energy Efficiency and Renewable Energy.

Englewood Cliffs, NJ 07632

October 17, 2011

Dr. Henry Kelly
Energy Efficiency and Renewable Energy
Department of Energy
1000 Independence Avenue SW.,
Washington, DC 20585

Re: Samsung Petition for Waiver and Application for Interim Waiver, DVM Air Conditioner and Heat Pumps

Dear Assistant Secretary Kelly:

Samsung Electronics America, on behalf of Samsung Electronics Co. (Samsung), respectfully submits this petition for interim waiver and application for waiver to allow Samsung to fairly evaluate its new line of DVM air conditioners and heat pumps.

Under 10 CFR 431.401(a)(1), any interested person to submit a petition to waive for a particular basic model any requirement for commercial equipments, upon the grounds that either the basic model contains one or more design characteristics which prevent testing of the basic model according to the prescribed test procedures, or the prescribed test procedures may evaluate the basic model in a manner so unrepresentative of its true energy consumption characteristics as to provide materially inaccurate comparative data.

Samsung originally submitted a petition for waiver and application for interim waiver for its DVM system on October 7, 2003, seeking relief from 10 CFR 430 based on the fact that the multitude of combinations of outdoor and indoor units makes it highly impractical for Samsung to test every single combination. For this reason, DOE granted Samsung the Interim Waiver on February 8, 2005.

On December 8, 2006, the Department of Energy (DOE) published a final rule adopting ARI Standard 210/240–2003 for commercial package air conditioning and heating equipment with capacities <65,000 Btu/h and 340/360–2004 for commercial package air conditioner and heating equipment with capacities ≥65,000 Btu/h and <240,000 Btu/h. However, under these new test procedures, Samsung would still be required to test every single combination of its commercial DVM outdoor and indoor units. Based on DOE's recognition that (1) there is a problem of being physically unable to test most of the complete systems in a laboratory; (2) there are difficulties associated with the regulatory requirement to test the highest-sales-volume combination; and (3) there is the lack of a method for predicting the performance of untested combinations, DOE granted Samsung the waiver from having to test every single combination of its DVM system in 72 FR 71387, on December 17, 2007.

Since then, Samsung has further improved its DVM system, establishing new models not covered in the waiver published in 72 FR 71387. Even though model numbers changed, the difficulty with testing the multitude of combination of Samsung's DVM models remains; therefore, Samsung is seeking DOE's granting of waiver and interim waiver for the following Samsung DVM models:

Type	Model	Description	Cooling/Heating [Btu/h]
Outdoor Unit	RVXVHT075FE	Condensing unit heat pump	72,000/81,000
	RVXVHT100FE	Condensing unit heat pump	96,000/108,000
	RVXVHT125FE	Condensing unit heat pump	120,000/135,000

Type	Model	Description	Cooling/Heating [Btu/h]
	RD075VRXFA	Condensing unit heat pump	72,000/81,000
	RD100VRXFA	Condensing unit heat pump	96,000/108,000
	RD125VRXFA	Condensing unit heat pump	120,000/135,000
Indoor Unit	AVXCMH032CE	4-Way Ceiling Cassette Heat pump	9,500/10,500
	AVXCMH040CE	4-Way Ceiling Cassette Heat pump	12,000/13,500
	AVXCMH052CE	4-Way Ceiling Cassette Heat pump	18,000/20,000
	AVXCMH060CE	4-Way Ceiling Cassette Heat pump	20,000/23,000
	AVXC4H052CE	4-Way Ceiling Cassette Heat pump	18,000/20,000
	AVXC4H072CE	4-Way Ceiling Cassette Heat pump	24,000/27,000
	AVXC4H100CE	4-Way Ceiling Cassette Heat pump	30,000/34,000
	AVXC4H110CE	4-Way Ceiling Cassette Heat pump	36,000/40,000
	AVXC4H145CE	4-Way Ceiling Cassette Heat pump	48,000/54,000
	AVXDSH020CE	Built-in Slim Duct (Low pressure)	6,000/7,000
	AVXDSH032CE	Built-in Slim Duct (Low pressure)	9,500/10,500
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	AVXDSH052CE	Built-in Slim Duct (Low pressure)	18,000/20,000
	AVXDSH072CE	Built-in Slim Duct (Low pressure)	24,000/27,000
	AVXDSH100CE	Built-in Slim Duct (Low pressure)	30,000/34,000
	AVXDSH110CE	Built-in Slim Duct (Low pressure)	36,000/40,000
	AVXDSH145CE	Built-in Slim Duct (Low pressure)	48,000/54,000
	AVXDUH100CE	Built-in Duct (Mid pressure)	30,000/34,000
	AVXDUH110CE	Built-in Duct (Mid pressure)	36,000/40,000
	AVXDUH145CE	Built-in Duct (Mid pressure)	48,000/54,000
	AVXWVH020CE	High Wall Mount Heat Pump	6,000/7,000
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	AVXWVH040CE	High Wall Mount Heat Pump	12,000/13,500
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	AVXCSH032CE	1-Way Ceiling Cassette Heat pump	9,500/10,500
	AVXCSH040CE	1-Way Ceiling Cassette Heat pump	12,000/13,500

Each outdoor unit may be combined with up to ten different indoor units and each indoor unit may be independently turned on, off, standby, etc. depending on user-desired settings. With up to 33 different indoor units for the consumer to choose from and combined, and as evident in the chart above, there are thousands of different combinations, creating an extremely burdensome task for Samsung or any testing laboratory to evaluate all possible combinations. Being responsible to test every conceivable combination would place an unfair burden upon Samsung, while offering no added value for purpose of energy testing.

Samsung's new DVM system is very similar to Samsung's old DVM system, which DOE had granted a waiver for in 72 FR 71387. Until a final test procedure addressing commercial central air conditioners and heat pumps, similar to Samsung's DVM systems, is prescribed, Samsung believes that the interim waiver as granted by the Department in 70 FR 9629 and waiver as granted by the Department in 72 FR 71387, be granted for Samsung's new DVM system in order for Samsung to feasibly evaluate its new line of DVM central air conditioners and heat pumps.

Sincerely,

Michael Moss

[FR Doc. 2011–33172 Filed 12–23–11; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Office of Energy Efficiency and Renewable Energy

[Case No. DW–006]

Decision and Order Granting a Waiver to Miele, Inc. From the U.S. Department of Energy Residential Dishwasher Test Procedure

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Decision and order.

SUMMARY: The U.S. Department of Energy (DOE) gives notice of the decision and order (Case No. DW–006) that grants to Miele, Inc. (Miele) a waiver from the DOE dishwasher test procedure for certain basic models that run on a 208 volt electrical supply. Under today's decision and order, Miele shall be required to test and rate these dishwashers using an alternate test procedure that takes this supply voltage into account when measuring energy and water consumption.

DATES: This Decision and Order is effective December 27, 2011.

FOR FURTHER INFORMATION CONTACT:

Dr. Michael G. Raymond, U.S. Department of Energy, Building Technologies Program, Mail Stop EE–2J, Forrestal Building, 1000 Independence Avenue SW., Washington, DC 20585–0121. Telephone: (202) 586–9611. Email: *Michael.Raymond@ee.doe.gov.*

Ms. Elizabeth Kohl, U.S. Department of Energy, Office of the General Counsel, Mail Stop GC–71, Forrestal Building, 1000 Independence Avenue SW., Washington, DC 20585–0103. Telephone: (202) 586–7796. Email: *Elizabeth.Kohl@hq.doe.gov.*

SUPPLEMENTARY INFORMATION: In accordance with Title 10 of the Code of Federal Regulations (10 CFR 430.27(l)), DOE gives notice of the issuance of its decision and order as set forth below. The decision and order grants Miele a waiver from the applicable residential dishwasher test procedure in 10 CFR part 430, subpart B, appendix C for certain basic models of dishwashers with a 208 volt supply voltage, provided that Miele tests and rates such products using the alternate test procedure described in this notice.

Today's decision prohibits Miele from making representations concerning the energy efficiency of these products unless the product has been tested consistent with the provisions of the alternate test procedure set forth in the decision and order below, and the representations fairly disclose the test results. Distributors, retailers, and private labelers are held to the same standard when making representations regarding the energy efficiency of these products. 42 U.S.C. 6293(c).

Issued in Washington, DC on December 20, 2011.

Kathleen B. Hogan,

Deputy Assistant Secretary for Energy Efficiency, Energy Efficiency and Renewable Energy.

Decision and Order

In the Matter of: Miele, Inc. (Case No. DW–006).

I. Background and Authority

Title III, Part B of the Energy Policy and Conservation Act of 1975 (EPCA), Public Law 94–163 (42 U.S.C. 6291–6309, as codified) established the Energy Conservation Program for Consumer Products Other Than Automobiles, a program covering most major household appliances, which includes the residential dishwashers that are the focus of this notice.[1] Part B includes definitions, test procedures, labeling provisions, energy conservation standards, and the authority to require information and reports from manufacturers. Further, Part B authorizes the Secretary of Energy to prescribe test procedures that are reasonably designed to produce results which measure energy efficiency, energy use, or estimated operating costs, and that are not unduly burdensome to conduct. (42 U.S.C. 6293(b)(3)) The test procedure for residential dishwashers is contained in 10 CFR part 430, subpart B, appendix C.

DOE's regulations for covered products contain provisions allowing a person to seek a waiver for a particular basic model from the test procedure requirements for covered consumer products when

(1) The petitioner's basic model for which the petition for waiver was submitted contains one or more design characteristics that prevent testing according to the prescribed test procedure, or (2) when prescribed test procedures may evaluate the basic model in a manner so unrepresentative of its true energy consumption characteristics as to provide materially inaccurate comparative data. 10 CFR 430.27(a)(1). Petitioners must include in their petition any alternate test procedures known to the petitioner to evaluate the basic model in a manner representative of its energy consumption characteristics. 10 CFR 430.27(b)(1)(iii).

The Assistant Secretary for Energy Efficiency and Renewable Energy (the Assistant Secretary) may grant a waiver subject to conditions, including adherence to alternate test procedures. 10 CFR 430.27(l). Waivers remain in effect pursuant to the provisions of 10 CFR 430.27(m).

Any interested person who has submitted a petition for waiver may also file an application for interim waiver of the applicable test procedure requirements. 10 CFR 430.27(a)(2). The Assistant Secretary will grant an interim waiver request if it is determined that the applicant will experience economic hardship if the interim waiver is denied, if it appears likely that the petition for waiver will be granted, and/or the Assistant Secretary determines that it would be desirable for public policy reasons to grant immediate relief pending a determination on the petition for waiver. 10 CFR 430.27(g).

II. Miele's Petition for Waiver: Assertions and Determinations

On July 19, 2011, Miele submitted the instant petition for waiver and application for interim waiver (petition) from the test procedure applicable to residential dishwashers set forth in 10 CFR part 430, subpart B, appendix C. Miele requested a waiver to test the specified basic model of residential dishwasher that runs on an electrical supply voltage of 208 volts. The existing test procedure under Title 10 of the Code of Federal Regulations 430.23(c) provides for testing at 115 and 240 volts only. The electrical supply voltage of 208 volts prevents testing these dishwashers according to the DOE test procedure. The only modification needed to the test procedure is to provide for testing with a 208 volt electrical supply. DOE received no comments on the Miele petition.

III. Consultations With Other Agencies

DOE consulted with the Federal Trade Commission (FTC) staff concerning the Miele petition for waiver. The FTC staff did not have any objections to granting a waiver to Miele.

IV. Conclusion

After careful consideration of the material that was submitted by Miele and consultation with the FTC staff, it is ordered that:

(1) The petition for waiver submitted by Miele, Inc. (Case No. DW–006) is hereby granted as set forth in the paragraphs below.

(2) Miele shall be required to test and rate its dishwasher model G7856–208V according to the existing DOE test procedure at 10 CFR 430, subpart B, appendix C, with the modification set forth below:

Under appendix C, add the following section 2.2.3:

2.2.3 *Dishwashers that operate with an electrical supply of 208 volts.* Maintain the electrical supply to the dishwasher at 208 volts ±2 percent and within 1 percent of its nameplate frequency as specified by the manufacturer.

(3) Representations. Miele may make representations about the energy use of its dishwasher products for compliance, marketing, or other purposes only to the extent that such products have been tested in accordance with the provisions outlined above and such representations fairly disclose the results of such testing.

(4) This waiver shall remain in effect consistent with the provisions of 10 CFR 430.27(m).

(5) This waiver is issued on the condition that the statements, representations, and documentary materials provided by the petitioner are valid. DOE may revoke or modify this waiver at any time if it determines the factual basis underlying the petition for waiver is incorrect, or the results from the alternate test procedure are unrepresentative of the basic models' true energy consumption characteristics.

(6) This waiver applies only to the basic model set out in Miele's July 19, 2011 petition for waiver. Grant of this waiver does not release a petitioner from the certification requirements set forth at 10 CFR part 429.

Issued in Washington, DC, on December 20, 2011.

Kathleen B. Hogan,

Deputy Assistant Secretary for Energy Efficiency, Energy Efficiency and Renewable Energy.

[FR Doc. 2011–33171 Filed 12–23–11; 8:45 am]

BILLING CODE 6450–01–P

[1] For editorial reasons, upon codification in the U.S. Code, Part B was re-designated Part A.

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Filings Instituting Proceedings

Docket Numbers: RP12–240–000.
Applicants: Gulf South Pipeline Company, LP.
Description: Filing to Remove Expired Agreements from Tariff to be effective 12/15/2011.
Filed Date: 12/15/11.
Accession Number: 20111215–5072.
Comments Due: 5 p.m. ET 12/27/11.

Docket Numbers: RP12–241–000.
Applicants: NGO Transmission, Inc.
Description: NGO Transmission—Negotiated Rate Filing to be effective 1/1/2012.
Filed Date: 12/15/11.
Accession Number: 20111215–5161.
Comments Due: 5 p.m. ET 12/27/11.

Docket Numbers: RP12–242–000.
Applicants: USG Pipeline Company, LLC.
Description: Name Change Filing to be effective 12/12/2011.
Filed Date: 12/15/11.
Accession Number: 20111215–5169.
Comments Due: 5 p.m. ET 12/27/11.

Docket Numbers: RP12–243–000.
Applicants: Young Gas Storage Company, Ltd.
Description: ATC Change effective 12/1/11 to be effective 12/1/2011.
Filed Date: 12/15/11.
Accession Number: 20111215–5199.
Comments Due: 5 p.m. ET 12/27/11.

Docket Numbers: RP12–244–000.
Applicants: Colorado Interstate Gas Company LLC.
Description: ATC Change effective 12/1/11 to be effective 12/1/2011.
Filed Date: 12/15/11.
Accession Number: 20111215–5261.
Comments Due: 5 p.m. ET 12/27/11.

Docket Numbers: RP12–245–000.
Applicants: TransColorado Gas Transmission Company LLC.
Description: Reservation Charge Credits to be effective 1/16/2012.
Filed Date: 12/16/11.
Accession Number: 20111216–5063.
Comments Due: 5 p.m. ET 12/28/11.

Docket Numbers: RP12–246–000.
Applicants: Kinder Morgan Interstate Gas Trans. LLC.
Description: Annual Reconciliation filing of Kinder Morgan Interstate Gas Transmission LLC.
Filed Date: 12/16/11.
Accession Number: 20111216–5150.
Comments Due: 5 p.m. ET 12/28/11.

Docket Numbers: RP12–247–000.
Applicants: Gulf South Pipeline Company, LP.
Description: SSO Update to be effective 1/16/2012.
Filed Date: 12/16/11.
Accession Number: 20111216–5160.
Comments Due: 5 p.m. ET 12/28/11.

Docket Numbers: RP12–248–000.
Applicants: Millennium Pipeline Company, LLC.
Description: Negotiated Rate Service Agreement Filing to be effective 1/1/2012.
Filed Date: 12/16/11.
Accession Number: 20111216–5173.
Comments Due: 5 p.m. ET 12/28/11.

Docket Numbers: RP12–249–000.
Applicants: Millennium Pipeline Company, LLC.
Description: System Map to be effective 1/16/2012.
Filed Date: 12/16/11.
Accession Number: 20111216–5179.
Comments Due: 5 p.m. ET 12/28/11.

Docket Numbers: RP12–250–000.
Applicants: Kern River Gas Transmission Company.
Description: 2012 Credit to be effective 1/16/2012.
Filed Date: 12/16/11.
Accession Number: 20111216–5190.
Comments Due: 5 p.m. ET 12/28/11.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, and service can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: December 19, 2011.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2011–32981 Filed 12–23–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC12–52–000.
Applicants: Agua Caliente Solar, LLC, MidAmerican AC Holding, LLC.
Description: Application of MidAmerican AC Holding, LLC, and Agua Caliente Solar, LLC for Authorization of Transaction under Section 203 of the Federal Power Act and Request for Expedited Consideration.
Filed Date: 12/16/11.
Accession Number: 20111216–5172.
Comments Due: 5 p.m. ET 1/6/12.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–3079–001; ER12–126–001.
Applicants: Tyr Energy, LLC, Trademark Merchant Energy, LLC.
Description: Tyr Energy, LLC, et al. Request for Category 1 Seller Determination, *et al.*
Filed Date: 12/15/11.
Accession Number: 20111215–5287.
Comments Due: 5 p.m. ET 1/5/12.

Docket Numbers: ER11–2605–003.
Applicants: Tyr Energy LLC.
Description: Request for Category 1 Seller in all regions to be effective 12/16/2011.
Filed Date: 12/15/11.
Accession Number: 20111215–5225.
Comments Due: 5 p.m. ET 1/5/12.

Docket Numbers: ER12–126–002.
Applicants: Trademark Merchant Energy, LLC.
Description: Trademark Merchant Energy, LLC submits tariff filing per 35.17(b): Amendment to October 19, 2011 Tariff Filing to be effective 12/19/2011.
Filed Date: 12/16/11.
Accession Number: 20111216–5090.
Comments Due: 5 p.m. ET 1/6/12.

Docket Numbers: ER12–308–001.
Applicants: Manzana Wind LLC.
Description: Manzana Wind LLC submits tariff filing per 35.17(b): Amendment to Market-Based Rate Application to be effective 12/31/2011.
Filed Date: 12/16/11.
Accession Number: 20111216–5157.
Comments Due: 5 p.m. ET 1/6/12.

Docket Numbers: ER12–615–000.
Applicants: Southwestern Public Service Company.
Description: 2011–12–15_SPS–RBEC–GSEC–Const Agrmt_651 to be effective 4/4/2011.
Filed Date: 12/15/11.
Accession Number: 20111215–5158.
Comments Due: 5 p.m. ET 1/5/12.

Docket Numbers: ER12–616–000.
Applicants: PJM Interconnection, LLC.
Description: PJM submits Service Agreement Nos. 3144 and 3166 to be effective 11/18/2011.
Filed Date: 12/15/11.
Accession Number: 20111215–5197.
Comments Due: 5 p.m. ET 1/5/12.

Docket Numbers: ER12–617–000.
Applicants: Thermo Cogeneration Partnership, LP.
Description: Cancellation of Tariff to be effective 12/15/2011.
Filed Date: 12/15/11.
Accession Number: 20111215–5239.
Comments Due: 5 p.m. ET 1/5/12.

Docket Numbers: ER12–618–000.
Applicants: Southern California Edison Company.
Description: Notices of Cancellation of FSA & Switchyard Agmt with LADWP, NPC and SRP to be effective 12/17/2011.
Filed Date: 12/16/11.
Accession Number: 20111216–5005.
Comments Due: 5 p.m. ET 1/6/12.

Docket Numbers: ER12–619–000.
Applicants: Southern California Edison Company.
Description: Amend Eldorado System Operating Agreement with LADWP, NPC, and SRP to be effective 12/17/2011.
Filed Date: 12/16/11.
Accession Number: 20111216–5007.
Comments Due: 5 p.m. ET 1/6/12.

Docket Numbers: ER12–621–000.
Applicants: Westar Energy, Inc.
Description: Tennessee Valley Authority BA Opers Coordination Agreement (Caney River Wind) to be effective 1/1/2012.
Filed Date: 12/16/11.
Accession Number: 20111216–5064.
Comments Due: 5 p.m. ET 1/6/12.

Docket Numbers: ER12–622–000.
Applicants: PJM Interconnection, L.L.C., Virginia Electric and Power Company.
Description: PJM Interconnection, L.L.C. submits tariff filing per 35.13(a)(2)(iii: Dominion submits PJM SA 3151–MOA between Dominion and Town of Windsor, NC to be effective 1/1/2012.
Filed Date: 12/16/11.
Accession Number: 20111216–5069.
Comments Due: 5 p.m. ET 1/6/12.

Docket Numbers: ER12–623–000.
Applicants: Occidental Power Marketing, L.P.
Description: Occidental Power Marketing, L.P. submits tariff filing per 35: Compliance Filing of Revised Market-Based Rate Tariff to be effective 1/1/2012.
Filed Date: 12/16/11.
Accession Number: 20111216–5127.
Comments Due: 5 p.m. ET 1/6/12.

Docket Numbers: ER12–624–000.
Applicants: Occidental Power Services, Inc.
Description: Occidental Power Services, Inc. submits tariff filing per 35: Compliance Filing of Revised Market-Based Rate Tariff to be effective 1/1/2012.
Filed Date: 12/16/11.
Accession Number: 20111216–5128.
Comments Due: 5 p.m. ET 1/6/12.

Docket Numbers: ER12–625–000.
Applicants: PacifiCorp.
Description: PacifiCorp submits tariff filing per 35.13(a)(2)(iii: Logan City Amended and Restated Construction Agreement to be effective 2/15/2012.
Filed Date: 12/16/11.
Accession Number: 20111216–5129.
Comments Due: 5 p.m. ET 1/6/12.

Docket Numbers: ER12–626–000.
Applicants: PacifiCorp.
Description: PacifiCorp submits tariff filing per 35.15: Cancellation of Roseburg Forest Products Facilities Maintenance Agreement to be effective 2/15/2012.
Filed Date: 12/16/11.
Accession Number: 20111216–5130.
Comments Due: 5 p.m. ET 1/6/12.

Docket Numbers: ER12–627–000.
Applicants: California Independent System Operator Corporation.
Description: California Independent System Operator Corporation submits tariff filing per 35.13(a)(2)(iii: 2011–12–16 CAISO and Anaheim MSSA Amendment to be effective 1/1/2012.
Filed Date: 12/16/11.
Accession Number: 20111216–5131.
Comments Due: 5 p.m. ET 1/6/12.

Docket Numbers: ER12–628–000.
Applicants: MRL Energy, LLC.
Description: MRL Energy, LLC submits tariff filing per 35.12: MBR Tariff Filing to be effective 1/1/2012.
Filed Date: 12/16/11.
Accession Number: 20111216–5133.
Comments Due: 5 p.m. ET 1/6/12.

Docket Numbers: ER12–629–000.
Applicants: Westar Energy, Inc.
Description: Westar Energy, Inc. submits tariff filing per 35.13(a)(2)(iii: Oklahoma Municipal Power Authority Letter Agreement to be effective 8/31/2010.
Filed Date: 12/16/11.
Accession Number: 20111216–5159.
Comments Due: 5 p.m. ET 1/6/12.

Take notice that the Commission received the following electric securities filings:

Docket Numbers: ES12–13–000.
Applicants: AEP Texas North Company.
Description: Application under Section 204 of the Federal Power Act for Authorization to Issue Securities of AEP Texas North Company.
Filed Date: 12/16/11.
Accession Number: 20111216–5146.
Comments Due: 5 p.m. ET 1/6/12.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: December 16, 2011.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2011–32984 Filed 12–23–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. PR11–118–002]

Kansas Gas Service, a division of ONEOK, Inc.; Notice of Compliance Filing

Take notice that on December 16, 2011, Kansas Gas Service, a division of ONEOK, Inc. filed a revised Statement of Operating Conditions to comply with a Delegated letter order issued December 7, 2011.

Any person desiring to participate in this rate filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the date as indicated below. Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically

should submit an original and 7 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on Tuesday, January 3, 2012.

Dated: December 19, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–32989 Filed 12–23–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL01–88–010]

Louisiana Public Service Commission v. Entergy Services, Inc.; Notice of Compliance Filing

Take notice that on December 19, 2011, Entergy Services, Inc., as agent on behalf of the Entergy Operating Companies submitted a compliance filing, in accordance with the Commission's *Order on Remand,* 137 FERC ¶ 61,047 (2011).

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant and all the parties in this proceeding.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on January 9, 2012.

Dated: December 20, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–33074 Filed 12–23–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project Nos. 13226–003; 13368–002]

Blue Heron Hydro LLC; Notice of Availability of Environmental Assessment

In accordance with the National Environmental Policy Act of 1969 and the Federal Energy Regulatory Commission (Commission) regulations, 18 CFR part 380 (Order No. 486, 52 FR 47897), the Office of Energy Projects has reviewed the applications for original licenses for the Ball Mountain Dam Hydroelectric Project (FERC Project No. 13226–003) and the Townshend Dam Hydroelectric Project (FERC Project No. 13368–002). The Ball Mountain Dam Hydroelectric Project is proposed to be located on the West River near the town of Jamaica in Windham County, Vermont, at the U.S. Army Corps of Engineers' (Corps) Ball Mountain Dam. The Townshend Dam Hydroelectric Project is proposed to be located West River in the town of Townshend in Windham County, Vermont, at the Corps' Townshend Dam.

Staff prepared a multi-project environmental assessment (EA), which analyzes the potential environmental effects of licensing the projects, and concludes that licensing the projects, with appropriate environmental protection measures, would not constitute a major federal action that would significantly affect the quality of the human environment.

A copy of the EA is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *www.ferc.gov* using the ''eLibrary'' link. Enter the docket, excluding the last three digits for each docket number, in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov;* toll-free at 1–(866) 208–3676, or for TTY, (202) 502–8659.

You may also register online at *www.ferc.gov/docs-filing/ferconline.asp* to be notified via email of new filings and issuances related to these or other pending projects. For assistance, contact FERC Online Support.

Any comments should be filed within 30 days from the date of this notice. Comments may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov/doc-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426. Please affix Ball Mountain Dam Hydroelectric Project, P–13226–003 and/or Townshend Dam Hydroelectric Project, P–13368–002 to all comments.

For further information, contact Dr. Nicholas Palso at (202) 502–8854 or by email at *nicholas.palso@ferc.gov.*

Dated: December 20, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–33075 Filed 12–23–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2790–055]

Boott Hydropower, Inc.; Notice of Availability of Final Environmental Assessment

In accordance with the National Environmental Policy Act of 1969 and

the Federal Energy Regulatory Commission's (Commission or FERC) regulations, 18 CFR part 380, Commission staff has reviewed the application for amendment of license for the Lowell Hydroelectric Project (FERC No. 2790–055) and has prepared an environmental assessment (EA). The project is located on the Merrimack River in Middlesex County, Massachusetts.

The EA contains the Commission staff's analysis of the potential environmental effects of the proposed replacement of the wooden flashboards with a pneumatic crest gate system of the same height and interim modifications to the existing flashboard system and concludes that authorizing the amendment, with appropriate environmental protective measures, would not constitute a major federal action that would significantly affect the quality of the human environment.

A copy of the EA is available for review at the Commission in the Public Reference Room, or it may be viewed on the Commission's Web site at *http://www.ferc.gov* using the e-Library link. Enter the docket number (P–2790) in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or call toll-free at 1–(866) 208–3676 or (202) 502–8659 (for TTY).

Dated: December 19, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–32988 Filed 12–23–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER12–628–000]

MRL Energy, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of MRL Energy, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street, NE. Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is January 9, 2012.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: December 19, 2011.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2011–32982 Filed 12–23–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER12–610–000]

Shiloh III Lessee, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Shiloh III Lessee, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR Part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is January 9, 2012.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: December 19, 2011.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2011–32983 Filed 12–23–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 14328–000]

Cortez Pumped Storage Project; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

On December 1, 2011, INCA Engineers, Inc., Washington, filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act (FPA), proposing to study the feasibility of the Cortez Pumped Storage Project to be located on Plateau Creek, near the town of Dolores, Montezuma County, Colorado. The project affects Federal lands administered by the Forest Service (San Juan National Forest). The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed project would consist of the following new facilities: (1) An upper reservoir, formed by a 130-foot-high by 6,500-foot-long, roller-compacted concrete (RCC) dam, with a total storage capacity of 8,000 acre-feet and a water surface area of 275 acres at full pool elevation; (2) a lower reservoir, formed by a 270-foot-high by 800-foot-long dam, having a total storage capacity of 9,500 acre-feet and a water surface area of 200 acres at full pool elevation; (3) two 15-foot-diameter steel consisting of a surface penstock, a vertical shaft and an inclined tunnel; (4) two 27-foot-diameter tailrace tunnels that would be 850-feet-long; (5) an underground powerhouse containing two reversible pump-turbines totaling 500 megawatts (MW) (2 units × 250 MW units) of generating capacity; and (6) a 7-mile-long, 230 kilovolt (kV) transmission line that would connect from the switchyard with an existing 230 kV interconnection east of the project area. The project's annual energy output would vary between 600 and 1,500 gigawatt hours.

Applicant Contact: Mr. Donald Thompson, INCA Engineers, Inc., 400, 112th Ave. NE., Suite 400, Bellevue, WA 98004; phone (425) 653–1000.

FERC Contact: Brian Csernak; phone: (202) 502–6144.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at 1–(866) 208–3676, or for TTY, (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

More information about this project, including a copy of the application, can be viewed or printed on the ''eLibrary'' link of Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–14328–000) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: December 20, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–33073 Filed 12–23–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP12–22–000]

Dominion Transmission, Inc; Notice of Request Under Blanket Authorization

Take notice that on December 5, 2011, Dominion Transmission, Inc (DTI), 701 East Cary Street, Richmond, VA 23219, filed in Docket No. CP12–22–000, a prior notice request under its blanket certificate issued in Docket No. CP82–537–000 pursuant to sections 157.205, 157.208 and 157.210 of the Commission's regulations under the Natural Gas Act (NGA) to replace certain pipeline facilities located in Gilmer County, West Virginia, all as more fully set forth in the application, which is on file with the Commission and open to public inspection. The filing may also be viewed on the web at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (866) 208–3676 or TTY, (202) 502–8659.

Specifically, DTI proposes to: (1) Replace approximately 14.98 miles of it's existing multi-diameter (12, 14, and 16-inch) TL–264 pipeline in Calhoun and Gilmer Counties, West Virginia with 16-inch diameter pipe; (2) construct approximately 735 feet of 8-inch diameter TL–369 Ext. 2 receiver pipeline facilities; and (3) construct two new pipeline launcher/receivers and one new pipeline receiver as necessary to perform pigging operations on the pipeline. DTI estimates the total cost of the subject facilities is $16.2 million.

Any questions regarding this Prior Notice should be directed to Brad Knisley, Regulatory and Certificates Analyst III, Dominion Transmission, Inc., 701 East Cary Street, Richmond, VA 23219, telephone no. (804) 771–4416, facsimile no. (804) 771–4804 and Email: *Brad.A.Knisley@dom.com.*

Any person may, within 60 days after the issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention. Any person filing to intervene or the Commission's staff may, pursuant to section 157.205 of the Commission's regulations under the NGA (18 CFR 157.205) file a protest to the request. If no protest is filed within the time allowed therefore, the proposed activity shall be deemed to be authorized effective the day after the time allowed for protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to section 7 of the NGA.

The Commission strongly encourages electronic filings of comments, protests, and interventions via the internet in lieu of paper. See 18 CFR 385.2001(a) (1) (iii) and the instructions on the Commission's Web site (*www.ferc.gov*) under the ''e-Filing'' link.

Dated: December 19, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–32990 Filed 12–23–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP12–74–000]

Gulf South Pipeline Company, LP; Notice of Technical Conference

On November 30, 2011, the Commission accepted and suspended the tariff records that Gulf South Pipeline Company, LP (Gulf South) filed to implement daily allocations on its pipeline system, subject to refund and to the outcome of a technical conference.[1]

Take notice that a technical conference to discuss the issues raised by Columbia's filings will be held on Thursday, January 12, 2012 at 10 a.m. (EST), in a room to be designated at the offices of the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

Federal Energy Regulatory Commission conferences are accessible under section 508 of the Rehabilitation Act of 1973. For accessibility accommodations please send an email to *accessibility@ferc.gov* or call toll free 1–(866) 208–3372 (voice) or (202) 208–1659 (TTY), or send a FAX to (202) 208–2106 with the required accommodations.

All interested persons, parties, and staff are permitted to attend. For further information please contact Brian White at (202) 502–8332.

Dated: December 19, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–32987 Filed 12–23–11; 8:45 am]

BILLING CODE 6717–01–P

[1] *Gulf South Pipeline Company, LP,* 136 FERC ¶ 61,170 (2011).

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OECA–2011–0220; FRL–9508–5]

Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; NSPS for Glass Manufacturing Plants (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this document announces that an Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval. This is a request to renew an existing approved collection. The ICR which is abstracted below describes the nature of the collection and the estimated burden and cost.

DATES: Additional comments may be submitted on or before January 26, 2012.

ADDRESSES: Submit your comments, referencing docket ID number EPA–HQ–OECA–2011–0220, to: (1) EPA online using *http://www.regulations.gov* (our preferred method), or by email to *docket.oeca@epa.gov,* or by mail to: EPA Docket Center (EPA/DC), Environmental Protection Agency, Enforcement and Compliance Docket and Information Center, mail code 2822IT, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; and (2) OMB at: Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: Desk Officer for EPA, 725 17th Street NW., Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Learia Williams, Monitoring, Assistance, and Media Programs Division, Office of Compliance, Mail Code 2227A, Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; telephone number: (202) 564–4113; fax number: (202) 564–0050; email address: *williams.learia@epa.gov.*

SUPPLEMENTARY INFORMATION: EPA has submitted the following ICR to OMB for review and approval according to the procedures prescribed in 5 CFR 1320.12. On May 9, 2011 (76 FR 26900), EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). EPA received no comments. Any additional comments on this ICR should be submitted to both EPA and OMB within 30 days of this notice.

EPA has established a public docket for this ICR under docket ID number EPA–HQ–OECA–2011–0220, which is available for public viewing online at *http://www.regulations.gov*, in person viewing at the Enforcement and Compliance Docket in the EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Avenue, NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is (202) 566–1744, and the telephone number for the Enforcement and Compliance Docket is (202) 566–1752.

Use EPA's electronic docket and comment system at *http://www.regulations.gov*, to either submit or view public comments, access the index listing of the contents of the docket, and to access those documents in the docket that are available electronically. Once in the system, select ''docket search,'' then key in the docket ID number identified above. Please note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing at *http://www.regulations.gov* as EPA receives them and without change, unless the comment contains copyrighted material, Confidential Business Information (CBI), or other information whose public disclosure is restricted by statute. For further information about the electronic docket, go to *http://www.regulations.gov.*

Title: NESHAP for Glass Manufacturing Plants (Renewal).

ICR Numbers: EPA ICR Number 1131.10, OMB Control Number 2060–0054.

ICR Status: This ICR is scheduled to expire on December 31, 2011. Under OMB regulations, the Agency may continue to conduct or sponsor the collection of information while this submission is pending at OMB.

Abstract: The New Source Performance Standards (NSPS) for Glass Manufacturing Plants (40 CFR part 60, subpart CC) were promulgated on October 7, 1980 and amended on October 17, 2000. The provisions of this subpart apply to each glass manufacturing plant that either commenced construction or modification after June 15, 1979.

Owners or operators of subpart CC facilities are required to comply with reporting and recordkeeping requirements, and maintain records of specific information needed by EPA to determine if compliance has been achieved. Sources are required to submit semiannual reports of excess emissions. These notifications, reports, and records are essential in determining compliance; and, in general, are required of all sources subject to NSPS.

Notifications are to inform the Agency or delegated authority when a source becomes subject to the standard. The reviewing authority may then inspect the source to ensure that the pollution control devices are properly installed and operating and that the standards are being met. Performance test reports are required as these are the Agency's records of a sources' initial capability to comply with the emission standards and to serve as a record of the operating conditions under which compliance are to be achieved. The information generated by monitoring, recordkeeping, and reporting requirements described in this ICR are used by the Agency to

ensure that facilities that are affected by the standard continue to operate the control equipment and achieve continuous compliance with the regulation.

All reports are sent to the delegated state or local authority. In the event that there is no such delegated authority, the reports are sent directly to the EPA regional office. This information is being collected to assure compliance with 40 CFR part 60, subpart CC, as authorized in sections 112 and 114(a) of the Clean Air Act. The required information consists of emissions data and other information that have been determined to be private.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB Control Number. The OMB Control Numbers for EPA's regulations are listed in 40 CFR part 9 and 48 CFR Chapter 15, and are identified on the form and/or instrument, if applicable.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 8 hours per response. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements which have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

Respondents/Affected Entities: Glass manufacturing plants.

Estimated Number of Respondents: 41.

Frequency of Response: Occasionally, semiannually and annually.

Estimated Total Annual Hour Burden: 803.

Estimated Total Annual Cost: $314,638 which includes $76,838 in labor costs, no capital/startup costs, and $237,800 in operation and maintenance (O&M) costs.

Changes in the Estimates: There is no change in the labor hours in this ICR as compared to the previous ICR. This is due to two considerations: (1) The regulations have not changed over the past three years and are not anticipated to change over the next three years; and (2) the growth rate according to the industry sources is very low, negative, or non-existent, so there is no significant change in the overall burden. There are no new facilities expected to be constructed over the next three years of this ICR.

However, there is an increase in the estimated burden cost as currently identified in the OMB Inventory of Approved Burdens. The increase is not due to any program changes. The change in burden is due to the use of the most updated labor rates.

Dated: December 16, 2011.

John Moses,

Director, Collection Strategies Division.

[FR Doc. 2011–33122 Filed 12–23–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OECA–2011–0225; FRL–9509–7]

Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; NSPS for Municipal Solid Waste Landfills (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this document announces that an Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval. This is a request to renew an existing approved collection. The ICR which is abstracted below describes the nature of the collection and the estimated burden and cost.

DATES: Additional comments may be submitted on or before January 26, 2012.

ADDRESSES: Submit your comments, referencing docket ID number EPA–HQ–OECA–2011–0225, to (1) EPA online using *http://www.regulations.gov* (our preferred method), or by email to *docket.oeca@epa.gov*, or by mail to: EPA Docket Center (EPA/DC), Environmental Protection Agency, Enforcement and Compliance Docket and Information Center, Mail Code 2822IT, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, and (2) OMB at: Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: Desk Officer for EPA, 725 17th Street, NW., Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Learia Williams, Monitoring, Assistance, and Media Programs Division, Office of Compliance, Mail Code 2227A, Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; telephone number: (202) 564–4113; fax number: (202) 564–0050; email address: *williams.learia@epa.gov.*

SUPPLEMENTARY INFORMATION: EPA has submitted the following ICR to OMB for review and approval according to the procedures prescribed in 5 CFR 1320.12. On May 9, 2011 (76 FR 26900), EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). EPA received no comments. Any additional comments on this ICR should be submitted to both EPA and OMB within 30 days of this notice.

EPA has established a public docket for this ICR under docket ID number EPA–HQ–OECA–2011–0225, which is available for public viewing online at *http://www.regulations.gov*, in person viewing at the Enforcement and Compliance Docket in the EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Avenue, NW., Washington, DC The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is (202) 566–1744, and the telephone number for the Enforcement and Compliance Docket is (202) 566–1752.

Use EPA's electronic docket and comment system at *http://www.regulations.gov*, to submit or view public comments, access the index listing of the contents of the docket, and to access those documents in the docket that are available electronically. Once in the system, select ''docket search,'' then key in the docket ID number identified above. Please note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing at *http://www.regulations.gov*, as EPA receives them and without change, unless the comment contains copyrighted material, Confidential Business Information (CBI), or other information whose public disclosure is restricted by statute. For further information about the electronic docket, go to *http://www.regulations.gov.*

Title: NSPS for Municipal Solid Waste Landfills (Renewal).

ICR Numbers: EPA ICR Number 1557.08, OMB Control Number 2060–0220.

ICR Status: This ICR is scheduled to expire on December 31, 2011. Under OMB regulations, the Agency may

continue to conduct or sponsor the collection of information while this submission is pending at OMB. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB Control Number. The OMB Control Numbers for EPA regulations, listed in 40 CFR part 9 and 48 CFR chapter 15, are identified on the form and/or instrument, if applicable.

Abstract: The New Source Performance Standards (NSPS) for Municipal Solid Waste Landfills were proposed on May 30, 1991, promulgated on May 12, 1996, and amended on June 16, 1998 (63 FR 32753), February 24, 1999 (64 FR 9262), and April 10, 2000 (65 FR 18909). These standards apply to municipal solid waste landfills for which construction, modification, or reconstruction commences either on or after May 30, 1991. The rule requires the installation of properly designed emission control equipment and the proper operation and maintenance of this equipment. These standards rely on the capture and reduction of methane, carbon dioxide, and non-methane organic gas compound emissions by combustion devices (boilers, internal combustion engines, or flares).

Owners and operators of the affected facilities described must make initial reports when a source becomes subject to the standards. Respondents should conduct and report on performance tests, report on annual or periodic emission rates, report on design plans, report on equipment removal and closure, as well as maintain records of the reports, system design, performance tests, monitoring, exceedances, plot map, and well locations.

Any owner or operator subject to the provisions of this part must maintain a file of the applicable reporting and recordkeeping requirements for at least five years following the collection of such measurements, maintenance reports, and records.

All reports are sent to the delegated state or local authority. In the event that there is no such delegated authority, the reports are sent directly to the EPA regional office. This information is being collected to assure compliance with 40 CFR part 60, subpart WWW, as authorized in sections 112 and 114(a) of the Clean Air Act. The required information consists of emissions data and other information that have been determined to be private.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 17 hours per response. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements which have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

Respondents/Affected Entities: Municipal solid waste landfills.

Estimated Number of Respondents: 183.

Frequency of Response: Initially, occasionally, and annually.

Estimated Total Annual Hour Burden: 3,971.

Estimated Total Annual Cost: $434,255, which includes $380,261 in labor costs, $32,400 capital/startup costs, and $21,594 operation and maintenance (O&M) costs.

Changes in the Estimates: The adjustment increase in burden from the most recently approved ICR is due to an increase in the number of new sources. Consultations with the Office of Air Quality Planning and Standards (OAQPS) and trade association revealed that there are approximately 183 sources subject to the rule, as compared to the previous ICR with 175 sources. Also, we have used the most updated labor rates.

Because there are new sources with reporting requirements, both capital/startup costs and operation and maintenance (O&M) costs of monitoring the equipment are incurred.

Dated: December 20, 2011.

John Moses,

Director, Collection Strategies Division.

[FR Doc. 2011–33130 Filed 12–23–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OECA–2011–0226; FRL–9509–5]

Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; NSPS for Metal Coil Surface Coating (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this document announces that an Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval. This is a request to renew an existing approved collection. The ICR which is abstracted below describes the nature of the collection and the estimated burden and cost.

DATES: Additional comments may be submitted on or before January 26, 2012.

ADDRESSES: Submit your comments, referencing docket ID number EPA–HQ–OECA–2011–0226, to (1) EPA online using *http://www.regulations.gov* (our preferred method), or by email to *docket.oeca@epa.gov,* or by mail to: EPA Docket Center (EPA/DC), Environmental Protection Agency, Enforcement and Compliance Docket and Information Center, Mail Code 28221T, 1200 Pennsylvania Avenue NW., Washington, DC 20460, and (2) OMB at: Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: Desk Officer for EPA, 725 17th Street NW., Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Learia Williams, Monitoring, Assistance, and Media Programs Division, Office of Compliance, Mail Code 2227A, Environmental Protection Agency, 1200 Pennsylvania Avenue NW., Washington, DC 20460; telephone number: (202) 564–4113; fax number: (202) 564–0050; email address: *williams.learia@epa.gov.*

SUPPLEMENTARY INFORMATION: EPA has submitted the following ICR to OMB for review and approval according to the procedures prescribed in 5 CFR 1320.12. On May 9, 2011 (76 *FR* 26900), EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). EPA received no comments. Any additional comments on this ICR should be submitted to both EPA and OMB within 30 days of this notice.

EPA has established a public docket for this ICR under docket ID number EPA–HQ–OECA–2011–0226, which is available for public viewing online at *http://www.regulations.gov* and in person viewing at the Enforcement and Compliance Docket in the EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Avenue NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the

Reading Room is (202) 566–1744, and the telephone number for the Enforcement and Compliance Docket is (202) 566–1752.

Use EPA's electronic docket and comment system at *http://www.regulations.gov* to submit or view public comments, access the index listing of the contents of the docket, and to access those documents in the docket that are available electronically. Once in the system, select ''docket search,'' then key in the docket ID number identified above. Please note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing at *http://www.regulations.gov* as EPA receives them and without change, unless the comment contains copyrighted material, Confidential Business Information (CBI), or other information whose public disclosure is restricted by statute. For further information about the electronic docket, go to *http://www.regulations.gov.*

Title: NSPS for Metal Coil Surface Coating (Renewal).

ICR Numbers: EPA ICR Number 0660.11, OMB Control Number 2060–0107.

ICR Status: This ICR is scheduled to expire on December 31, 2011. Under OMB regulations, the Agency may continue to conduct or sponsor the collection of information while this submission is pending at OMB. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, are displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers in certain EPA regulations is consolidated in 40 CFR part 9.

Abstract: New Source Performance Standards (NSPS) for the regulations published at 40 CFR part 60, subpart TT were proposed on January 5, 1981 and promulgated on November 1, 1982. These regulations apply to the following surface coating lines in the metal coil surface coating industry: each prime coat operation, each finish coat operation, and each prime and finish coat operation cured simultaneously where the finish coat is applied wet on wet over the prime coat.

In general, all New Source Performance Standards (NSPS) require initial notifications, performance tests, and periodic reports. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. These notifications, reports, and records are essential in determining compliance, and are required of all sources subject to NSPS.

All reports are sent to the delegated state or local authority. In the event that there is no such delegated authority, the reports are sent directly to the EPA regional office. This information is being collected to assure compliance with 40 CFR part 60, subpart TT, as authorized in sections 112 and 114(a) of the Clean Air Act. The required information consists of emissions data and other information that have been determined to be private.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 41 hours per response. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements which have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

Respondents/Affected Entities: Metal coil surface coating facilities.

Estimated Number of Respondents: 158.

Frequency of Response: Initially, occasionally, annually, and semiannually.

Estimated Total Annual Hour Burden: 15,643.

Estimated Total Annual Cost: $1,829,259, which includes $1,497,459 in labor costs, no capital/startup costs, and $331,800 in operation and maintenance (O&M) costs.

Changes in the Estimates: There is no change in the labor hours in this ICR compared to the previous ICR. Consultations with EPA's Office of Air Quality Planning and Standards (OAQPS) and trade associations revealed that there are approximately 158 sources subject to the rule, with no new facilities expected to be constructed over the next three years of this ICR.

However, there is an increase in the estimated burden cost as currently identified in the OMB Inventory of Approved Burdens. The increase is not due to any program changes. The change in burden is due to the use of the most updated labor rates.

Dated: December 20, 2011.

John Moses,

Director, Collection Strategies Division.

[FR Doc. 2011–33129 Filed 12–23–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–RCRA–2011–0543, FRL–9509–3]

Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; Requirements and Exemptions for Specific RCRA Wastes (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), this document announces that an Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval. This is a request to renew an existing approved collection. The ICR, which is abstracted below, describes the nature of the information collection and its estimated burden and cost.

DATES: Additional comments may be submitted on or before January 26, 2012.

ADDRESSES: Submit your comments, referencing Docket ID No. EPA–HQ–RCRA–2011–0543, to (1) EPA, either online using *http://www.regulations.gov* (our preferred method), or by email to *rcra-docket@epa.gov,* or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW., Washington, DC 20460, and (2) OMB by mail to: Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: Desk Officer for EPA, 725 17th Street NW., Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Peggy Vyas, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460; telephone number: (703) 308–5477; fax number:

(703) 308–8433; email address: *vyas.peggy@epa.gov.*

SUPPLEMENTARY INFORMATION: EPA has submitted the following ICR to OMB for review and approval according to the procedures prescribed in 5 CFR 1320.12. On July 19, 2011 (76 FR 42704), EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). EPA received no comments. Any additional comments on this ICR should be submitted to EPA and OMB within 30 days of this notice.

EPA has established a public docket for this ICR under Docket ID No EPA–HQ–RCRA–2011–0543, which is available for online viewing at *http://www.regulations.gov,* or in person viewing at the Resource Conservation and Recovery Act (RCRA) Docket in the EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The EPA/DC Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is (202) 566–1744, and the telephone number for the RCRA Docket is (202) 566–0270.

Use EPA's electronic docket and comment system at *http://www.regulations.gov*, to submit or view public comments, access the index listing of the contents of the docket, and to access those documents in the docket that are available electronically. Once in the system, select ''docket search,'' then key in the docket ID number identified above. Please note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing at *http://www.regulations.gov* as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose public disclosure is restricted by statute. For further information about the electronic docket, go to *http://www.regulations.gov.*

Title: Requirements and Exemptions for Specific RCRA Wastes (Renewal).

ICR numbers: EPA ICR No. 1597.10, OMB Control No. 2050–0145.

ICR Status: This ICR is scheduled to expire on December 31, 2011. Under OMB regulations, the Agency may continue to conduct or sponsor the collection of information while this submission is pending at OMB. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, are displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers in certain EPA regulations is consolidated in 40 CFR part 9.

Abstract: In 1995, EPA promulgated regulations in 40 CFR Part 273 that govern the collection and management of widely-generated hazardous wastes known as ''Universal Wastes''. Universal Wastes are wastes that are generated in non-industrial settings by a vast community, and are present in non-hazardous waste management systems. Examples of Universal Wastes include certain batteries, pesticides, mercury-containing lamps and thermostats. The Part 273 regulations are designed to separate Universal Waste from the municipal wastestream by encouraging individuals and organizations to collect these wastes and to manage them in an appropriate hazardous waste management system. EPA distinguishes two types of handlers of Universal Wastes: small quantity handlers of Universal Waste (SQHUW) and large quantity handlers of Universal Waste (LQHUW). SQHUWs do not accumulate more than 5,000 kg of any one category of Universal Waste at one time, while LQHUWs may accumulate quantities at or above this threshold. More stringent requirements are imposed on LQHUWs because of greater potential environmental risks.

In 2001, EPA promulgated regulations in 40 CFR Part 266 that provide increased flexibility to facilities managing wastes commonly known as ''Mixed Waste''. Mixed Waste are low-level mixed waste (LLMW), and naturally occurring and/or accelerator-produced radioactive material (NARM) containing hazardous waste. These wastes are also regulated by the Atomic Energy Act. As long as specified eligibility criteria and conditions are met, LLMW and NARM are exempt from the definition of hazardous waste as defined in part 261. Although these eligible wastes are exempted from RCRA manifest, transportation, and disposal requirements, they must still comply with the manifest, transportation, and disposal requirements under the NRC (or NRC–Agreement State) regulations.

And finally, in 1992, EPA finalized management standards for used oils destined for recycling. The Agency codified the used oil management standards in part 279 of 40 CFR. The regulations at 40 CFR part 279 establish, among other things, streamlined procedures for notification, testing, labeling, and recordkeeping. They also establish a flexible self-implementing approach for tracking off-site shipments that allow used oil handlers to use standard business practices (*e.g.,* invoices, bill of lading). In addition, part 279 sets standards for the prevention and cleanup of releases to the environment during storage and transit. EPA believes these requirements will minimize potential mismanagement of used oils, while not discouraging recycling.

Burden Statement: The annual public reporting burden for this collection of information is estimated to average 4.9 hours per response. The total public recordkeeping burden for the Universal Waste requirements is estimated to average 0.2 hours per response. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements which have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

Respondents/Affected Entities: Private Sector and State, Local, or Tribal Governments.

Estimated Number of Respondents: 123,164.

Frequency of Response: Biennially, occasionally.

Estimated Total Annual Hour Burden: 651,165 hours.

Estimated Total Annual Cost: $34,534,985 which includes $10,014,520 annualized capital and O&M costs and $24,520,465 annualized labor costs.

Changes in the Estimates: There is an increase of 30 hours in the total estimated burden currently identified in the OMB Inventory of Approved ICR Burdens. This is due to an adjustment in the state universal waste program.

Dated: December 16, 2011.

John Moses,

Director, Collection Strategies Division.

[FR Doc. 2011–33124 Filed 12–23–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OW–2004–0013; FRL 9509–2]

Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; EPA Strategic Plan Information on Source Water Protection (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA)(44 U.S.C. 3501 *et seq.*), this document announces that an Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval. This is a request to renew an existing approved collection. The ICR, which is abstracted below, describes the nature of the information collection and its estimated burden and cost.

DATES: Additional comments may be submitted on or before January 26, 2012.

ADDRESSES: Submit your comments, referencing Docket ID No. EPA–HQ–OW–2004–0013, to (1) EPA online using *http://www.regulations.gov* (our preferred method), by email to *OW–Docket@epa.gov*, or by mail to: EPA Docket Center, Environmental Protection Agency, Water Docket, Environmental Protection Agency, EPA Docket Center (EPA/DC), Mailcode 28221T, 1200 Pennsylvania Ave. NW., Washington, DC 20460, and (2) OMB by mail to: Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: Desk Officer for EPA, 725 17th Street NW., Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Beth Hall, Drinking Water Protection Division—Prevention Branch, Office of Ground Water and Drinking Water (MC 4606M), Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460; telephone number: (202) 564–3883; fax number: (202) 564–3756; email address: *hall.beth@epa.gov.*

SUPPLEMENTARY INFORMATION: EPA has submitted the following ICR to OMB for review and approval according to the procedures prescribed in 5 CFR 1320.12. On August 16, 2011 (76 FR 50726), EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). EPA received two (2) comments during the comment period, which are addressed in the ICR. Any additional comments on this ICR should be submitted to EPA and OMB within 30 days of this notice.

EPA has established a public docket for this ICR under Docket ID No. EPA–HQ–OW–2004–0013, which is available for online viewing at *http://www.regulations.gov*, or in person viewing at the Water Docket Docket in the EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The EPA/DC Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is (202) 566–1744, and the telephone number for the Water Docket is (202) 566–2426.

Use EPA's electronic docket and comment system at *http://www.regulations.gov*, to submit or view public comments, access the index listing of the contents of the docket, and to access those documents in the docket that are available electronically. Once in the system, select ''docket search,'' then key in the docket ID number identified above. Please note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing at *http://www.regulations.gov* as EPA receives them and without change, unless the comment contains copyrighted material, confidential business information (CBI), or other information whose public disclosure is restricted by statute. For further information about the electronic docket, go to *http://www.regulations.gov.*

Title: EPA Strategic Plan Information on Source Water Protection (Renewal).

ICR numbers: EPA ICR No. 1816.05, OMB Control No. 2040–0197.

ICR status: This ICR is currently scheduled to expire on December 31, 2011. Under OMB regulations, the Agency may continue to conduct or sponsor the collection of information while this submission is pending at OMB. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, are displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers in certain EPA regulations is consolidated in 40 CFR part 9.

Abstract: EPA is collecting, on a voluntary basis, data from the States on their progress toward substantial implementation of prevention strategies for all community water systems (CWSs). The information to be collected will help states and EPA understand the progress toward the Agency's goal of increasing the number of CWSs (and the populations they serve) with minimized risk to public health through development and implementation of source water protection strategies for source water areas. The Safe Drinking Water Act, while authorizing the generation of this data, does not require the implementation of source water protection programs by States. Section 1452 of the Safe Drinking Water Act allows the use of Drinking Water State Revolving Fund monies for support efforts in the information collection.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 27.6 hours per response. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements which have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

Respondents/Affected Entities: State environmental and health agencies.

Estimated Number of Respondents: 51.

Frequency of Response: Annual.

Estimated Total Annual Hour Burden: 1,408.

Estimated Total Annual Cost: $58,325; all of this cost is associated with labor; there are no capital investment or maintenance and operational costs associated with this ICR.

Changes in the Estimates: There is a decrease of 308 hours in the total estimated annual respondent burden compared with that identified in the ICR currently approved by OMB. This decrease results from reduced labor burden associated with automated reporting of progress toward developing and implementing prevention strategies for all community water systems via the Safe Drinking Water Information System (SDWIS). EPA estimates that at least 11 states will incur reduced burden by using the capabilities of SDWIS to

report to EPA on the status of contamination prevention efforts in their states.

Dated: December 16, 2011.

John Moses,

Director, Collection Strategies Division.

[FR Doc. 2011–33125 Filed 12–23–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OW–2003–0026, FRL 9509–1]

Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; National Water Quality Inventory Reports (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA)(44 U.S.C. 3501 *et seq.*), this document announces that an Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval. This is a request to renew an existing approved collection. The ICR, which is abstracted below, describes the nature of the information collection and its estimated burden and cost.

DATES: Additional comments may be submitted on or before January 26, 2012.

ADDRESSES: Submit your comments, referencing Docket ID No. EPA–HQ–OW–2003–0026, to (1) EPA online using *http://www.regulations.gov* (our preferred method), by email to *OW–Docket@epa.gov*, or by mail to: EPA Docket Center, Environmental Protection Agency, Water Docket (28221T), 1200 Pennsylvania Ave. NW., Washington, DC 20460, and (2) OMB by mail to: Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: Desk Officer for EPA, 725 17th Street NW., Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Alice Mayio, Assessment and Watershed Protection Division, Office of Water, Mail Code: 4503T, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460; telephone number: (202) 566–1184; fax number: (202) 566–1437; email address: *mayio.alice@epa.gov.*

SUPPLEMENTARY INFORMATION: EPA has submitted the following ICR to OMB for review and approval according to the procedures prescribed in 5 CFR 1320.12. On July 13, 2011 (76 FR 41243), EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). EPA received no comments. Any additional comments on this ICR should be submitted to EPA and OMB within 30 days of this notice.

EPA has established a public docket for this ICR under Docket ID No. EPA–HQ–OW–2003–0026, which is available for online viewing at *http://www.regulations.gov*, or in person viewing at the Water Docket in the EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The EPA/DC Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is (202) 566–1744, and the telephone number for the Water Docket is (202) 566–2426.

Use EPA's electronic docket and comment system at *http://www.regulations.gov*, to submit or view public comments, access the index listing of the contents of the docket, and to access those documents in the docket that are available electronically. Once in the system, select ''docket search,'' then key in the docket ID number identified above. Please note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing at *http://www.regulations.gov* as EPA receives them and without change, unless the comment contains copyrighted material, Confidential Business Information (CBI), or other information whose public disclosure is restricted by statute. For further information about the electronic docket, go to *http://www.regulations.gov.*

Title: National Water Quality Inventory Reports (Renewal).

ICR numbers: EPA ICR No. 1560.10, OMB Control No. 2040–0071.

ICR Status: This ICR is scheduled to expire on December 31, 2011. Under OMB regulations, the Agency may continue to conduct or sponsor the collection of information while this submission is pending at OMB. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, are displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers in certain EPA regulations is consolidated in 40 CFR part 9.

Abstract: Section 303(d) of the Clean Water Act requires States to identify and rank waters which cannot meet water quality standards (WQS) following the implementation of technology-based controls. Under Section 303(d), States are also required to establish total maximum daily loads (TMDLs) for listed waters not meeting standards as a result of pollutant discharges. In developing the Section 303(d) lists, States are required to consider various sources of water-quality related data and information, including the Section 305(b) State water quality reports. The State Section 305(b) reports contain information on the extent of water quality degradation, the pollutants and sources affecting water quality, and State progress in controlling water pollution.

EPA's Assessment and Watershed Protection Division (AWPD) works with its Regional counterparts to review and approve or disapprove State Section 303(d) lists and TMDLs from 56 respondents (the 50 States, the District of Columbia, and the five Territories). Section 303(d) specifically requires States to develop lists and TMDLs ''from time to time'' and EPA to review and approve or disapprove the lists and the TMDLs. EPA also collects State 305(b) reports from 59 respondents (the 50 States, the District of Columbia, five Territories, and 3 River Basin commissions).

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 66,590 hours per year per respondent for the 56 respondents with both 305(b) and 303(d) responsibilities and TMDL development activities. The average reporting burden for the 3 respondents with only 305(b) responsibilities is estimated at 3,659 hours per year. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements which have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

Respondents/Affected Entities: States, Territories, River Basin Commissions.

Estimated Number of Respondents: 59.

Frequency of Response: Biennially.

Estimated Total Annual Hour Burden: 3,740,017.

Estimated Total Annual Cost: $193,658,080. includes no capital or O&M costs.

Changes in the Estimates: There is no change in hours in the total estimated burden currently identified in the OMB Inventory of Approved ICR Burdens.

Dated: December 16, 2011.

John Moses,

Director, Collection Strategies Division.

[FR Doc. 2011–33126 Filed 12–23–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OECA–2011–0228; FRL–9509–8]

Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; NSPS for Petroleum Refineries (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this document announces that an Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval. This is a request to renew an existing approved collection. The ICR which is abstracted below describes the nature of the collection and the estimated burden and cost.

DATES: Additional comments may be submitted on or before January 26, 2012.

ADDRESSES: Submit your comments, referencing docket ID number EPA–HQ–OECA–2011–0228, to (1) EPA online using *http://www.regulations.gov* (our preferred method), or by email to *docket.oeca@epa.gov,* or by mail to: EPA Docket Center (EPA/DC), Environmental Protection Agency, Enforcement and Compliance Docket and Information Center, Mail Code 2822IT, 1200 Pennsylvania Avenue NW., Washington, DC 20460, and (2) OMB at: Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: Desk Officer for EPA, 725 17th Street NW., Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Learia Williams, Monitoring, Assistance, and Media Programs Division, Office of Compliance, Mail Code 2227A, Environmental Protection Agency, 1200 Pennsylvania Avenue NW., Washington, DC 20460; telephone number: (202) 564–4113; fax number: (202) 564–0050; email address: *williams.learia@epa.gov.*

SUPPLEMENTARY INFORMATION: EPA has submitted the following ICR to OMB for review and approval according to the procedures prescribed in 5 CFR 1320.12. On May 9, 2011 (76 *FR* 26900), EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). EPA received no comments. Any additional comments on this ICR should be submitted to both EPA and OMB within 30 days of this notice.

EPA has established a public docket for this ICR under docket ID number EPA–HQ–OECA–2011–0228, which is available for public viewing online at *http://www.regulations.gov*, in person viewing at the Enforcement and Compliance Docket in the EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Avenue NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is (202) 566–1744, and the telephone number for the Enforcement and Compliance Docket is (202) 566–1752.

Use EPA's electronic docket and comment system at *http://www.regulations.gov*, to submit or view public comments, access the index listing of the contents of the docket, and to access those documents in the docket that are available electronically. Once in the system, select ''docket search,'' then key in the docket ID number identified above. Please note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing at *http://www.regulations.gov*, as EPA receives them and without change, unless the comment contains copyrighted material, Confidential Business Information (CBI), or other information whose public disclosure is restricted by statute. For further information about the electronic docket, go to *http://www.regulations.gov.*

Title: NSPS for Petroleum Refineries (Renewal).

ICR Numbers: EPA ICR Number 2263.03, OMB Control Number 2060–0602.

ICR Status: This ICR is scheduled to expire on December 31, 2011. Under OMB regulations, the Agency may continue to conduct or sponsor the collection of information while this submission is pending at OMB. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB Control Number. The OMB Control Numbers for EPA regulations are listed in 40 CFR part 9 and 48 CFR Chapter 15, and are identified on the form and/or instrument, if applicable.

Abstract: For the New Source Performance Standards (NSPS) for Petroleum Refineries, the affected entities are subject to the General Provisions of the NSPS at 40 CFR part 60, subpart A, and any changes or additions to the General Provisions specified at 40 CFR part 60, subpart Ja. The affected facilities include: fluid catalytic cracking units, fluid coking units, delayed coking units, process heaters and other fuel gas combustion devices, and sulfur recovery plants. Emissions limitations would be used to control emissions of particulate matter (PM), nitrogen oxides (NO_X), carbon monoxide (CO), sulfur dioxide (SO_2), hydrogen sulfide (H_2S) and/or reduced sulfur compounds (RSC). Work practice standards would apply to depressuring operations and flaring of fuel gases.

All reports are sent to the delegated state or local authority. In the event that there is no such delegated authority, the reports are sent directly to the EPA regional office. This information is being collected to assure compliance with 40 CFR part 60, subpart Ja, as authorized in sections 112 and 114(a) of the Clean Air Act. The required information consists of emissions data and other information that have been determined to be private.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 59 hours per response. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements which have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

Respondents/Affected Entities: Petroleum Refineries.

Number of Respondents: 18.

Frequency of Response: Semiannually.

Estimated Total Annual Hour Burden: 2,142.

Estimated Total Annual Cost: $1,873,880, which includes $197,720 in labor costs, no capital/startup costs, and $1,676,160 in operating and maintenance (O&M) costs.

Changes in the Estimates: There is a decrease in the labor hours and cost in this ICR compared to the previous ICR. Consultations with the Office of Air Quality Planning and Standards (OAQPS) and trade associations revealed that there are approximately eighteen sources subject to the rule, with no new facilities expected to be constructed over the next three years of this ICR. Because there are no new sources with reporting requirements, no capital/startup costs are incurred. The only cost that is incurred is for the O&M of the monitoring equipment.

Dated: December 20, 2011.

John Moses,

Director, Collection Strategies Division.

[FR Doc. 2011–33128 Filed 12–23–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OECA–2011–0224; FRL–9509–6]

Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; NSPS for Calciners and Dryers in Mineral Industries (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this document announces that an Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval. This is a request to renew an existing approved collection. The ICR, which is abstracted, below describes the nature of the collection and the estimated burden and cost.

DATES: Additional comments may be submitted on or before January 26, 2012.

ADDRESSES: Submit your comments, referencing docket ID number EPA–HQ–OECA–2011–0224, to (1) EPA online using *www.regulations.gov* (our preferred method), or by email to *docket.oeca@epa.gov*, or by mail to: EPA Docket Center (EPA/DC), Environmental Protection Agency, Enforcement and Compliance Docket and Information Center, Mail Code 2822IT, 1200 Pennsylvania Avenue NW., Washington, DC 20460, and (2) OMB at: Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: Desk Officer for EPA, 725 17th Street NW., Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Learia Williams, Monitoring, Assistance, and Media Programs Division, Office of Compliance, Mail Code 2227A, Environmental Protection Agency, 1200 Pennsylvania Avenue NW., Washington, DC 20460; telephone number: (202) 564–4113; fax number: (202) 564–0050; email address: *williams.learia@epa.gov.*

SUPPLEMENTARY INFORMATION: EPA has submitted the following ICR to OMB for review and approval according to the procedures prescribed in 5 CFR 1320.12. On May 9, 2011 (76 *FR* 26900), EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). EPA received no comments. Any additional comments on this ICR should be submitted to both EPA and OMB within 30 days of this notice.

EPA has established a public docket for this ICR under docket ID number EPA–HQ–OECA–2011–0224, which is available for public viewing online at *http://www.regulations.gov*, or in person viewing at the Enforcement and Compliance Docket in the EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Avenue NW., Washington, DC The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is (202) 566–1744, and the telephone number for the Enforcement and Compliance Docket is (202) 566–1752.

Use EPA's electronic docket and comment system at *http://www.regulations.gov*, to submit or view public comments, access the index listing of the contents of the docket, and to access those documents in the docket that are available electronically. Once in the system, select ''docket search,'' then key in the docket ID number identified above. Please note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing at *http://www.regulations.gov* as EPA receives them and without change, unless the comment contains copyrighted material, Confidential Business Information (CBI), or other information whose public disclosure is restricted by statute. For further information about the electronic docket, go to *www.regulations.gov.*

Title: NSPS for Calciners and Dryers in Mineral Industries (Renewal).

ICR Numbers: EPA ICR Number 0746.08, OMB Control Number 2060–0251.

ICR Status: This ICR is scheduled to expire on December 31, 2011. Under OMB regulations, the Agency may continue to conduct or sponsor the collection of information while this submission is pending at OMB. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB Control Number. The OMB Control Numbers for EPA regulations are listed in 40 CFR part 9 and 48 CFR Chapter 15, and are identified on the form and/or instrument, if applicable.

Abstract: The New Source Performance Standards (NSPS) for Calciners and Dryers in Mineral Industries (40 CFR part 60, subpart UUU) were proposed on April 23, 1986 and promulgated on September 28, 1992.

The affected entities are subject to the General Provisions of the NSPS at 40 CFR part 60, subpart A, and any changes or additions to the General Provisions specified at 40 CFR part 60, subpart UUU.

These standards apply to new, modified, and reconstructed calciners and dryers at mineral processing plants that process or produce any of the following minerals and their concentrates, or any mixture of which the majority is any of the following minerals or a combination of these minerals: Alumina, ball clay, bentonite, diatomite, feldspar, fire clay, fuller's earth, gypsum, industrial sand, kaolin, lightweight aggregate, magnesium compounds, perlite, roofing granules, talc, titanium dioxide, and vermiculite. Particulate matter is the pollutant regulated under this subpart. Feed and product conveyors are not considered part of the affected facility. Facilities subject to NSPS subpart LL, Metallic Mineral Processing Plants, are not subject to this standard. There are additional processes and process units at mineral processing plants listed at section 60.730(b), which are not subject to the provisions of this subpart.

All reports are sent to the delegated state or local authority. In the event that there is no such delegated authority, the reports are sent directly to the EPA regional office. This information is being collected to assure compliance with 40 CFR part 60, subpart UUU, as authorized in sections 112 and 114(a) of

the Clean Air Act. The required information consists of emissions data and other information that have been determined to be private.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 19 hours per response. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements which have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

Respondents/Affected Entities: Calciners and dryers at mineral processing plants.

Estimated Number of Respondents: 334.

Frequency of Response: Occasionally, semiannually and annually.

Estimated Total Annual Hour Burden: 6,434.

Estimated Total Annual Cost: $724,410, which includes $615,860 in labor costs, no capital startup costs; and $108,550 in operating and maintenance (O&M) costs.

Changes in the Estimates: There is an adjustment decrease in the total estimated burden hours as currently identified in the OMB Inventory of Approved Burdens. The change was due to the fact that there are no new respondents. There is, however, an increase in the estimated labor cost. The increase is not due to any program changes. The change is due to the use of the most updated labor rates.

There is a change in the capital/startup costs vs. operation and maintenance (O&M) costs, which could be attributed to the fact that no capital/startup costs are incurred because there are no new sources. The only cost that is incurred is for the O&M of the monitoring equipment.

Dated: December 20, 2011.

John Moses,

Director, Collection Strategies Division.

[FR Doc. 2011–33127 Filed 12–23–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OAR–2011–0371; FRL–9508–6]

Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; Reporting and Recordkeeping Requirements for National Volatile Organic Compound Emission Standards for Architectural Coatings (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), this document announces that an Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval. This is a request to renew an existing approved collection. The ICR, which is abstracted below, describes the nature of the information collection and its estimated burden and cost.

DATES: Additional comments may be submitted on or before January 26, 2012.

ADDRESSES: Submit your comments, referencing Docket ID No. EPA–HQ–OAR–2011–0371, to (1) the EPA online using *www.regulations.gov* (our preferred method), by email to *a-and-r-Docket@epa.gov*, or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW., Washington, DC 20460, and (2) OMB by mail to: Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: Desk Officer for EPA, 725 17th Street NW., Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Kim Teal, Office of Air and Radiation, Office of Air Quality Planning and Standards, Mail Code D243–04, Research Triangle Park, North Carolina 27711, telephone number: (919) 541–5580; fax number: (919) 541–5450; email address: *teal.kim@epa.gov*.

SUPPLEMENTARY INFORMATION: EPA has submitted the following ICR to OMB for review and approval according to the procedures prescribed in 5 CFR 1320.12. On June 27, 2011 (76 FR 37347), the EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). The EPA received no comments during the comment period. Any additional comments on this ICR should be submitted to the EPA and OMB within 30 days of this notice.

The EPA has established a public docket for this ICR under Docket ID No. EPA–HQ–OAR–2011–0371, which is available for online viewing at *www.regulations.gov,* or in person viewing at the Air and Radiation Docket Information Center in the EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The EPA/DC Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is (202) 566–1744, and the telephone number for the Air and Radiation Docket Information Center is (202) 566–1742.

Use the EPA's electronic docket and comment system at *www.regulations.gov,* to submit or view public comments, access the index listing of the contents of the docket, and to access those documents in the docket that are available electronically. Once in the system, select ''docket search,'' then key in the docket ID number identified above. Please note that the EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing at *www.regulations.gov* as the EPA receives them and without change, unless the comment contains copyrighted material, confidential business information (CBI), or other information whose public disclosure is restricted by statute. For further information about the electronic docket, go to *www.regulations.gov.*

Title: National Volatile Organic Compound Emission Standards for Architectural Coatings (Renewal).

ICR numbers: EPA ICR No. 1750.06, OMB Control No. 2060–0393.

ICR Status: This ICR is scheduled to expire on December 31, 2011. Under OMB regulations, the agency may continue to conduct or sponsor the collection of information while this submission is pending at OMB. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless it displays a currently valid OMB control number. The OMB control numbers for the EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, are displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers in certain EPA regulations is consolidated in 40 CFR part 9.

Abstract: The EPA is required under section 183(e) of the Clean Air Act to regulate volatile organic compound emissions from the use of consumer and commercial products. Pursuant to

section 183(e)(3), the EPA published a list of consumer and commercial products and a schedule for their regulation (60 FR 15264). Architectural and industrial maintenance coatings were included on the list, and the standards for such coatings are codified at 40 CFR part 59, subpart D. The information collection includes initial reports and periodic recordkeeping necessary for the EPA to ensure compliance with Federal standards for volatile organic compounds in architectural coatings. Respondents are manufacturers, distributors, and importers of architectural coatings. Responses to the collection are mandatory under 40 CFR part 59, subpart D—National Volatile Organic Compound Emission Standards for Architectural Coatings. All information submitted to the EPA for which a claim of confidentiality is made will be safeguarded according to the agency policies set forth in 40 CFR part 2, subpart B— Confidentiality of Business Information.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 29 hours per response. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements which have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

Respondents/Affected Entities: Manufacturers and importers of architectural coatings.

Estimated Number of Respondents: 500.

Frequency of Response: On occasion.

Estimated Total Annual Hour Burden: 14,661.

Estimated Total Annual Cost: $1,261,526, there are no annualized capital or O&M costs.

Changes in the Estimates: There is a decrease of 1,980 hours in the total estimated burden currently identified in the OMB Inventory of Approved ICR Burdens. This decrease is a result of fewer tonnage exemptions and exceedance fees reports.

Dated: December 16, 2011.

John Moses,

Director, Collection Strategies Division.

[FR Doc. 2011–33123 Filed 12–23–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OW–2008–0517; FRL–9611–7]

RIN 2040–AF06

Notice of Final 2010 Effluent Guidelines Program Plan; Re-Opening Public Comment Period

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice; Re-opening Public Comment Period.

SUMMARY: On October 26, 2011, EPA published its final 2010 Effluent Guidelines Program Plan (''final 2010 Plan'') and announced its 2011 Effluent Guidelines Reviews, as required under the Clean Water Act (CWA). Since publication, the Agency has received several requests for additional time to submit comments. EPA is therefore re-opening the comment period and will accept public comments on both actions for an additional 60 days.

DATES: Submit comments on or before February 27, 2012.

ADDRESSES: *Comments:* Submit your comments on the final 2010 Effluent Guidelines Program Plan identified by Docket ID No. EPA–HQ–OW–2008–0517, by one of the following methods:

- *http://www.regulations.gov*: Follow the on-line instructions for submitting comments.
- *Email: ow-docket@epa.gov,* Attention Docket ID No. EPA–HQ–OW–2008–0517.
- *Fax:* (202) 566–9744.
- *Mail:* Water Docket, Environmental Protection Agency, Mailcode: 28221T, Attention Docket ID No. EPA–HQ–OW–2008–0517, 1200 Pennsylvania Ave. NW., Washington, DC 20460.
- *Hand Delivery:* EPA Docket Center, EPA West, Room 3334, 1301 Constitution Avenue NW., Washington, DC, Attention Docket ID No. EPA–HQ–OW–2008–0517. Such deliveries are accepted only during the Docket Center's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments on the final 2010 Effluent Guidelines Program Plan to Docket ID No. EPA–HQ–OW–2008–0517. EPA's policy is that all comments received will be included in the public docket without change and could be made available online at *www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or email. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means that EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through *www.regulations.gov* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment because of technical difficulties and cannot contact you for clarification, EPA might not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.* For additional instructions on submitting comments, go to the **SUPPLEMENTARY INFORMATION** section of this document.

Submitting Confidential Business Information (CBI)

Any CBI you wish to submit should be sent via a trackable physical method, such as Federal Express or United Parcel Service, to Mr. M. Ahmar Siddiqui, Document Control Officer, Engineering and Analysis Division (4303T), Room 6231S EPA West, U.S. EPA, 1200 Pennsylvania Ave. NW., Washington, DC 20460. A CBI package should be double-wrapped, so that the CBI is in one package, which is itself inside another package. Clearly mark the part or all of the information that you claim to be CBI. For CBI information on a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete copy of the material that

includes information claimed as CBI, a copy of the material that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information marked as CBI will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

Docket: All documents in the docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at the Water Docket, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave. NW., Washington, DC 20004. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding federal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Water Docket is (202) 566–2426.

Submit your comments on the 2011 Effluent Guidelines Reviews identified by Docket ID No. EPA–HQ–OW–2010–0824 using one of the methods described above.

FOR FURTHER INFORMATION CONTACT: Mr. William F. Swietlik, Engineering and Analysis Division, Office of Water, 4303T, U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue NW., Washington, DC., 20460; telephone number: (202) 566–1129; fax number: (202) 566–1053; email address: *swietlik.william@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Supporting Documents for the Final 2010 Effluent Guidelines Program Plan

Key documents providing additional information about EPA's annual reviews and the final 2010 Effluent Guidelines Program Plan include the following:

- Technical Support Document for the 2010 Effluent Guidelines Program Plan, EPA–820–R–10–021, DCN 07320;
- Coalbed Methane Point Source Category: Detailed Study Report, EPA–820–R–10–022, DCN 09999;
- Draft Guidance Document: Best Management Practices for Unused Pharmaceuticals at Health Care Facilities, August 26, 2010, EPA–821–R–10–006.
- Ore Mining and Dressing Category Preliminary Study, EPA–820–R–10–025, DCN 07369.

B. How can I get copies of these documents and other related information?

1. *Docket.* EPA has established official public dockets for these actions under Docket ID Nos. EPA–HQ–OW–2008–0517 and EPA–HQ–OW–2010–0824. The official public docket is the collection of materials that is available for public viewing at the Water Docket in the EPA Docket Center, (EPA/DC) EPA West, Room 3334, 1301Constitution Ave, NW., Washington, DC 20460.

2. *Electronic Access.* You may access this **Federal Register** document electronically through the United States government online source for Federal regulations at *http://www.regulations.gov.*

C. What should I consider as I prepare my comments for EPA?

1. Tips for Preparing Your Comments. When submitting comments, remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).
- Follow directions—The agency might ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
- Explain why you agree or disagree, suggest alternatives, and substitute language for your requested changes.
- Describe any assumptions and provide any technical information and/or data that you used.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples to illustrate your concerns, and suggest alternatives.
- Explain your views as clearly as possible.
- Make sure to submit your comments by the comment period deadline identified.

II. Re-Opening of the Public Comment Period for the Final 2010 Effluent Guidelines Program Plan (''Final 2010 Plan'') and the 2011 Effluent Guidelines Reviews

On October 26, 2011 (76 FR 66286), EPA published its final 2010 Effluent Guidelines Program Plan (''final 2010 Plan''), which, as required under the Clean Water Act (CWA), identified new or existing industrial dischargers, both those discharging directly to surface waters and those discharging to publicly owned treatment works (POTWs), selected for effluent guidelines rulemaking, and provided a schedule for such rulemakings. The Agency solicited comments from the public on the final Plan for 30 days (to have been submitted on or before November 25, 2011). The notice also solicited data and information (during the same 30-day period) for EPA's 2011 Effluent Guidelines Reviews pursuant to the authority of CWA sections 304(b), 304(g), 301(d) and 307(b).

The Agency received several requests for additional time to submit comments. In response, EPA is re-opening the public comment period and will accept additional public comments on its final 2010 Effluent Guidelines Program Plan, which announced schedules to develop standards for wastewater discharges produced by natural gas extraction from underground coalbed and shale formations as well as mercury discharges from dental offices. EPA is also accepting additional data and information for its 2011 Effluent Guidelines Program Reviews, which were announced as a part of the 2010 Plan released in October. For more information visit *http://water.epa.gov/lawsregs/lawsguidance/cwa/304m/index.cfm.* EPA believes that this additional 60-day comment period will assist in providing interested stakeholders, as well as other members of the public, adequate time to review the documents and provide written comments.

Dated: December 19, 2011.

Nancy K. Stoner,

Acting Assistant Administrator for Water.

[FR Doc. 2011–33153 Filed 12–23–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–ORD–2011–0954; FRL–9611–6]

Human Studies Review Board; Notification of a Public Meeting

AGENCY: U.S. Environmental Protection Agency.

ACTION: Notice.

SUMMARY: The EPA Office of the Science Advisor announces a public meeting of the Human Studies Review Board to advise the Agency on the EPA scientific and ethical reviews of research with human subjects.

DATES: This public meeting will be held on January 26, 2012, from approximately 9 a.m. to approximately 5:30 p.m. Eastern Time. Comments may

be submitted on or before Thursday, January 19, 2012.

ADDRESSES: Submit your written comments, identified by Docket ID No. EPA–HQ–ORD–2011–0954, by one of the following methods:

Internet: http://www.regulations.gov: Follow the online instructions for submitting comments.

Email: ORD.Docket@epa.gov.

Mail: The EPA Docket Center EPA/DC, ORD Docket, Mail code: 28221T, 1200 Pennsylvania Avenue NW., Washington, DC 20460.

Hand Delivery: The EPA/DC Public Reading Room is located in the EPA Headquarters Library, Room Number 3334 in the EPA West Building, at 1301 Constitution Avenue NW., Washington, DC 20460. The hours of operation are 8:30 a.m. to 4:30 p.m. Eastern Time, Monday through Friday, excluding federal holidays. Please call (202) 566–1744 or email the ORD Docket at *ord.docket@epa.gov.* for instructions. Updates to Public Reading Room access are available on the Web site *http://www.epa.gov/epahome/dockets.htm.*

Instructions: Direct your comments to Docket ID No. EPA–HQ–ORD–2011–0954. The Agency's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information or other information the disclosure of which is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or email. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to the EPA without going through *http://www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, the EPA recommends that you include your name and other contact information in the body of your comment and with any electronic storage media you submit. If the EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, the EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

FOR FURTHER INFORMATION CONTACT: Any member of the public who wishes to receive further information should contact Jim Downing at telephone number (202) 564–2468; fax: (202) 564–2070; email address: *downing.jim@epa.gov* or Lu-Ann Kleibacker on telephone number (202) 564–7189; fax (202) 564–2070; email address *kleibacker.lu-ann@epa.gov*; mailing address Environmental Protection Agency, Office of the Science Advisor Mail code 8105R, 1200 Pennsylvania Avenue NW., Washington, DC 20460. General information concerning the EPA HSRB can be found on the EPA Web site at *http://www.epa.gov/osa/hsrb/.*

SUPPLEMENTARY INFORMATION:

Location: The meeting will be held at the EPA Conference Center—Lobby Level, One Potomac Yard (South Building), 2777 S. Crystal Drive, Arlington, VA 22202.

Meeting access: Seating at the meeting will be on a first-come basis. To request accommodation of a disability, please contact the persons listed under **FOR FURTHER INFORMATION CONTACT** at least ten business days prior to the meeting using the information under **FOR FURTHER INFORMATION CONTACT,** so that appropriate arrangements can be made.

Procedures for providing public input: Interested members of the public may submit relevant written or oral comments for the HSRB to consider during the advisory process. Additional information concerning submission of relevant written or oral comments is provided in Section I, ''Public Meeting'' under subsection D. ''How May I Participate in this Meeting?'' of this notice.

I. Public Meeting

A. Does this action apply to me?

This action is directed to the public in general. This action may, however, be of particular interest to persons who conduct or assess human studies, especially studies on substances regulated by the EPA, or to persons who are, or may be required to conduct testing of chemical substances under the Federal Food, Drug, and Cosmetic Act or the Federal Insecticide, Fungicide, and Rodenticide Act. This notice might also be of special interest to participants of studies involving human subjects, or representatives of study participants or experts on community engagement. Since many entities may also be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult Jim Downing or Lu-Ann Kleibacker listed under **FOR FURTHER INFORMATION CONTACT.**

B. How can I access electronic copies of this document and other related information?

In addition to using regulations.gov, you may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr/.*

Docket: All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the ORD Docket, EPA/DC, Public Reading Room. The EPA/DC Public Reading Room is located in the EPA Headquarters Library, Room Number 3334 in the EPA West Building, at 1301 Constitution Avenue NW., Washington, DC 20460. The hours of operation are 8:30 a.m. to 4:30 p.m. Eastern Time, Monday through Friday, excluding federal holidays. Please call (202) 566–1744 or email the ORD Docket at *ord.docket@epa.gov* for instructions. Updates to Public Reading Room access are available on the Web site (*http://www.epa.gov/epahome/dockets.htm*).

The Agency's position paper(s), charge/questions to the HSRB, and the meeting agenda will be available by the first week of January 2012. In addition, the Agency may provide additional background documents as the materials become available. You may obtain electronic copies of these documents, and certain other related documents that might be available electronically, from the regulations.gov Web site and the EPA HSRB Web site at *http://www.epa.gov/osa/hsrb/.* For questions on document availability, or if you do not have access to the Internet, consult either Jim Downing or Lu-Ann Kleibacker listed under **FOR FURTHER INFORMATION CONTACT.**

C. What should I consider as I prepare my comments for the EPA?

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible.

2. Describe any assumptions that you used.

3. Provide copies of any technical information and/or data that you used to support your views.

4. Provide specific examples to illustrate your concerns and suggest alternatives.

5. To ensure proper receipt by the EPA, be sure to identify the Docket ID number assigned to this action in the subject line on the first page of your response. You may also provide the name, date, and **Federal Register** citation.

D. How may I participate in this meeting?

You may participate in this meeting by following the instructions in this section. To ensure proper receipt by the EPA, it is imperative that you identify Docket ID number EPA–HQ–ORD–2011–0954 in the subject line on the first page of your request.

1. *Oral comments.* Requests to present oral comments will be accepted up to Thursday, January 19, 2012. To the extent that time permits, interested persons who have not pre-registered may be permitted by the Chair of the HSRB to present oral comments at the meeting. Each individual or group wishing to make brief oral comments to the HSRB is strongly advised to submit their request (preferably via email) to Jim Downing or Lu-Ann Kleibacker, under **FOR FURTHER INFORMATION CONTACT** no later than noon, Eastern Time, Thursday, January 19, 2012, in order to be included on the meeting agenda and to provide sufficient time for the HSRB Chair and HSRB Designated Federal Official to review the meeting agenda to provide an appropriate public comment period. The request should identify the name of the individual making the presentation and the organization (if any) the individual will represent. Oral comments before the HSRB are generally limited to five minutes per individual or organization. Please note that this includes all individuals appearing either as part of, or on behalf of, an organization. While it is our intent to hear a full range of oral comments on the science and ethics issues under discussion, it is not our intent to permit organizations to expand the time limitations by having numerous individuals sign up separately to speak on their behalf. If additional time is available, further public comments may be possible.

2. *Written comments.* Submit your written comments prior to the meeting. For the Board to have the best opportunity to review and consider your comments as it deliberates on its report, you should submit your comments at least five business days prior to the beginning of this meeting. If you submit comments after this date, those comments will be provided to the Board members, but you should recognize that the HSRB members may not have adequate time to consider those comments prior to making a decision. Thus, if you plan to submit written comments, the agency strongly encourages you to submit such comments no later than noon, Eastern Time, Thursday, January 19, 2012. You should submit your comments using the instructions in Section I., under subsection C., ''What Should I Consider as I Prepare My Comments for the EPA?'' In addition, the agency also requests that persons submitting comments directly to the docket also provide a copy of their comments to Jim Downing or Lu-Ann Kleibacker listed under **FOR FURTHER INFORMATION CONTACT.** There is no limit on the length of written comments for consideration by the HSRB.

E. Background

The HSRB is a Federal advisory committee operating in accordance with the Federal Advisory Committee Act 5 U.S.C. App.2 § 9. The HSRB provides advice, information, and recommendations to the EPA on issues related to scientific and ethical aspects of human subjects research. The major objectives of the HSRB are to provide advice and recommendations on: (1) Research proposals and protocols; (2) reports of completed research with human subjects; and (3) how to strengthen EPA's programs for protection of human subjects of research. The HSRB reports to the EPA Administrator through the Agency's Science Advisor.

1. *Topics for discussion.* At its meeting on January 26, 2012, the EPA's Human Studies Review Board will consider scientific and ethical issues surrounding these topics:

a. A new scenario design and associated protocol from the Agricultural Handler Exposure Task Force describing proposed research to measure dermal and inhalation exposure to workers who mix, load, and apply liquid pesticides with powered handgun equipment. The Agency requests the advice of the HSRB concerning whether, if it is revised as suggested in the EPA's review and if it is performed as described, this research is likely to generate scientifically reliable data, useful for assessing the exposure of those who mix, load, and apply liquid pesticides with powered handgun equipment, and to meet the applicable requirements of 40 CFR part 26, subparts K and L.

b. The report of a completed scenario monograph and study report from the Antimicrobial Exposure Assessment Task Force II in which the dermal and inhalation exposure of professional janitorial workers was monitored as they applied a liquid antimicrobial pesticide product for indoor surface disinfecting using a pressurized aerosol can. The EPA seeks the advice of the HSRB on the scientific soundness of this completed research and on its appropriateness for use in estimating the exposure of professional janitorial workers who apply liquid antimicrobial pesticide products to indoor surfaces using pressurized aerosol cans, and on whether available information supports a determination that the study was conducted in substantial compliance with subparts K and L of 40 CFR part 26.

2. *Meeting minutes and reports.* Minutes of the meeting, summarizing the matters discussed and recommendations, if any, made by the advisory committee regarding such matters, will be released within 90 calendar days of the meeting. Such minutes will be available at *http://www.epa.gov/osa/hsrb/* and *http://www.regulations.gov*. In addition, information regarding the Board's final meeting report, will be found at *http://www.epa.gov/osa/hsrb/* or from the person listed under **FOR FURTHER INFORMATION CONTACT.**

Dated: December 19, 2011.

Paul T. Anastas,

EPA Science Advisor.

[FR Doc. 2011–33156 Filed 12–23–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9611–5]

Environmental Laboratory Advisory Board Meeting Dates and Agenda

AGENCY: U.S. Environmental Protection Agency.

ACTION: Notice of teleconference and face-to-face meetings.

SUMMARY: The EPA Environmental Laboratory Advisory Board, as previously announced, holds teleconference meetings on the third Wednesday of each month at 1 p.m. Eastern Time, and two face-to-face meetings each calendar year. For 2012, teleconference only meetings will be February 15, 2012 at 1 p.m. Eastern

Time; March 21, 2012 at 1 p.m. Eastern Time; April 18, 2012 at 1 p.m. Eastern Time; May 16, 2012 at 1 p.m. Eastern Time; June 20, 2012 at 1 p.m. Eastern Time; July 18, 2012 at 1 p.m. Eastern Time; September 19, 2012 at 1 p.m. Eastern Time; October 17, 2012 at 1 p.m. Eastern Time; November 21, 2012 at 1 p.m. Eastern Time; and December 19, 2012 at 1 p.m. Eastern Time to discuss the ideas and views presented at the previous ELAB meetings, as well as new business. Items to be discussed by ELAB over these coming meetings include: (1) Issues in continuing the expansion of national environmental accreditation; (2) ELAB support to the Agency on issues relating to measurement and monitoring for all programs; and (3) follow-up on some of ELAB's past recommendations and issues. In addition to these teleconferences, ELAB will be hosting its two face-to-face meetings on January 30, 2012 at the Hyatt Regency Sarasota in Sarasota, FL at 8 a.m. Eastern Time and on August 6, 2012 at the Hyatt Regency Capitol Hill in Washington, DC at 9 a.m. Eastern Time. Teleconference lines will also be available for these meetings.

Written comments on laboratory accreditation issues and/or environmental monitoring, or measurement issues are encouraged. These comments and should be sent to Ms. Lara P. Autry, Designated Federal Officer, US EPA, Mail Code E243–05, 109 T. W. Alexander Drive, Research Triangle Park, NC 27709, or email her at *autry.lara@epa.gov.* Members of the public are invited to listen to the teleconference calls, and time permitting, will be allowed to comment on issues discussed during the ELAB meetings. Those persons interested in attending should call Lara P. Autry on (919) 541–5544 to obtain teleconference information. For information on access or services for individuals with disabilities or to request accommodation of a disability, please contact Lara P. Autry on the number above, preferably at least 10 days prior to the meeting, to give the Agency as much time as possible to process your request.

Dated: December 19, 2011.

Paul T. Anastas,

EPA Science Advisor.

[FR Doc. 2011–33155 Filed 12–23–11; 8:45 am]

BILLING CODE 6560–50–P

EXPORT-IMPORT BANK OF THE UNITED STATES

[Public Notice 2011–0070]

Agency Information Collection Activities: Comment Request

AGENCY: Export-Import Bank of the United States.

ACTION: Submission for OMB Review and Comments Request.

Form Title: EIB 11–08 Application for Global Credit Express Revolving Line of Credit.

SUMMARY: The Export-Import Bank of the United States (Ex-Im Bank), as a part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal Agencies to comment on the proposed information collection, as required by the Paperwork Reduction Act of 1995.

The Application for Global Credit Express Revolving Line of Credit will be used to determine the eligibility of the applicant and the transaction for Export-Import Bank assistance under its Working Capital Guarantee and Direct Loan Program. Export-Import Bank customers will be able to submit this form on paper or electronically.

This is a new application form for use by small U.S. businesses with limited export experience. Companies that are eligible to use the Application for Global Credit Express Revolving Line of Credit will need to answer approximately 35 questions and sign an acknowledgement of the certifications that appear on page 5 of the application form. This program relies to a large extent on the exporter's qualifying score on the FICO (Fair Issac Corporation) SBSS (Small Business Scoring Service). Therefore the financial and credit information needs are minimized. This new form incorporates the recently updated standard Certifications and Notices section as well as one question about the amount of U.S. employment to be supported by this program.

The application can be reviewed at: *http://www.exim.gov/pub/pending/EIB11-08.pdf.* Application for Global Credit Express Revolving Line of Credit.

DATES: Comments should be received on or before February 27, 2012 to be assured of consideration.

ADDRESSES: Comments may be submitted electronically on *http://www.regulations.gov* or by mail to Jim Newton, Export-Import Bank of the United States, 811 Vermont Ave. NW., Washington, DC 20571.

SUPPLEMENTARY INFORMATION:

Titles and Form Number: EIB 11–08 Application for Global Credit Express Revolving Line of Credit.

OMB Number: 3048–xxxx.

Type of Review: New.

Need and Use: The Application for Global Credit Express Revolving Line of Credit will be used to determine the eligibility of the applicant and the transaction for Export-Import Bank assistance under its Working Capital Guarantee Program.

Annual Number of Respondents: 500.

Estimated Time per Respondent: 1.5 hours.

Government Annual Burden Hours: 500 hours.

Frequency of Reporting or Use: Once per year.

Sharon A. Whitt,

Agency Clearance Officer.

[FR Doc. 2011–33084 Filed 12–23–11; 8:45 am]

BILLING CODE 6690–01–P

FEDERAL COMMUNICATIONS COMMISSION

[WC Docket Nos. 10–90 and 05–337; DA 11–2026]

Request for Connect America Fund Cost Models

AGENCY: Federal Communications Commission.

ACTION: Notice; solicitation of comments.

SUMMARY: In this document, the Federal Communications Commission (Commission) requests interested parties to submit forward-looking cost models, consistent with the *USF/ICC Transformation Order,* for consideration in this proceeding. The Commission also requests parties to notify the Wireline Competition Bureau of their intention to submit a forward-looking cost model. The Commission's goal is to adopt a specific model to be used for estimating support amounts in price cap areas in order to provide support.

DATES: Interested parties should notify the Wireline Competition Bureau of their intent to file a forward-looking cost model consistent with the *USF/ICC Transformation Order* no later than December 30, 2011. Interested parties may submit forward-looking cost models or file comments no later than February 1, 2012.

ADDRESSES: You may submit forward looking cost models or file comments, identified by WC Docket Nos. 10–90 and 05–337, by any of the following methods:

- *Electronic Filers:* Comments may be filed electronically using the Internet by

accessing the ECFS: *http://fjallfoss.fcc.gov/ecfs2/.*

• *Paper Filers:* Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

• *People with Disabilities:* To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an email to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (tty). For detailed instructions for submitting comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Patrick Halley, Wireline Competition Bureau at (202) 418–7550 or TTY (202) 418–0484.

SUPPLEMENTARY INFORMATION: 1. On November 18, 2011, the Commission released the *USF/ICC Transformation Order,* 76 FR 73830, November 29, 2011, which comprehensively reforms and modernizes the universal service and intercarrier compensation systems into a new Connect America Fund (CAF) to ensure that robust, affordable voice and broadband service are available to Americans throughout the nation. Among other things, the Commission adopted a methodology for providing CAF support in areas served by price cap carriers that will use a forward-looking cost model to estimate the costs of deploying broadband-capable networks in high-cost areas and identify at a granular level the areas where support will be available. Using the cost model, the Commission will offer each price cap local exchange carrier (LEC) annual support for a period of five years in exchange for a commitment to offer voice service across its service territory within a state and broadband service to supported locations within that service territory. The Commission also intends to use the forward-looking cost model to identify extremely high-cost and remote areas (in both price cap and rate-of-return territories) that should receive support from the Remote Areas Fund. As with the current model, we expect that the new model will be readily available to support recipients and the public for their ongoing use.

2. *Timetable.* Our goal is to adopt a specific model to be used for estimating support amounts in price cap areas by the end of 2012 in order to provide support beginning January 1, 2013. To meet this timetable and to ensure that interested parties have adequate time to evaluate the models and inputs under consideration, the Wireline Competition Bureau (Bureau) hereby requests parties to submit forward-looking cost models, consistent with the Commission's order, for consideration in this proceeding as soon as possible, but no later than February 1, 2012. Parties should notify the Bureau of their intention to do so no later than three days after publication of this public notice in the **Federal Register** or by December 30, 2011, whichever comes later, so that there is sufficient time before the February 1 deadline to craft the terms of any protective order(s) necessary to resolve any issues related to licensing of third party data and making appropriate arrangements for providing access to the public.

3. After a model or models are filed, the Bureau will evaluate the extent to which the models meet the criteria laid out below. Following that, and with input from the public, the Bureau may decide there is a need to make certain modifications and changes, which may include combining elements of multiple models into a new model. In addition, the Bureau will identify the data sources and input values that will be used to determine support areas and amounts. The final model and inputs will be developed through an open, deliberative process, and there will be opportunity for further public input before a final model is adopted and support levels are established.

4. *Public Access to Submitted Models.* In the *USF/ICC Transformation Order and FNPRM,* the Commission reaffirmed criteria that any forward-looking cost model used to determine federal high-cost support must meet, stating that the ''model and all underlying data, formulae, computations, and software associated with the model must be available to all interested parties for review and comment. All underlying data should be verifiable, engineering assumptions reasonable, and outputs plausible.'' Models and input values submitted in this proceeding may be subject to reasonable restrictions to protect commercially sensitive information and proprietary data, but the models and data must be available for public scrutiny and potential modification. A copy of all models' underlying source code must be available to Commission staff and interested parties, who must also have meaningful access to the relevant data, and the ability to change input values, run sensitivity tests, and analyze the results of various model runs. Access to models may not be restricted by use of a paywall (i.e., access to the model cannot be conditioned on paying a fee). In addition, any need to procure additional data or intellectual property to make use of or modifications to models will be taken into account in evaluating submissions.

5. *Model Capabilities.* The following paragraphs describe the capabilities the Bureau seeks in models filed in the record to support the policy choices specified by the Commission. We seek to balance the benefits of obtaining the most robust model submissions possible with the need to conclude the model development process expeditiously, so that we can begin distributing model-based support in January 2013. We understand it may not be practical to include all preferred capabilities in the final model in the timeframe established by the Commission, but we will evaluate submissions based on the capabilities they provide, in light of the model requirements set forth in the *USF/ICC Transformation Order and FNPRM.* In particular, we describe the geographic requirements (paragraph 6), the model capabilities to ensure the model is *forward-looking and economically efficient* (paragraphs 7–9), the types of cost that the model should calculate (paragraph 10), and other capabilities (paragraph 11). There will be one or more public notices seeking comment on specific issues that must be resolved before we adopt a final model.

6. Consistent with the Commission's order, the adopted model should be capable of estimating the forward-looking economic costs of an efficient wireline provider at a granular level—census block or smaller—in all areas of the country, including Alaska, Hawaii, Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, and Northern Marianas Islands. These granular cost estimates should capture the effects of scale and low utilization rates on costs. Thus, for example, models should take into account that in less densely populated areas the cost of shared facilities is spread over fewer locations, driving up the cost per location. In addition, it may be appropriate to estimate higher per-unit costs for small providers, or to reflect savings on costs such as overhead for large providers to reflect economies of scale. Models must also be capable of excluding areas served by unsubsidized competitors. Because available data will likely change between the deadline for filing models and the time a model is adopted and support levels are set, models should be able to incorporate changes to underlying data sources.

7. The Commission directed the Bureau ''to ensure that the model design

maximizes the number of locations that will receive robust, scalable broadband within the budgeted amounts.'' The Commission also delegated to the Bureau the choice of a greenfield or brownfield broadband model. To meet these objectives and evaluate alternative policy choices, models should be capable of estimating the costs of both brownfield and greenfield builds for multiple wireline technologies. In particular, models should be capable of estimating the costs of fiber-to-the-premises (FTTP) and digital subscriber loop (DSL) of varying loop lengths (*e.g.,* short-loop, VDSL-capable, 3,000-foot-loop DSL to 12,000-foot-loop DSL).

8. The forward-looking costs of an efficient provider calculated by models must be based on reasonable engineering assumptions. As the Commission noted, newer models can significantly improve the accuracy of modeled forward-looking costs by estimating the costs of efficient routing along roads. Models should also reflect how an efficient provider would likely evaluate deployment decisions. Given the five-year time horizon of CAF Phase II funding, existing deployments, and the economics of new investments, some deployments may not be appropriate for an efficient provider (e.g., a brownfield FTTP, or a greenfield DSL build-out). Decisions regarding what type of network to model will be made following further public input.

9. Similarly, models should be capable of estimating the costs of providing service over a shared network to all households, businesses and community anchor institutions within a geographic area, and appropriately allocating costs and capacity among those different users. By including all locations models will be capable of reflecting the economies of scale and scope associated with providing services over a shared network, thereby reducing the per-location cost of serving residential customers.

10. Next, models should be capable of incorporating a comprehensive range of different costs. Cost models created by the Commission in the past were capable of estimating initial capital costs (capex) as well as ongoing capex and operating expenses (opex); reflected variations in construction costs in different areas due not only to plant mix, but also to costs such as labor or transportation; and captured the impact on cost of economic and accounting lives of plant and equipment, and the impact of taxes and the cost of capital. Models for CAF support should capture a similarly comprehensive set of costs. In addition, prior models have allowed averaging of costs over different geographies, whether defined by the census *(e.g.,* census blocks or counties) or wireline networks (*e.g.,* wire centers or study areas); models for CAF support should have a similar capability.

11. Additional capabilities in models might prove useful, but could conceivably lead to a delay that outstrips the incremental value of those capabilities. To the extent these additional capabilities are present in any model submitted, or could be added easily, the Bureau will take that into account in evaluating the model. For example, one capability that could be useful could be the ability to model revenue in each geographic area, allowing the Bureau to take revenue into account in determining support thresholds, or to calculate cash flows for each year of a modeled five-year period of network costs, rather than steady-state (levelized) cost.

12. *Areas Served by Unsubsidized Competitors.* In the *USF/ICC Transformation Order and FNPRM,* the Commission directed the Bureau to publish, following adoption of the cost model, a list of all census blocks in price cap areas eligible for support. Areas eligible for support would exclude areas served by an ''unsubsidized competitor.'' Any models submitted should have the capability to carve out areas served by an unsubsidized competitor.

13. Price cap ETCs that accept a state-level commitment must offer broadband at actual speeds of at least 4 Mbps downstream and 1 Mbps downstream, and must offer at least 6 Mbps/1.5 Mbps by the end of the fifth year to a number of locations to be specified. The State Broadband Initiative (SBI) data used in the National Broadband Map are collected at a sufficiently granular level—census block or smaller—but none of the speed tiers corresponds to 4 Mbps/1Mbps. Breakpoints closest to the 4 Mbps downstream speed are 3 Mbps and 6 Mbps; breakpoints closest to 1 Mbps are 768 kbps and 1.5 Mbps. The Commission recognized that the best data available at this time to determine whether broadband is available at speeds at or above the 4 Mbps/1 Mbps speed threshold will likely be data on availability at 3 Mbps downstream and 768 kbps upstream, which is collected pursuant to SBI and the Commission's Form 477. It further noted that such data may be used as a proxy for the availability of 4 Mbps/1 Mbps broadband. Models should therefore have the ability to use the 3 Mbps/768 kbps tier from the SBI data to identify areas served by unsubsidized competitors. In addition, we note that the 6 Mbps/1.5 Mbps target for the end of the five-year funding period corresponds to speeds available directly from SBI and Form 477 data. Ideally, models should therefore also have the capability to incorporate SBI and 477 data regarding areas that have 6 Mbps/1.5 Mbps broadband. It may also be desirable for models to allow use of these data sources in combination with data from Warren Media, Nielsen, or other sources to identify areas with cable coverage. We will seek comment on appropriate data sources to identify areas served by ''unsubsidized competitors'' in a subsequent notice.

14. *Alaska, Hawaii, and U.S. Territories.* The Commission directed the Bureau to consider the unique circumstances of Alaska, Hawaii, Puerto Rico, the U.S. Virgin Islands and Northern Marianas Islands when adopting a cost model, and consider whether the model ultimately adopted adequately accounts for the costs faced by carriers serving these areas. In evaluating models, we will therefore consider the extent to which they are able to account for the costs of providing service in these areas. We will seek comment on these issues, including what data sources we could use to develop appropriate model inputs for these areas in a subsequent notice.

15. Interested parties may submit models or file comments on or before February 1, 2012. All pleadings are to reference WC Docket Nos. 10–90 and 05–337. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS), or by filing paper copies.

- *Electronic Filers:* Comments may be filed electronically using the Internet by accessing the ECFS: *http://fjallfoss.fcc.gov/ecfs2/.*
- *Paper Filers:* Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St. SW., Room TW–A325, Washington, DC 20554. All hand deliveries must be held together with rubber bands or fasteners. Any

envelopes must be disposed of *before* entering the building. The filing hours are 8 a.m. to 7 p.m. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street SW., Washington DC 20554.

People with Disabilities: To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an email to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (tty).

In addition, one copy of each pleading must be sent to each of the following:

(1) The Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street SW., Room CY–B402, Washington, DC 20554, *www.bcpiweb.com*; phone: (202) 488–5300 fax: (202) 488–5563;

(2) Katie King, Telecommunications Access Policy Division, Wireline Competition Bureau, 445 12th Street SW., Room 5–A317, Washington, DC 20554; email: *Katie.King@fcc.gov*; and

(3) Charles Tyler, Telecommunications Access Policy Division, Wireline Competition Bureau, 445 12th Street SW., Room 5–A452, Washington, DC 20554; email: *Charles.Tyler@fcc.gov.*

Filings and comments are also available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street SW., Room CY–A257, Washington, DC 20554. They may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone: (202) 488–5300, fax: (202) 488–5563, or via email *www.bcpiweb.com.*

This matter shall be treated as a ''permit-but-disclose'' proceeding in accordance with the Commission's *ex parte* rules. Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentation and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented generally is required. Other rules pertaining to oral and written *ex parte* presentations in permit-but-disclose proceedings are set forth in § 1.1206(b) of the Commission's rules.

For further information, please contact Patrick Halley, Wireline Competition Bureau at (202) 418–7550 or TTY (202) 418–0484.

Federal Communications Commission.

Trent Harkrader,

Division Chief, Wireline Competition Bureau.

[FR Doc. 2011–33152 Filed 12–23–11; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Agency Information Collection Activities: Submission for OMB Review; Comment Request (3064–0022)

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Notice of information collection to be submitted to OMB for review and approval under the Paperwork Reduction Act.

SUMMARY: In accordance with requirements of the Paperwork Reduction Act of 1995 (''PRA''), 44 U.S.C. 3501 *et seq.,* the FDIC may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. The FDIC, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on the renewal of existing information collection, as required by the PRA. On October 20, 2011 (76 FR 65192), the FDIC solicited public comment for a 60-day period on renewal of the following information collection: Uniform Application/Uniform Termination for Municipal Securities Principal or Representative (OMB No. 3064–0022). No comments were received. Therefore, the FDIC hereby gives notice of submission of its request for renewal to OMB for review.

DATES: Comments must be submitted on or before January 26, 2012.

ADDRESSES: Interested parties are invited to submit written comments to the FDIC by any of the following methods:

- *http://www.FDIC.gov/regulations/laws/federal/notices.html.*
- *Email: comments@fdic.gov.* Include the name of the collection in the subject line of the message.
- *Mail:* Gary A. Kuiper ((202) 898–3877), Counsel, Room F–1086, Federal Deposit Insurance Corporation, 550 17th Street NW., Washington, DC 20429.
- *Hand Delivery:* Comments may be hand-delivered to the guard station at the rear of the 17th Street Building (located on F Street), on business days between 7 a.m. and 5 p.m.

All comments should refer to the relevant OMB control number. A copy of the comments may also be submitted to the OMB desk officer for the FDIC: Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Gary A. Kuiper, at the FDIC address above.

SUPPLEMENTARY INFORMATION:

Proposal To Renew the Following Currently-Approved Collection of Information

Title: Uniform Application/Uniform Termination for Municipal Securities Principal or Representative.

OMB Number: 3064–0022.

Frequency of Response: On occasion.

Affected Public: Business or other financial institutions.

Estimated Number of Respondents: 75.

Estimated Time per Response: 1 hour.

Total Annual Burden: 75 hours.

General Description of Collection: An insured state nonmember bank which serves as a municipal securities dealer must file Form MSD–4 or MSD–5, as applicable, to permit an employee to become associated or to terminate the association with the municipal securities dealer. FDIC uses the form to ensure compliance with the professional requirements for municipal securities dealers in accordance with the rules of the Municipal Securities Rulemaking Board.

Request for Comment

Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the FDIC's functions, including whether the information has practical utility; (b) the accuracy of the estimates of the burden of the information collection, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology. All comments will become a matter of public record.

Dated at Washington, DC, this 20th day of December 2011.

Federal Deposit Insurance Corporation.

Valerie J. Best,

Assistant Executive Secretary.

[FR Doc. 2011–33076 Filed 12–23–11; 8:45 am]

BILLING CODE 6714–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Update to Notice of Financial Institutions for Which the Federal Deposit Insurance Corporation Has Been Appointed Either Receiver, Liquidator, or Manager

AGENCY: Federal Deposit Insurance Corporation.

ACTION: Update Listing of Financial Institutions in Liquidation.

SUMMARY: Notice is hereby given that the Federal Deposit Insurance Corporation (Corporation) has been appointed the sole receiver for the following financial institutions effective as of the Date Closed as indicated in the listing. This list (as updated from time to time in the **Federal Register**) may be relied upon as ''of record'' notice that the Corporation has been appointed receiver for purposes of the statement of policy published in the July 2, 1992 issue of the **Federal Register** (57 FR 29491). For further information concerning the identification of any institutions which have been placed in liquidation, please visit the Corporation Web site at *www.fdic.gov/bank/individual/failed/banklist.html* or contact the Manager of Receivership Oversight in the appropriate service center.

Dated: December 19, 2011.
Federal Deposit Insurance Corporation.

Pamela Johnson,
Regulatory Editing Specialist.

INSTITUTIONS IN LIQUIDATION
[In Alphabetical Order]

FDIC ref. No.	Bank name	City	State	Date closed
10415	Premier Community Bank of the Emerald Coast	Crestview	FL	12/16/2011
10416	Western National Bank	Phoenix	AZ	12/16/2011

[FR Doc. 2011–33020 Filed 12–23–11; 8:45 am]
BILLING CODE 6714–01–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The application also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than January 23, 2012.

A. Federal Reserve Bank of Kansas City (Dennis Denney, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198–0001:

1. *Central Financial Corporation, Hutchinson, Kansas,* to acquire an additional .25 percent, for a total of 7.05 percent, of the voting shares of TTAC Corp., and thereby indirectly acquire additional voting shares of Community First National Bank, both in Manhattan, Kansas.

Board of Governors of the Federal Reserve System, December 21, 2011.

Robert deV. Frierson,
Deputy Secretary of the Board.

[FR Doc. 2011–33096 Filed 12–23–11; 8:45 am]
BILLING CODE 6210–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Request for Nominations of Candidates To Serve on the Advisory Committee on Breast Cancer in Young Women (ACBCYW)

The CDC is soliciting nominations for membership on the ACBCYW. The Committee provides advice and guidance to the Secretary, HHS; the Assistant Secretary for Health; and the Director, CDC, regarding the formative research, development, implementation and evaluation of evidence-based activities designed to prevent breast cancer (particularly among those at heightened risk) and promote the early detection and support of young women who develop the disease. The advice provided by the Committee will assist in ensuring scientific quality, timeliness, utility, and dissemination of credible appropriate messages and resource materials.

Nominations are being sought for individuals who have expertise and qualifications necessary to contribute to the accomplishments of the committee's objectives. The Secretary, HHS, acting through the Director, CDC, shall appoint to the advisory committee nominees with expertise in breast cancer, disease prevention, early detection, diagnosis, public health, social marketing, genetic screening and counseling, treatment, rehabilitation, palliative care, and survivorship in young women, or in related disciplines with a specific focus on young women. Members may be invited to serve for up to four years. The next cycle of selection of candidates will begin in the winter of 2012, for selection of potential nominees to replace members whose terms will end on October 15, 2012 and October 15, 2013 respectively.

Selection of members is based on candidates' qualifications to contribute to the accomplishment of ACBCYW objectives *http://www.cdc.gov/maso/FACM/facmACBCYW.htm.* The U.S. Department of Health and Human Services will give close attention to equitable geographic distribution and to minority and female representation so long as the effectiveness of the Committee is not impaired. Appointments shall be made without discrimination on the basis of age, race, ethnicity, gender, sexual orientation, HIV status, disability, and cultural, religious, or socioeconomic status. Consideration is given to a broad

representation of geographic areas within the U.S., with diverse representation of both genders, ethnic and racial minorities, and persons with disabilities. Nominees must be U.S. citizens, and cannot be full-time employees of the U.S. Government.

Candidates should submit the following items:

- Current curriculum vitae or resume, including complete contact information (name, affiliation, mailing address, telephone numbers, fax number, email address);
- A 150 word biography for the nominee;
- At least one letter of recommendation from a person(s) not employed by the U.S. Department of Health and Human Services. Candidates may submit letter(s) from current HHS employees if they wish, but at least one letter must be submitted by a person not employed by HHS.

Nominations should be submitted (postmarked or received) by January 25, 2012.

- *Electronic submission:* You may submit nominations, including attachments, electronically to *acbcyw@cdc.gov*.
- *Regular, Express or Overnight Mail:* Written nominations may be submitted to the following addressee only: Temeika L. Fairley, Ph.D., c/o ACBCYW Designated Federal Officer, CDC, 4770 Buford Highway NE., Mailstop K–52, Atlanta, Georgia 30341.

Telephone and facsimile submissions cannot be accepted. Nominations may be submitted by the candidate or by the person/organization recommending the candidate.

Candidates invited to serve will be asked to submit the ''Confidential Financial Disclosure Form for Special Government Employees Serving on Federal Advisory Committees at the Centers for Disease Control and Prevention.'' This form allows CDC to determine whether there is a statutory conflict between that person's public responsibilities as a Special Government Employee and private interests and activities, or the appearance of a lack of impartiality, as defined by Federal regulation. The form may be viewed and downloaded at *http://www.usoge.gov/forms/oge450_pdf/oge450_accessible.pdf*. This form should not be submitted as part of the nomination.

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and the Agency for Toxic Substances and Disease Registry.

Dated: December 20, 2011.

Elaine L. Baker,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. 2011–33092 Filed 12–23–11; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2011–N–0915]

Agency Information Collection Activities; Proposed Collection; Comment Request; Guidance for Industry on Postmarketing Adverse Event Reporting for Nonprescription Human Drug Products Marketed Without an Approved Application

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing an opportunity for public comment on the proposed collection of certain information by the Agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal Agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on the FDA guidance for industry on ''Postmarketing Adverse Event Reporting for Nonprescription Human Drug Products Marketed Without an Approved Application.'' This guidance document provides recommendations on postmarketing serious adverse event reporting for nonprescription (over-the-counter) human drugs marketed without an approved application. It provides recommendations on the minimum data elements that should be included in a serious adverse event report, the label that should be included with the report, reporting formats for paper and electronic submissions, and how and where to submit the reports.

DATES: Submit either electronic or written comments on the collection of information by February 27, 2012.

ADDRESSES: Submit electronic comments on the collection of information to *http://www.regulations.gov*. Submit written comments on the collection of information to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852. All comments should be identified with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Juanmanuel Vilela, Office of Information Management, Food and Drug Administration, 1350 Piccard Dr. PI50–400B, Rockville, MD 20850, (301) 796–7651, *juanmanuel.vilela@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal Agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes Agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal Agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Guidance for Industry on Postmarketing Adverse Event Reporting for Nonprescription Human Drug Products Marketed Without an Approved Application—(OMB Control Number 0910–0636)—Extension

Respondents to this collection of information are manufacturers, packers, and distributors whose name (under

section 502(b)(1) (21 U.S.C. 352(b)(1)) of the Federal Food, Drug, and Cosmetic Act (FD&C Act)) appears on the label of a nonprescription drug marketed in the United States.

FDA is requesting public comment on estimates of annual submissions from these respondents, as required by the Dietary Supplement and Nonprescription Drug Consumer Protection Act (Public Law 109–462) and described in the guidance. This guidance document discusses what should be included in a serious adverse drug event report submitted under section 760(b)(1) (21 U.S.C. 379aa(b)(1)) of the FD&C Act, including followup reports under 760(c)(2) (21 U.S.C. 379aa(c)(2)) of the FD&C Act, and how to submit these reports. The estimates for annual reporting burden and recordkeeping are based on FDA's knowledge of adverse drug experience reports historically submitted per year for prescription drug products and for nonprescription drug products marketed under an approved application, including knowledge about the time needed to prepare the reports and to maintain records.

FDA receives approximately 2,500 serious adverse event reports for nonprescription drug products marketed under approved applications, which comprise approximately 20 percent of the overall nonprescription drug market. Based on this experience, we estimate between 10,000 and 15,000 (*i.e.,* 12,500) total annual responses for nonprescription drugs marketed without an approved application.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

Activity	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response (in hours)	Total hours
Reports of Serious Adverse Drug Events (21 U.S.C. 379aa(b) and (c))	50	250	12,500	2	25,000
Total					25,000

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

Section 760(e) (21 U.S.C. 379aa(e)) of the FD&C Act also requires that responsible persons maintain records of nonprescription adverse event reports, whether or not the event is serious, for a period of 6 years. The guidance recommends that responsible persons maintain records of efforts to obtain the minimum data elements for a report of a serious adverse drug event and any followup reports. Although the guidance does not provide recommendations on recordkeeping activities generally under section 760(e) of the FD&C Act, FDA is providing an estimate for the burden of this collection. Historically, serious adverse event reports comprise approximately two-thirds and nonserious adverse event reports comprise approximately one-third of the total number of postmarketing adverse event reports associated with drugs and biologic therapeutics (except vaccines) received by FDA. Based on this generalization, FDA estimates the total annual records to be approximately 20,000 records per year. FDA estimates that it takes 5 hours to maintain each record and the recordkeeping burden as follows:

TABLE 2—ESTIMATED ANNUAL RECORDKEEPING BURDEN [1]

Activity	Number of recordkeepers	Number of records per recordkeeper	Total annual records	Average burden per recordkeeping (in hours)	Total hours
Recordkeeping (21 U.S.C. 379aa(e)(1))	200	100	20,000	5	100,000
Total					100,000

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

Therefore, the estimated annual reporting burden for this information is 25,000 hours and the estimated annual recordkeeping burden is 100,000 hours.

Dated: December 19, 2011.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2011–33140 Filed 12–23–11; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2011–D–0787]

Draft Guidance for Industry and Food and Drug Administration Staff; Investigational Device Exemptions for Early Feasibility Medical Device Clinical Studies, Including Certain First in Human Studies; Extension of Comment Period

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice; extension of comment period.

SUMMARY: The Food and Drug Administration (FDA) is extending the comment period for the notice that appeared in the **Federal Register** of Thursday, November, 10, 2011 (76 FR 70150). In the notice, FDA requested comments on the draft guidance that addresses the approaches FDA intends to facilitate early feasibility studies of medical devices, using appropriate risk mitigation strategies, under the investigational device exemption (IDE) requirements. The Agency is taking this

action to allow interested persons additional time to submit comments.

DATES: Submit either electronic or written comments and information by March 9, 2012.

ADDRESSES: Submit electronic comments on the draft guidance to *http://www.regulations.gov.* Submit written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Identify comments with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Dorothy Abel, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, rm. 1204, Silver Spring, MD 20993–0002, (301) 796–6366.

I. Background

In the **Federal Register** of November 10, 2011 (76 FR 70150), FDA published a notice announcing the availability of the draft guidance entitled ''Investigational Device Exemptions (IDE) for Early Feasibility Medical Device Clinical Studies, Including Certain First in Human (FIH) Studies'' and the opening of a public docket to receive comments on the key principles unique to the justification for, and design of, early feasibility studies, as well as outlines the general principles for preparing and reviewing early feasibility study IDE applications that are discussed in the guidance. Interested persons were invited to submit comments by February 8, 2012. At this time, the Agency is extending the comment period until March 9, 2012, to continue to receive public comments. Comments submitted to the docket will enhance the development and review of IDE applications for early feasibility studies of significant risk for the industry and the Center for Devices and Radiological Health.

II. Request for Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) either electronic or written comments regarding this document. It is only necessary to submit one set of comments. It is no longer necessary to send two copies of mailed comments. Identify comments with the docket number found in the brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

Dated: December 21, 2011.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2011–33142 Filed 12–23–11; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2011–D–0790]

Draft Guidance for Industry, Clinical Investigators, Institutional Review Boards, and Food and Drug Administration Staff; Food and Drug Administration Decisions for Investigational Device Exemption (IDE) Clinical Investigations; Extension of Comment Period

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice; extension of comment period.

SUMMARY: The Food and Drug Administration (FDA) is extending the comment period for the notice that appeared in the **Federal Register** of Thursday, November, 10, 2011 (76 FR 70151). In the notice, FDA requested comments on the draft guidance that has been developed to promote the initiation of clinical investigations to evaluate the medical devices under FDA's Investigational Device Exemptions (IDE) regulations. The Agency is taking this action to allow interested persons additional time to submit comments.

DATES: Submit written or electronic comments and information by March 9, 2012.

ADDRESSES: Submit electronic comments on the draft guidance to *http://www.regulations.gov.* Submit written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Identify comments with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Owen Faris, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, rm. 1108, Silver Spring, MD 20993–0002, (301) 796–6356.

Stephen Ripley, Center for Biologics Evaluation and Research (HFM–17), Food and Drug Administration, 1401 Rockville Pike, suite 200N, Rockville, MD 20852, (301) 827–6210.

SUPPLEMENTARY INFORMATION:

I. Background

In the **Federal Register** of November 10, 2011 (76 FR 70151), FDA published a notice announcing the availability of the draft guidance entitled ''FDA Decisions for Investigational Device Exemption (IDE) Clinical Investigations'' and the opening of a public docket to receive comments on the development of methods to allow a clinical investigation to begin under certain circumstances, even when there are outstanding issues regarding the IDE submission. Interested persons were invited to submit comments by February 8, 2012. At this time, the Agency is extending the comment period until March 9, 2012, to continue to receive public comments. Comments submitted to the docket will assist in promoting timely clinical investigations actions that the Center for Devices and Radiological Health and Center for Biologics Evaluation and Research can consider taking for IDE submissions.

II. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) either electronic or written comments regarding this document. It is only necessary to submit one set of comments. It is no longer necessary to send two copies of mailed comments. Identify comments with the docket number found in the brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

Dated: December 21, 2011.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2011–33141 Filed 12–23–11; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2011–N–0002]

Endocrinologic and Metabolic Drugs Advisory Committee; Notice of Meeting

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

This notice announces a forthcoming meeting of a public advisory committee of the Food and Drug Administration (FDA). The meeting will be open to the public.

Name of Committee: Endocrinologic and Metabolic Drugs Advisory Committee.

General Function of the Committee: To provide advice and recommendations to the Agency on FDA's regulatory issues.

Date and Time: The meeting will be held on February 22, 2012, from 8 a.m. to 5 p.m.

Location: FDA White Oak Campus, 10903 New Hampshire Ave., Bldg. 31 Conference Center, the Great Room (rm. 1503), Silver Spring, MD 20993–0002. Information regarding special accommodations due to a disability, visitor parking, and transportation may be accessed at: *http://www.fda.gov/AdvisoryCommittees/default.htm;* under the heading ''Resources for You'', click on ''Public Meetings at the FDA White Oak Campus''. Please note that visitors to the White Oak Campus must enter through Bldg. 1.

Contact Person: Paul Tran, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 31, rm. 2417, Silver Spring, MD 20993–0002, (301) 796–9001, Fax: (301) 847–8533, email: *EMDAC@fda.hhs.gov,* or FDA Advisory Committee Information Line, 1–(800) 741–8138 (301) 443–0572 in the Washington, DC area), and follow the prompts to the desired center or product area. Please call the Information Line for up-to-date information on this meeting. A notice in the **Federal Register** about last minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice. Therefore, you should always check the Agency's Web site and call the appropriate advisory committee hot line/phone line to learn about possible modifications before coming to the meeting.

Agenda: The committee will discuss the safety and efficacy of new drug application (NDA) 22–580, proposed trade name QNEXA (phentermine/topiramate) Controlled-Release Capsules, manufactured by VIVUS, Inc., as an adjunct to diet and exercise for weight management in patients with a body mass index (BMI) equal to or greater than 30 kilograms (kg) per square meter or a BMI equal to or greater than 27 kg per square meter if accompanied by weight-related comorbidities.

FDA intends to make background material available to the public no later than 2 business days before the meeting. If FDA is unable to post the background material on its Web site prior to the meeting, the background material will be made publicly available at the location of the advisory committee meeting, and the background material will be posted on FDA's Web site after the meeting. Background material is available at *http://www.fda.gov/AdvisoryCommittees/Calendar/default.htm.* Scroll down to the appropriate advisory committee link.

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person on or before February 7, 2012. Oral presentations from the public will be scheduled between approximately 1 p.m. and 2 p.m. Those individuals interested in making formal oral presentations should notify the contact person and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation on or before January 30, 2012. Time allotted for each presentation may be limited. If the number of registrants requesting to speak is greater than can be reasonably accommodated during the scheduled open public hearing session, FDA may conduct a lottery to determine the speakers for the scheduled open public hearing session. The contact person will notify interested persons regarding their request to speak by January 31, 2012.

Persons attending FDA's advisory committee meetings are advised that the Agency is not responsible for providing access to electrical outlets.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Paul Tran at least 7 days in advance of the meeting.

FDA is committed to the orderly conduct of its advisory committee meetings. Please visit our Web site at *http://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm111462.htm* for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: December 20, 2011.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2011–33059 Filed 12–23–11; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2011–N–0002]

Request for Nominations for Voting Members on Public Advisory Panels or Committees

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is requesting nominations for voting members to serve on the Device Good Manufacturing Practice Advisory Committee, certain device panels of the Medical Devices Advisory Committee, and the National Mammography Quality Assurance Advisory Committee in the Center for Devices and Radiological Health. Nominations will be accepted for current vacancies and those that will or may occur through December 31, 2012.

FDA has a special interest in ensuring that women, minority groups, and individuals with disabilities are adequately represented on advisory committees and, therefore, encourages nominations of qualified candidates from these groups.

DATES: Because scheduled vacancies occur on various dates throughout each year, no cutoff date is established for the receipt of nominations. However, when possible, nominations should be received at least 6 months before the date of scheduled vacancies for each year, as indicated in this notice.

ADDRESSES: All nominations for membership should be sent electronically to *cv@oc.fda.gov,* or by mail to Advisory Committee Oversight and Management Staff, 10903 New Hampshire Ave., Bldg. 32, rm. 5103, Silver Spring, MD 20993–0002.

Information about becoming a member on a FDA advisory committee can also be obtained by visiting FDA's Web site at *http://www.fda.gov/AdvisoryCommittees/default.htm.*

FOR FURTHER INFORMATION CONTACT: For specific Committee/Panel questions, contact the following persons listed in table 1 of this document.

TABLE 1—CONTACT PERSONS AND COMMITTEE/PANEL NAMES

Contact person	Committee/certain device panels of the Medical Devices Advisory Committee
LCDR Sara Anderson, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, rm. 1544, Silver Spring, MD 20993, 301–796–7046, email: *Sara.Anderson@fda.hhs.gov*.	National Mammography Quality Assurance Advisory Committee. Clinical Chemistry and Clinical Toxicology Devices Panel. Dental Products Panel. General Hospital and Personal Use Devices Panel. Ophthalmic Devices Panel.
Shanika Craig, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, rm. 1613, Silver Spring, MD 20993, 301–796–6639, email: *Shanika.Craig@fda.hhs.gov*.	Microbiology Devices Panel. Obstetrics and Gynecology Devices Panel.
Lt. Avena Russell, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, rm. 1535, Silver Spring, MD 20993, 301–796–3805, email: *Avena.Russell@fda.hhs.gov*.	Device Good Manufacturing Practice Advisory Committee. Gastroenterology and Urology Devices Panel. General and Plastic Surgery Devices Panel. Neurological Devices Panel. Orthopedic and Rehabilitation Devices Panel.
Jamie Waterhouse, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, rm. 1544, Silver Spring, MD 20993, 301–796–3036, email *Jamie.Waterhouse@fda.hhs.gov*.	Circulatory System Devices Panel. Ear, Nose and Throat Devices Panel. Molecular and Clinical Genetics Devices Panel.

SUPPLEMENTARY INFORMATION:

I. Vacancies

FDA is requesting nominations of voting members for vacancies listed as follows:

TABLE 2—COMMITTEE/PANEL AND VACANCIES

Committee/Panel expertise needed	Current & upcoming vacancies	Approximate date needed
Circulatory System Devices Panel of the Medical Devices Advisory Committee—Interventional cardiologists, electrophysiologists, invasive (vascular) radiologists, vascular and cardiothoracic surgeons, and cardiologists with special interest in congestive heart failure.	2	July 1, 2012.
Clinical Chemistry and Clinical Toxicology Devices Panel of the Medical Devices Advisory Committee—Doctors of medicine or philosophy with experience in clinical chemistry, clinical toxicology, clinical pathology, clinical laboratory medicine, endocrinology, and diabetes.	2	March 1, 2012.
Dental Products Panel of the Medical Devices Advisory Committee—Dentists, engineers, and scientists who have expertise in the areas of dental implants, dental materials, periodontology, tissue engineering, and dental anatomy.	1	November 1, 2012.
Ear, Nose and Throat Devices Panel of the Medical Devices Advisory Committee—Otologists, neurotologists, and audiologists.	1	November 1, 2012.
Gastroenterology and Urology Devices Panel of the Medical Devices Advisory Committee–Transplant specialists, gastroenterologists, urologists, and nephrologists.	3	January 1, 2013.
General and Plastic Surgery Devices Panel of the Medical Devices Advisory Committee—Surgeons (general, plastic, reconstructive, pediatric, thoracic, abdominal, pelvic and endoscopic); dermatologists; experts in biomaterials, lasers, wound healing, and quality of life; and biostatisticians.	1 2	Immediately. September 1, 2012.
General Hospital and Personal Use Devices Panel of the Medical Devices Advisory Committee—Internists, pediatricians, neonatologists, endocrinologists, gerontologists, nurses, biomedical engineers or microbiologists/infection control practitioners or experts.	1	January 1, 2013.
Microbiology Devices Panel of the Medical Devices Advisory Committee—Infectious disease clinicians, e.g., pulmonary disease specialists, sexually transmitted disease specialists, pediatric infectious disease specialists, experts in tropical medicine and emerging infectious diseases, biofilm development; mycologists; clinical microbiologists and virologists; clinical virology and microbiology laboratory directors, with expertise in clinical diagnosis and in vitro diagnostic assays, e.g., hepatologists; molecular biologists.	1	March 1, 2012
Molecular and Clinical Genetics Devices Panel of the Medical Devices Advisory Committee—Experts in human genetics and in the clinical management of patients with genetic disorders, e.g., pediatricians, obstetricians, and neonatologists. Individuals with training in inborn errors of metabolism, biochemical and/or molecular genetics, population genetics, epidemiology and related statistical training, and clinical molecular genetics testing (e.g., genotyping, array CGH, etc.). Individuals with experience in genetics counseling and medical ethics are also desired, and individuals with experience in ancillary fields of study will be considered.	1	June 1, 2012.
Neurological Devices Panel of the Medical Devices Advisory Committee—Neurosurgeons (cerebrovascular and pediatric), neurologists (stroke, pediatric, pain management, and movement disorders), interventional neuroradiologists, psychiatrists, and biostatisticians.	2	December 1, 2012.

TABLE 2—COMMITTEE/PANEL AND VACANCIES—Continued

Committee/Panel expertise needed	Current & upcoming vacancies	Approximate date needed
Obstetrics and Gynecology Devices Panel of the Medical Devices Advisory Committee—Experts in perinatology, embryology, reproductive endocrinology, pediatric gynecology, gynecological oncology, operative hysteroscopy, pelviscopy, electrosurgery, laser surgery, assisted reproductive technologies, contraception, postoperative adhesions, and cervical cancer and colposcopy; biostatisticians and engineers with experience in obstetrics/gynecology devices; urogynecologists; experts in breast care; experts in gynecology in the older patient; experts in diagnostic (optical) spectroscopy; experts in midwifery; labor and delivery nursing.	1	February 1, 2012.
Ophthalmic Devices Panel of the Medical Devices Advisory Committee—Ophthalmologists specializing in cataract and refractive surgery and vitreo-retinal surgery, in addition to vision scientists, optometrists, and biostatisticians practiced in ophthalmic clinical trials.	1	Immediately. November 1, 2012.
Orthopaedic and Rehabilitation Devices Panel of the Medical Devices Advisory Committee—Orthopedic surgeons (joint, spine, trauma, and pediatric); rheumatologists; engineers (biomedical, biomaterials, and biomechanical); experts in rehabilitation medicine, sports medicine, and connective tissue engineering; and biostatisticians.	2	September 1, 2012.
National Mammography Quality Assurance Advisory Committee—Physicians, practitioners, or other health professionals whose clinical practice, research specialization, or professional expertise include a significant focus on mammography.	3	February 1, 2012.
Device Good Manufacturing Practice Advisory Committee—Vacancies include a public representative and a health professional representative.	2	June 1, 2012.

II. Functions

A. Medical Devices Advisory Committee

The committee reviews and evaluates data on the safety and effectiveness of marketed and investigational devices and makes recommendations for their regulation. The panels engage in a number of activities to fulfill the functions of the Federal Food, Drug, and Cosmetic Act (the FD&C Act) envisions for device advisory panels. With the exception of the Medical Devices Dispute Resolution Panel, each panel, according to its specialty area performs the following duties: (1) Advises the Commissioner of Food and Drugs (the Commissioner) regarding recommended classification or reclassification of devices into one of three regulatory categories, (2) advises on any possible risks to health associated with the use of devices, (3) advises on formulation of product development protocols; (4) reviews premarket approval applications for medical devices, (5) reviews guidelines and guidance documents, (6) recommends exemption of certain devices from the application of portions of the FD&C Act, (7) advises on the necessity to ban a device, and (8) responds to requests from the Agency to review and make recommendations on specific issues or problems concerning the safety and effectiveness of devices. With the exception of the Medical Devices Dispute Resolution Panel, each panel, according to its specialty area, may also make appropriate recommendations to the Commissioner on issues relating to the design of clinical studies regarding the safety and effectiveness of marketed and investigational devices.

The Dental Products Panel also functions at times as a dental drug panel. The functions of the dental drug panel are to evaluate and recommend whether various prescription drug products should be changed to over-the-counter status and to evaluate data and make recommendations concerning the approval of new dental drug products for human use.

The Medical Devices Dispute Resolution Panel provides advice to the Commissioner on complex or contested scientific issues between FDA and medical device sponsors, applicants, or manufacturers relating to specific products, marketing applications, regulatory decisions and actions by FDA, and Agency guidance and policies. The panel makes recommendations on issues that are lacking resolution, are highly complex in nature, or result from challenges to regular advisory panel proceedings or Agency decisions or actions.

B. National Mammography Quality Assurance Advisory Committee

The functions of the committee are to advise FDA on the following topics: (1) Developing appropriate quality standards and regulations for mammography facilities; (2) developing appropriate standards and regulations for bodies accrediting mammography facilities under this program; (3) developing regulations with respect to sanctions; (4) developing procedures for monitoring compliance with standards; (5) establishing a mechanism to investigate consumer complaints; (6) reporting new developments concerning breast imaging which should be considered in the oversight of mammography facilities; (7) determining whether there exists a shortage of mammography facilities in rural and health professional shortage areas and determining the effects of personnel on access to the services of such facilities in such areas; (8) determining whether there will exist a sufficient number of medical physicists after October 1, 1999, and (9) determining the costs and benefits of compliance with these requirements.

C. Device Good Manufacturing Practice Advisory Committee

The functions of the committee are to review proposed regulations issuance regarding good manufacturing practices governing the methods used in, and the facilities and controls used for manufacture, packaging, storage, installation, and servicing of devices, and make recommendations regarding the feasibility and reasonableness of those proposed regulations. The committee also reviews and makes recommendations on proposed guidelines developed to assist the medical device industry in meeting the good manufacturing practice requirements, and provides advice with regard to any petition submitted by a manufacturer for an exemption or variance from good manufacturing practice regulations.

Section 520 of the FD&C Act, (21 U.S.C. 360(j)), as amended, provides that the Device Good Manufacturing Practice Advisory Committee shall be composed of nine members as follows: (1) Three of the members shall be appointed from persons who are officers

or employees of any Federal, State, or local government; (2) two shall be representatives of the interests of the device manufacturing industry; (3) two shall be representatives of the interests of physicians and other health professionals; and (4) two shall be representatives of the interests of the general public.

III. Qualifications

A. Panels of the Medical Devices Advisory Committee

Persons nominated for membership on the panels should have adequately diversified experience appropriate to the work of the panel in such fields as clinical and administrative medicine, engineering, biological and physical sciences, statistics, and other related professions. The nature of specialized training and experience necessary to qualify the nominee as an expert suitable for appointment may include experience in medical practice, teaching, and/or research relevant to the field of activity of the panel. The particular needs at this time for each panel are listed in section I of this document. The term of office is up to 4 years, depending on the appointment date.

B. National Mammography Quality Assurance Advisory Committee

Persons nominated for membership should be physicians, practitioners, and other health professionals, whose clinical practice, research specialization, or professional expertise include a significant focus on mammography and individuals identified with consumer interests. Prior experience on Federal public advisory committees in the same or similar subject areas will also be considered relevant professional expertise.

The particular needs at this time for this committee are listed in section I of this document. The term of office is up to 4 years, depending on the appointment date.

C. Device Good Manufacturing Practice Advisory Committee

Persons nominated for membership as a health professional or officer or employee of any Federal, State, or local government should have knowledge of or expertise in any one or more of the following areas: Quality assurance concerning the design, manufacture, and use of medical devices. To be eligible for selection as a representative of the general public, nominees should possess appropriate qualifications to understand and contribute to the committee's work. The particular needs at this time for this committee are listed in section I of this document. The term of office is up to 4 years, depending on the appointment date.

IV. Nomination Procedures

Any interested person may nominate one or more qualified persons for membership on one or more of the advisory panels or advisory committees. Self-nominations are also accepted. Nominations must include a current, complete résumé or curriculum vitae for each nominee, and their current business address and/or home address, telephone number, and email address if available. Nominations must specify the advisory panel(s) or advisory committee(s) for which the nominee is recommended. Nominations must also acknowledge that the nominee is aware of the nomination unless self-nominated. FDA will ask potential candidates to provide detailed information concerning such matters related to financial holdings, employment, and research grants and/or contracts to permit evaluation of possible sources of conflict of interest.

This notice is issued under the Federal Advisory Committee Act (5 U.S.C. app. 2) and 21 CFR part 14 relating to advisory committees.

Dated: December 20, 2011.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2011–33060 Filed 12–23–11; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2011–N–0002]

Request for Nominations for Voting Members on a Public Advisory Committee; Food Advisory Committee

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is requesting nominations for members with expertise in epidemiology, pediatric development, and analytical chemistry or food science to serve on the Food Advisory Committee, Center for Food Safety and Applied Nutrition, Office of Regulations, Policy, and Social Sciences.

FDA has a special interest in ensuring that women, minority groups, and individuals with disabilities are adequately represented on advisory committees and, therefore, encourages nominations of qualified candidates from these groups.

DATES: Nominations received on or before February 27, 2012 will be given first consideration for membership on the Food Advisory Committee. Nominations received after February 27, 2012 will be considered for nomination to the committee if nominees are still needed.

ADDRESSES: All nominations for membership should be sent electronically to *cv@oc.fda.gov* or by mail to Advisory Committee Oversight and Management Staff, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 32, rm. 5103, Silver Spring, MD 20993–0002.

FOR FURTHER INFORMATION CONTACT: *Regarding all nomination questions for membership, the primary contact is:* Carolyn Jeletic, Office of Regulations, Policy, and Social Sciences, Center of Food Safety and Applied Nutrition (HFS–024), Food and Drug Administration, 5100 Paint Branch Ave., College Park, MD 20740, (240) 402–1913, FAX: (301) 436–2657, *Carolyn.Jeletic@fda.hhs.gov.*

Information about becoming a member on an FDA advisory committee can also be obtained by visiting FDA's Web site by using the following link: *http://www.fda.gov/AdvisoryCommittees/default.htm.*

SUPPLEMENTARY INFORMATION: FDA is requesting nomination for voting members on the Food Advisory Committee.

I. General Description of the Committee Duties

The Food Advisory Committee (the Committee) provides advice to the Commissioner of Food and Drugs (the Commissioner) and other appropriate officials, on emerging food safety, food science, nutrition, and other food-related health issues that FDA considers of primary importance for its food and cosmetics programs.

The Committee may be charged with reviewing and evaluating available data and making recommendations on matters such as those relating to: (1) Broad scientific and technical food- or cosmetic-related issues, (2) the safety of new foods and food ingredients, (3) labeling of foods and cosmetics, (4) nutrient needs and nutritional adequacy, and (5) safe exposure limits for food contaminants.

The Committee may also be asked to provide advice and make recommendations on ways of communicating to the public the potential risks associated with these

issues and on approaches that might be considered for addressing the issues.

II. Criteria for Voting Members

Members and the Chair are selected by the Commissioner or designee from among individuals knowledgeable in the fields of physical sciences, biological and life science, food science, risk assessment, nutrition, food technology, molecular biology, and other relevant scientific and technical disciplines.

Members will be invited to serve for terms of up to 4 years. The Committee consists of 17 standing members; of that 15 are voting members, of whom 2 are technically qualified members identified with consumer interest. In addition to the voting members the Committee has 2 nonvoting members who are identified with industry interests.

III. Nomination Procedures

Any interested person may nominate one or more qualified individuals for membership on the advisory committee. Self-nominations are also accepted. Nominations must include a current, complete résumé or curriculum vitae for each nominee, including current business address and/or home address, telephone number, and email address if available. Nominations must also specify the advisory committee for which the nominee recommended. Nominations must also acknowledge that the nominee is aware of the nomination unless self-nominated. FDA will ask potential candidates to provide detailed information concerning such matters related to financial holdings, employment, and research grants and/or contracts to permit evaluation of possible sources of conflicts of interest.

This notice is issued under the Federal Advisory Committee Act (5 U.S.C. app. 2) and 21 CFR part 14, relating to advisory committees.

Dated: December 20, 2011.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2011–33108 Filed 12–23–11; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Dental & Craniofacial Research; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the National Advisory Dental and Craniofacial Research Council.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and/or contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications and/or contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Advisory Dental and Craniofacial Research Council.

Date: January 30, 2012.

Open: 8:30 a.m. to 11:15 a.m.

Agenda: Report to the Director, NIDCR.

Place: National Institutes of Health, Building 31C, 31 Center Drive, Conference Room 10, Bethesda, MD 20892.

Closed: 1 p.m. to Adjournment.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Building 31C, 31 Center Drive, Conference Room 10, Bethesda, MD 20892.

Contact Person: Alicia J. Dombroski, PhD, Director, Division of Extramural Activities, National Institute of Dental and Craniofacial Research, National Institutes of Health, Bethesda, MD 20892.

Information is also available on the Institute's/Center's home page: *http://www.nidcr.nih.gov/about*, where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.121, Oral Diseases and Disorders Research, National Institutes of Health, HHS)

Dated: December 20, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–33133 Filed 12–23–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Library of Medicine Notice of Meeting

Pursuant to section 10(a) of the Federal Advisory Committee Act, as amended (5 U.S.C. App), notice is hereby given of a meeting of the Board of Scientific Counselors, National Center for Biotechnology Information.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public as indicated below in accordance with the provisions set forth in section 552b(c)(6), Title 5 U.S.C., as amended for review, discussion, and evaluation of individual intramural programs and projects conducted by the National Library of Medicine, including consideration of personnel qualifications and performance, and the competence of individual investigators, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Board of Scientific Counselors, National Center for Biotechnology Information.

Date: April 17, 2012.

Open: 8:30 a.m. to 12 p.m.

Agenda: Program Discussion.

Place: National Library of Medicine, Building 38, 2nd Floor, Board Room, 8600 Rockville Pike, Bethesda, MD 20892.

Closed: 12 p.m. to 2 p.m.

Agenda: To review and evaluate personal qualifications and performance, and competence of individual investigators.

Place: National Library of Medicine, Building 38, 2nd Floor, Board Room, 8600 Rockville Pike, Bethesda, MD 20892.

Open: 2 p.m. to 3 p.m.

Agenda: Program Discussion.

Place: National Library of Medicine, Building 38, 2nd Floor, Board Room, 8600 Rockville Pike, Bethesda, MD 20892.

Contact Person: David J. Lipman, MD, Director, National Center of Biotechnology Information, National Library of Medicine, Department of Health and Human Services, Building 38A, Room 8N805, Bethesda, MD 20892, (301) 435–5985, *dlipman@mail.nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

(Catalogue of Federal Domestic Assistance Program No. 93.879, Medical Library Assistance, National Institutes of Health, HHS).

Dated: December 20, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–33137 Filed 12–23–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Disorders; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.) notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The purpose of this meeting is to evaluate requests for preclinical development resources for potential new therapeutics for type 1 diabetes. The outcome of the evaluation will be a decision whether NIDDK should support the request and make available contract resources for development of the potential therapeutic to improve the treatment or prevent the development of type 1 diabetes and its complications. The research proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the proposed research projects, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Type 1 Diabetes—Rapid Access to Intervention Development Special Emphasis Panel, National Institute of Diabetes and Digestive and Kidney Diseases.

Date: January 26, 2012.

Time: 3 p.m.–5 p.m.

Agenda: To evaluate requests for preclinical development resources for potential new therapeutics for type 1 diabetes and its complications.

Place: 6707 Democracy Boulevard, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Dr. Guillermo Arreaza, Senior Advisor, Diabetes, Translation Research, Division of Diabetes, Endocrinology and Metabolic Diseases, NIDDK, NIH, 6707 Democracy Boulevard, Bethesda, MD 20892–5460, (301) 594–4724.

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 98.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: December 20, 2011.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–33136 Filed 12–23–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Environmental Health Sciences; Notice of Meeting

Pursuant to section 10(a) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the Interagency Breast Cancer and Environmental Research Coordinating Committee.

The meeting will be open to the public, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

Name of Committee: Interagency Breast Cancer and Environmental Research Coordinating Committee.

Date: January 4, 2012.

Time: 1 p.m. to 3 p.m.

Agenda: The purpose of the meeting is to continue the work of the Research Process Subcommittee as it addresses a broad set of objectives related to the overall mandate of the IBCERC including: setting research priorities, decreasing redundancies across federal and non-governmental organizations, developing a process for soliciting research, fostering collaborations, highlighting peer review issues, and identifying the most appropriate models for agencies to work together. The meeting agenda will be available on the Web at *http://www.niehs.nih.gov/about/orgstructure/boards/ibcercc/*.

Place: Nat. Inst. of Environmental Health Sciences, Building 101, Rodbell Auditorium, 111 T. W. Alexander Drive, Research Triangle Park, NC 27709, (Conference Call: This meeting will be conducted remotely, via conference call. To attend the meeting, please RSVP via email to *ibcercc@niehs.nih.gov* at least 10 days in advance and instructions for joining the meeting will be provided.)

Contact Person: Gwen W. Collman, Ph.D., Director, Division of Extramural Research and Training, Nat. Inst. of Environmental Health Sciences, National Institutes of Health, 615 Davis Dr., KEY615/3112, Research Triangle Park, NC 27709, (919) 541–4980, *collman@niehs.nih.gov* .

Any member of the public interested in presenting oral comments to the committee should submit their remarks in writing at least 10 days in advance of the meeting. Comments in document format (*i.e.* WORD, Rich Text, PDF) may be submitted via email to *ibcercc@niehs.nih.gov* or mailed to the Contact Person listed on this notice. You do not need to attend the meeting in order to submit comments.

(Catalogue of Federal Domestic Assistance Program Nos. 93.115, Biometry and Risk Estimation—Health Risks from Environmental Exposures; 93.142, NIEHS Hazardous Waste Worker Health and Safety Training; 93.143, NIEHS Superfund Hazardous Substances—Basic Research and Education; 93.894, Resources and Manpower Development in the Environmental Health Sciences; 93.113, Biological Response to Environmental Health Hazards; 93.114, Applied Toxicological Research and Testing, National Institutes of Health, HHS)

Dated: December 20, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–33138 Filed 12–23–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center For Scientific Review; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel, Member Conflict: Hearing and Pain.

Date: January 17–18, 2012.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: John Bishop, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5182, MSC 7844, Bethesda, MD 20892, (301) 408–9664, *bishopj@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: December 20, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–33135 Filed 12–23–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting. The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel, Biofilm P01 Review.

Date: January 11, 2012.

Time: 1 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6700B Rockledge Drive, Bethesda, MD 20817, (Telephone Conference Call).

Contact Person: Tracy A. Shahan, Ph.D., MBA, Scientific Review Officer, Scientific Review Program, NIAID/NIH/DHHS, 6700B Rockledge Drive, MSC 7616, Bethesda, MD 20892–7616, (301) 451–2606, tshahan@niaid.nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: December 20, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–33134 Filed 12–23–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel, Vitamin D and Diabetes.

Date: January 25, 2012.

Time: 2 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: D.G. Patel, Ph.D., Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes Of Health, Room 756, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 594–7682, *pateldg@niddk.nih.gov.*

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel, Comparative Effectiveness Research.

Date: January 26, 2012.

Time: 7:30 a.m. to 8 a.m.

Agenda: To review and evaluate grant applications.

Place: Bethesda Marriott Suites, 6711 Democracy Boulevard, Bethesda, MD 20817.

Contact Person: Michele L. Barnard, Ph.D., Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes Of Health, Room 753, 6707 Democracy Boulevard, Bethesda, MD 20892–2542, (301) 594–8898, *barnardm@extra.niddk.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: December 20, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–33132 Filed 12–23–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Prospective Grant of Exclusive License: Use of Methanocarba Analogues of Purine and Pyrimidine Nucleosides and Nucleotides to Treat or Prevent Cardiac Diseases in Humans

AGENCY: National Institutes of Health, Public Health Service, HHS.

ACTION: Notice.

SUMMARY: This is notice, in accordance with 35 U.S.C. 209(c)(1) and 37 CFR 404.7(a)(1)(i), that the National Institutes of Health (NIH), Department of Health and Human Services (HHS), is contemplating the grant of a worldwide exclusive evaluation option license, to practice the inventions embodied in U.S. Provisional Patent Application No. 60/176,373, filed January 14, 2000 and currently abandoned [HHS Ref. No. E–176–1999/0–US–01]; PCT Application PCT/US01/00981, filed January 12, 2001 and currently expired [HHS Ref. No. E–176–1999/0–PCT–02]; U.S. Patent Application No. 10/169,975, filed July 12, 2002 and issued as U.S. Patent No. 7,087,589 on August 8, 2006 [HHS Ref. No. E–176–1999/0–US–06]; U.S. Patent Application No. 11/500,860, filed August 8, 2006 and issued as U.S. Patent No. 7,790,735 on September 14, 2006 [HHS Ref. No. E–176–1999/0–US–07]; Australian Patent Application No. 2001230913, filed January 12, 2001 and issued as Australian Patent No. 2001230913 on October 13, 2005 [HHS Ref. No. E–176–1999/0–AU–03]; Canadian Patent Application No. 2,397,366, filed January 12, 2001 and issued as Canadian Patent No. 2,397,366 on March 15, 2011 [HHS Ref. No. E–176–1999/0–CA–04]; European Patent Application No. 01903043.6, filed January 12, 2001 and issued as European Patent No. 1252160 on August 6, 2006 and currently abandoned [HHS Ref. No. E–176–1999/0–EP–05]; and UK Patent Application No. 01903043.6, filed January 12, 2001 and issued as UK Patent No. 1252160 on August 16, 2006 [HHS Ref. No. E–176–1999/0–GB–08], entitled ‘‘Methanocarba Cycloalkyl

Nucleoside Analogues'' to Cornovus Pharmaceuticals, Inc., a company incorporated under the laws of the State of Delaware having its headquarters in Farmington, Connecticut. The United States of America is the assignee of the rights of the above inventions. The prospective exclusive evaluation option license territory may be ''worldwide'', and the field of use may be limited to ''The use of (1′S,2R,3S,4′R,5′S)-4-(6-amino-2-chloro-9H-purin-9-yl)-1-[phosphoryloxymethyl] bicycle[3.1.0]hexane-2,3-diol) (MRS2339) to treat and/or prevent cardiac diseases in humans.'' Upon the expiration or termination of the exclusive evaluation option license, Cornovus Pharmaceuticals, Inc. will have the right to execute an exclusive patent commercialization license which will supersede and replace the exclusive evaluation option license with no greater field of use and territory than granted in the evaluation license.

DATES: Only written comments and/or applications for a license received by the NIH Office of Technology Transfer on or before January 11, 2012 will be considered.

ADDRESSES: Requests for a copy of the patent application, inquiries, comments and other materials relating to the contemplated license should be directed to: Suryanarayana (Sury) Vepa, Ph.D., J.D., Office of Technology Transfer, National Institutes of Health, 6011 Executive Boulevard, Suite 325, Rockville, MD 20852–3804; Telephone: (301) 435–5020; Facsimile: (301) 402–0220; Email: *vepas@mail.nih.gov*. A signed confidentiality nondisclosure agreement will be required to receive copies of any patent applications that have not been published or issued by the United States Patent and Trademark Office or the World Intellectual Property Organization.

SUPPLEMENTARY INFORMATION: The present technology is premised upon the novel combination of adenine and uracil and their derivatives with a constrained cycloalkyl group, typically a cyclopentyl group. The constraint on the cycloalkyl group is introduced by fusion to a second cycloalkyl group. In the case of cyclopentane, the fusion is typically with cyclopropane. The compounds disclosed in this technology retain a surprising binding affinity despite the substitution for the ribose group. Moreover, the absence of the glycosidic bond in the compounds assists in improving the chemical stability of these compounds and aids in overcoming the stability problem associated with the glycosidic bond in previously known P1 and P2 receptor ligands. The compounds of the present technology are useful in the treatment or prevention of various cardiac and other disorders.

The prospective exclusive evaluation option license will comply with the terms and conditions of 35 U.S.C. 209 and 37 CFR 404.7. The prospective exclusive evaluation option license may be granted unless, within fifteen (15) days from the date of this published notice, NIH receives written evidence and argument that establishes that the grant of the license would not be consistent with the requirements of 35 U.S.C. 209 and 37 CFR 404.7.

Properly filed competing applications for a license filed in response to this notice will be treated as objections to the contemplated license. Comments and objections submitted in response to this notice will not be made available for public inspection, and, to the extent permitted by law, will not be released under the Freedom of Information Act, 5 U.S.C. 552.

Dated: December 20, 2011.

Richard U. Rodriguez,

Director, Division of Technology Development and Transfer, Office of Technology Transfer, National Institutes of Health.

[FR Doc. 2011–33131 Filed 12–23–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[USCG–2011–1061]

Information Collection Request to Office of Management and Budget; OMB Control Number: 1625–0011

AGENCY: Coast Guard, DHS.

ACTION: Sixty-day notice requesting comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, the U.S. Coast Guard intends to submit an Information Collection Request (ICR) to the Office of Management and Budget (OMB), Office of Information and Regulatory Affairs (OIRA), requesting an extension of its approval for the following collection of information: 1625–0011, Applications for Private Aids to Navigation and for Class I Private Aids to Navigation on Artificial Islands and Fixed Structures. Our ICR describes the information we seek to collect from the public. Before submitting this ICR to OIRA, the Coast Guard is inviting comments as described below.

DATES: Comments must reach the Coast Guard on or before February 27, 2012.

ADDRESSES: You may submit comments identified by Coast Guard docket number [USCG–2011–1061] to the Docket Management Facility (DMF) at the U.S. Department of Transportation (DOT). To avoid duplicate submissions, please use only one of the following means:

(1) *Online: http://www.regulations.gov.*

(2) *Mail:* DMF (M–30), DOT, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590–0001.

(3) *Hand delivery:* Same as mail address above, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is (202) 366–9329.

(4) *Fax:* (202) 493–2251. To ensure your comments are received in a timely manner, mark the fax, to attention Desk Officer for the Coast Guard.

The DMF maintains the public docket for this Notice. Comments and material received from the public, as well as documents mentioned in this Notice as being available in the docket, will become part of the docket and will be available for inspection or copying at room W12–140 on the West Building Ground Floor, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. You may also find the docket on the Internet at *http://www.regulations.gov.*

A copy of the ICR is available through the docket on the Internet at *http://www.regulations.gov.* Additionally, copies are available from: COMMANDANT (CG–611), Attn: Paperwork Reduction Act Manager, US Coast Guard, 2100 2nd Street SW., Stop 7101, Washington, DC 20593–7101.

FOR FURTHER INFORMATION CONTACT: Contact Ms. Kenlinishia Tyler, Office of Information Management, telephone (202) 475–3652, or fax (202) 475–3929, for questions on these documents. Contact Ms. Renee V. Wright, Program Manager, Docket Operations, (202) 366–9826, for questions on the docket.

SUPPLEMENTARY INFORMATION:

Public Participation and Request for Comments

This Notice relies on the authority of the Paperwork Reduction Act of 1995; 44 U.S.C. Chapter 35, as amended. An ICR is an application to OIRA seeking the approval, extension, or renewal of a Coast Guard collection of information (Collection). The ICR contains information describing the Collection's purpose, the Collection's likely burden

on the affected public, an explanation of the necessity of the Collection, and other important information describing the Collection. There is one ICR for each Collection.

The Coast Guard invites comments on whether this ICR should be granted based on the Collection being necessary for the proper performance of Departmental functions. In particular, the Coast Guard would appreciate comments addressing: (1) The practical utility of the Collection; (2) the accuracy of the estimated burden of the Collection; (3) ways to enhance the quality, utility, and clarity of information subject to the Collection; and (4) ways to minimize the burden of the Collection on respondents, including the use of automated collection techniques or other forms of information technology. In response to your comments, we may revise this ICR or decide not to seek approval of revisions of the Collection. We will consider all comments and material received during the comment period.

We encourage you to respond to this request by submitting comments and related materials. Comments must contain the OMB Control Number of the ICR and the docket number of this request, [USCG–2011–1061], and must be received by February 27, 2012. We will post all comments received, without change, to *http://www.regulations.gov.* They will include any personal information you provide. We have an agreement with DOT to use their DMF. Please see the ''Privacy Act'' paragraph below.

Submitting Comments

If you submit a comment, please include the docket number [USCG–2011–1061], indicate the specific section of the document to which each comment applies, providing a reason for each comment. If you submit a comment online via *www.regulations.gov,* it will be considered received by the Coast Guard when you successfully transmit the comment. If you fax, hand deliver, or mail your comment, it will be considered as having been received by the Coast Guard when it is received at the DMF. We recommend you include your name, mailing address, an email address, or other contact information in the body of your document so that we can contact you if we have questions regarding your submission.

You may submit your comments and material by electronic means, mail, fax, or hand delivery to the DMF at the address under **ADDRESSES**; but please submit them by only one means. To submit your comment online, go to *http://www.regulations.gov,* and type ''USCG–2011–1061'' in the ''Keyword'' box. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period and will address them accordingly.

Viewing Comments and Documents

To view comments, as well as documents mentioned in this Notice as being available in the docket, go to *http://www.regulations.gov,* click on the ''read comments'' box, which will then become highlighted in blue. In the ''Keyword'' box insert ''USCG–2011–1061'' and click ''Search.'' Click the ''Open Docket Folder'' in the ''Actions'' column. You may also visit the DMF in Room W12–140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Privacy Act

Anyone can search the electronic form of comments received in dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, *etc.*). You may review a Privacy Act statement regarding Coast Guard public dockets in the January 17, 2008, issue of the **Federal Register** (73 FR 3316).

Information Collection Request

Title: CG–2554 Private Aids to Navigation Application. CG–4143 Application for Class I Private Aids to Navigation on Artificial Islands/Fixed Structures.

OMB Control Number: 1625–0011.

SUMMARY: Under 14 U.S.C. 81, the Coast Guard is authorized to establish aids to navigation. Title 14 U.S.C. section 83 prohibits establishment of aids to navigation without permission of the Coast Guard. Title 33 CFR section 66.01–5 provides a means for private individuals to establish privately maintained aids to navigation. Under 43 U.S.C. 1333, the Coast Guard has the authority to promulgate and enforce regulations concerning lights and other warning devices relating to the promotion of safety of life and property on the artificial islands, installations, and other devices on the outer continental shelf involved in the exploration, development, removal, or transportation of resources therefrom. Title 33 CFR section 67.35–1 prescribes the type of aids to navigation that must be installed on artificial islands and fixed structures.

To obtain approval to establish a private aid to navigation, applicants must submit either CG Form 2554 (Private Aids to Navigation Application) or CG Form 4143 (Application for Class 1 Private Aids to Navigation on Artificial Islands and Fixed Structures). The forms collect information about the private aid to navigation (type, color, geographic position), as well as the applicant's contact information. The information is stored in the Coast Guard's Integrated Aids to Navigation System (I–ATONIS). I–ATONIS is the Coast Guard's comprehensive database for managing information about aids to navigation.

Collecting the applicant's contact information is important because it allows the Coast Guard to contact the applicant should there be a discrepancy or mishap involving the permitted private aid to navigation. Certain discrepancies create hazards to navigation and must be immediately corrected or repaired. I–ATONIS has user access controls in place to govern who may view or access the information. The contact information is only available to Coast Guard aids to navigation personnel and contact is only initiated if the private aid to navigation becomes discrepant or in need of repair.

Need: Provision of the applicant's contact information is mandatory, as it will allow the Coast Guard to contact the owner should there be a discrepancy or mishap with the permitted aid to navigation. Failure to provide the required contact information will lead to disapproval of the private aid to navigation application.

Forms: CG–2554 and CG–4143.

Respondents: Owners of private aids to navigation.

Frequency: On occasion.

Burden Estimate: The estimated burden is 3,000 hours a year.

Dated: December 19, 2011.

R.E. Day,

Rear Admiral, U.S. Coast Guard, Assistant Commandant for Command, Control, Communications, Computers and Information Technology.

[FR Doc. 2011–33033 Filed 12–23–11; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–1999–DR; Docket ID FEMA–2011–0001]

Texas; Amendment No. 6 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster for the State of Texas (FEMA–1999–DR), dated July 1, 2011, and related determinations.

DATES: *Effective Date:* December 13, 2011.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the incident period for this declared disaster is now April 6, 2011, through and including August 29, 2011.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households in Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant).

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2011–33035 Filed 12–23–11; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–1999–DR; Docket ID FEMA–2011–0001]

Texas; Amendment No. 7 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Texas (FEMA–1999–DR), dated July 1, 2011, and related determinations.

DATES: *Effective Date:* December 13, 2011.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Texas is hereby amended to include the following areas among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of July 1, 2011.

Childress and Deaf Smith Counties for Public Assistance.

Anderson, Bastrop, Blanco, Briscoe, Brooks, Brown, Burnett, Cass, Coke, Coryell, Crane, Crosby, Culberson, Dickens, Donley, Foard, Franklin, Frio, Gonzales, Hansford, Hardeman, Hardin, Harrison, Haskell, Houston, Howard, Hutchinson, Jack, Jasper, Jim Hogg, Jones, Kimble, Knox, Lamar, Lamb, Lampasas, Lee, Leon, Live Oak, Marion, Mills, Montague, Morris, Newton, Nolan, Ochiltree, Oldham, Panola, Potter, Randall, Reagan, Red River, Roberts, Rusk, Sabine, San Augustine, San Saba, Shackelford, Somervell, Swisher, Upton, Walker, Wheeler, Wilbarger, and Winkler Counties for emergency protective measures (Category B) under the Public Assistance program.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households in Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050 Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

W. Craig Fugate,

Federal Emergency Management Agency.

[FR Doc. 2011–33036 Filed 12–23–11; 8:45 a.m.]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4047–DR; Docket ID FEMA–2011–0001]

New Mexico; Amendment No. 1 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of New Mexico (FEMA–4047–DR), dated November 23, 2011, and related determinations.

DATES: *Effective Date:* December 16, 2011.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of New Mexico is hereby amended to include the following areas among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of November 23, 2011.

Los Alamos County and the Pueblo of Cochiti for Public Assistance.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households in Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2011–33034 Filed 12–23–11; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4048–DR; Docket ID FEMA–2011–0001]

New Jersey; Amendment No. 1 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of New Jersey (FEMA–4048–DR), dated November 30, 2011, and related determinations.

DATES: *Effective Date:* December 12, 2011.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of New Jersey is hereby amended to include the following areas among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of November 30, 2011.

Bergen, Middlesex, and Passaic Counties for Public Assistance.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050 Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2011–33038 Filed 12–23–11; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4013–DR; Docket ID FEMA–2011–0001]

Nebraska; Amendment No. 3 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Nebraska (FEMA–4013–DR), dated August 12, 2011, and related determinations.

DATES: *Effective Date:* December 12, 2011.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Nebraska is hereby amended to include the following areas among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of August 12, 2011.

Nemaha and Richardson Counties for Public Assistance [Categories C–G] (already designated for Individual Assistance and emergency protective measures [Category B] under the Public Assistance program).

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households in Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2011–33039 Filed 12–23–11; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5484–N–37]

Notice of Proposed Information Collection: Comment Request; Builder's Certification of Plans, Specifications, and Site

AGENCY: Office of the Assistant Secretary for Housing, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: *Comments Due Date: February 27, 2012.*

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Reports Liaison Officer, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410, Room 9120 or the number for the Federal Information Relay Service (1–(800) 877–8339).

FOR FURTHER INFORMATION CONTACT: Karin Hill, Director, Office of Single Family Program Development, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410, telephone (202) 708–2121 (this is not a toll free number) for copies of the proposed forms and other available information.

SUPPLEMENTARY INFORMATION: The Department is submitting the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended).

This Notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including the use of appropriate automated collection techniques or other forms of

information technology, e.g., permitting electronic submission of responses.

This Notice also lists the following information:

Title of Proposal: Builder's Certification of Plans, Specifications, and Site.

OMB Control Number, if applicable: 2502–0496.

Description of the need for the information and proposed use: This is a revision of a current collection and reflects recent statutory and policy changes but does not increase the paperwork burden previously approved. HUD requires the builder to complete the certification (form HUD–92541) noting adverse site/location factor(s) of the property, including Floodplains. This certification is necessary so that HUD does not insure a mortgage on property that poses a risk to health or safety of the occupant.

Agency form numbers, if applicable: HUD–92541.

Estimation of the total numbers of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response: The number of burden hours is 4,500. The number of respondents is 35,000, the number of responses is 30,000, the frequency of response is on occasion, and the burden hour per response is .15.

Status of the proposed information collection: Currently approved.

Authority: The Paperwork Reduction Act of 1995, 44 U.S.C., Chapter 35, as amended.

Dated: December 20, 2011.

Ronald Y. Spraker,

Acting General Deputy Assistant Secretary for Housing—Acting General Deputy, Federal Housing Commissioner.

[FR Doc. 2011–33115 Filed 12–23–11; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R6–ES–2011–N260; FXES11130600000D2–123–FF06E00000]

Endangered and Threatened Wildlife and Plants; Recovery Permit Applications

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability; request for comments.

SUMMARY: We, the U.S. Fish and Wildlife Service, invite the public to comment on the following applications to conduct certain activities with endangered or threatened species. The Endangered Species Act of 1973, as amended (Act), prohibits activities with endangered and threatened species unless a Federal permit allows such activity. The Act also requires that we invite public comment before issuing these permits.

DATES: To ensure consideration, please send your written comments by January 26, 2012.

ADDRESSES: Kris Olsen, Permit Coordinator by U.S. mail at Ecological Services, U.S. Fish and Wildlife Service, P.O. Box 25486–DFC, Denver, CO 80225, or by telephone at (303) 236–4256. Please refer to the respective permit number (*e.g.,* Permit No. TE–123456) for each application when submitting comments.

FOR FURTHER INFORMATION CONTACT: Kris Olsen, Permit Coordinator, Ecological Services, (303) 236–4256 (phone); *permitsR6ES@fws.gov* (email).

SUPPLEMENTARY INFORMATION:

Background

The Act (16 U.S.C. 1531 *et seq.*) prohibits activities with endangered and threatened species unless a Federal permit allows such activity. Along with our implementing regulations in the Code of Federal Regulations (CFR) at 50 CFR part 17, the Act provides for permits, and requires that we invite public comment before issuing these permits.

A permit granted by us under section 10(a)(1)(A) of the Act authorizes you to conduct activities with U.S. endangered or threatened species for scientific purposes, enhancement of propagation or survival, or interstate commerce (the latter only in the event that it facilitates scientific purposes or enhancement of propagation or survival). Our regulations implementing section 10(a)(1)(A) for these permits are found at 50 CFR 17.22 for endangered wildlife species, 50 CFR 17.32 for threatened wildlife species, 50 CFR 17.62 for endangered plant species, and 50 CFR 17.72 for threatened plant species.

Applications Available for Review and Comment

We invite local, State, and Federal agencies, and the public to comment on the following applications. Please refer to the appropriate permit number (*e.g.,* Permit No. TE–123456) for the application when submitting comments.

Documents and other information the applicants have submitted with these applications are available for review, subject to the requirements of the Privacy Act (5 U.S.C. 552a) and Freedom of Information Act (5 U.S.C. 552).

Permit Application Number: TE–054237

Applicant: U.S. Forest Service, Rocky Mountain Region, Lakewood, Colorado.

The applicant requests renewal of an existing permit to perform the following recovery activities with the following species, in conjunction with surveys and population monitoring activities throughout the range of each species in Colorado, for the purpose of enhancing the species' survival:

Take (harass by survey) the Preble's meadow jumping mouse *(Zapus hudsonius preblei)*, the Mexican spotted owl *(Strix occidentalis lucida)*, and the Southwestern willow flycatcher *(Empidonax traillii extimus)*; and

Take (capture, handle, and release) the greenback cutthroat trout *(Oncorhynchus clarki stomias)*.

Permit Application Number: TE–067729

Applicant: Kansas State University, Manhattan, Kansas.

The applicant requests renewal of an existing permit to perform the following recovery activities with the following species, in conjunction with surveys and population monitoring activities throughout the range of each species in Colorado and Kansas, for the purpose of enhancing the species' survival:

Take (capture, handle, and release) the Topeka shiner *(Notropis topeka)*; and

Take (collect and kill) 100 each of hatchery-reared Colorado pikeminnow *(Ptychocheilus lucius)* and razorback sucker *(Xyrauchen texanus)* for prey behavior trials; and

Take (capture, PIT tag, fin clip, and release) 100 each of hatchery-reared Colorado pikeminnow *(Ptychocheilus lucius)* and razorback sucker *(Xyrauchen texanus)* to determine the use and importance of tributaries to sustaining native fish communities in the San Juan River and identify potential barriers to fish passage.

Permit Application Number: TE–069300

Applicant: Nebraska Game and Parks Commission, Lincoln, Nebraska.

The applicant requests renewal of an existing permit to take (capture, collect, tag, hold, and transport) the pallid sturgeon *(Scaphirhynchus albus)* in conjunction with surveys and population monitoring activities throughout its range in Iowa, Kansas, Nebraska, and South Dakota, for the purpose of enhancing the species' survival.

Permit Application Number: TE–064682

Applicant: Prairie Wildlife Research, Inc., Wellington, Colorado.

The applicant requests renewal of an existing permit to take (harass by

survey, live trap, anesthetize, tag, collect genetic materials) the black-footed ferret *(Mustela nigripes)* in conjunction with surveys and population monitoring activities throughout its entire range, including Canada and Mexico, for the purpose of enhancing the species' survival.

National Environmental Policy Act

In compliance with the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), we have made an initial determination that the proposed activities in these permits are categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement (516 DM 6 Appendix 1, 1.4C(1)).

Public Availability of Comments

All comments and materials we receive in response to this request will be available for public inspection, by appointment, during normal business hours at the address listed in the **ADDRESSES** section of this notice.

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority

We provide this notice under section 10 of the Act (16 U.S.C. 1531 *et seq.*).

Dated: December 13, 2011.

Michael Thabault,

Assistant Regional Director–Ecological Services, Denver, CO.

[FR Doc. 2011–33081 Filed 12–23–11; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLNV912000.L10100000.PH0000. LXSS006F; 12–08807; MO# 4500031060; TAS: 14X1109]

Notice of Public Meeting: Resource Advisory Councils, Nevada

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of public meeting.

SUMMARY: In accordance with the Federal Land Policy and Management Act and the Federal Advisory Committee Act of 1972 (FACA), the Department of the Interior, Bureau of Land Management (BLM) Nevada will hold a joint meeting of its three Resource Advisory Councils (RACs), the Sierra Front-Northwestern Great Basin RAC, the Northeastern Great Basin RAC, and the Mojave-Southern Great Basin RAC in Las Vegas, Nevada. The meeting is open to the public and a public comment period will be available.

DATES: *Dates and Times:* The three RACs will meet on Thursday, January 26, 2012, from 8 a.m. to 5 p.m. and Friday, January 27, 2012, from 7:30 a.m. to 12:30 p.m. A public comment period will be held early in the afternoon on Thursday, January 26. The specific time for public comment will be included in the agenda, which will be available two weeks prior to the meetings at *www.blm.gov/nv*.

FOR FURTHER INFORMATION CONTACT: Rochelle Francisco, telephone: (775) 861–6588, email: *rfrancisco@blm.gov*. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–(800) 877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The three 15-member Nevada RACs advise the Secretary of the Interior, through the BLM Nevada State Director, on a variety of planning and management issues associated with public land management in Nevada. The meeting will be held at the Suncoast Hotel and Casino, 9090 Alta Drive, Las Vegas, Nevada. Agenda topics include a presentation and discussion of accomplishments during 2011; closeout reports of the three RACs; the year ahead for the BLM in Nevada; breakout meetings of each group category; breakout meetings of the three RACs; discussion of a recreation subgroup; and scheduling meetings of the individual RACs for the upcoming year. The public may provide written comments to the three RAC groups or to an individual RAC. Individuals who plan to attend and need further information about the meeting or need special assistance such as sign language interpretation or other reasonable accommodations may contact Rochelle Francisco at the phone number or email address above.

Amy Lueders,

State Director, Nevada.

[FR Doc. 2011–33083 Filed 12–23–11; 8:45 am]

BILLING CODE 4310–HC–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[L51010000.FX0000.LVRWA09A2400. LLAZP02000;AZA34187]

Notice of Availability of the Record of Decision for the Sonoran Solar Energy Project, Arizona

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of availability.

SUMMARY: The Bureau of Land Management (BLM) announces the availability of the Record of Decision (ROD) for the Sonoran Solar Energy Project (SSEP). The Secretary of the Interior approved the ROD on December 19, 2011, which constitutes the Interior Department's final decision.

ADDRESSES: Copies of the ROD for the proposed SSEP have been sent to Federal, State, and local government agencies and to other stakeholders. Copies are available for public inspection at the BLM's Phoenix District Office, Lower Sonoran Field Office, 21605 North Seventh Avenue, Phoenix, Arizona 85027–2929 and the BLM Arizona State Office, One North Central Avenue, Phoenix, Arizona 85004–4427. Interested parties may also review the final Environmental Impact Statement (EIS) at the following public libraries in Maricopa County, Arizona:

- Buckeye Public Library, 310 North Sixth Street, Buckeye, Arizona 85236.
- Gila Bend Public Library, 202 North Euclid Avenue, Gila Bend, Arizona 85337.
- Goodyear Public Library, 250 North Litchfield Road, Goodyear, Arizona 85338.

Interested parties may also view the final EIS at the following Web site: *http://www.blm.gov/az/st/en/prog/energy/solar/sonoran_solar.html.*

FOR FURTHER INFORMATION CONTACT: Joe Incardine, BLM National Project Manager, Phoenix District Office/Lower Sonoran Field Office, 21605 North Seventh Avenue, Phoenix, Arizona 85027–2929; phone: (801) 524–3833; or email: *jincardi@blm.gov.*

SUPPLEMENTARY INFORMATION: Boulevard Associates, LLC, a subsidiary of NextEra Energy Resources, filed a right-of-way (ROW) application for the SSEP on BLM-managed lands in the Little Rainbow Valley, east of State Route 85, and south of the Buckeye Hills and the town of Buckeye in Maricopa County, Arizona. As required under the National Environmental Policy Act of 1969, as amended, the Final EIS for the SSEP analyzed a No Action alternative which

would preclude development of the SSEP in any configuration and maintain existing land uses in the project area. The Final EIS also analyzed three action alternatives, one sub-alternative, and two options including: (1) The Proposed Action (375-megawatt (MW) wet-cooled concentrated solar thermal parabolic trough facility on 3,620 acres of land); (2) Alternative A: Reduced Water Use (using a dry-cooling technology); (3) Sub-alternative A1: Photovoltaic (PV) (a 300–MW PV facility occupying 2,013 acres of land); (4) Alternative B: Reduced Footprint (a 250–MW wet-cooled facility occupying 2,320 acres of land); (5) Brine Concentrator Option (could be added to the Proposed Action or Alternative B to reduce wastewater); and (6) Generation Intertie (Gen-tie) Line Option (could be used for any alternative to address alternate methods and locations for crossing existing high-voltage transmission lines near the project area).

The Preferred Alternative from the Final EIS, including the proposed gen-tie line, is the Selected Alternative in the ROD. The Selected Alternative will allow the issuance of a ROW grant for a PV facility capable of generating up to 300 MW of solar power on 2,013 acres of land. The project will consist of multiple arrays of PV panels electrically connected to associated power inverter units. The current from the power inverters will be gathered by an internal electrical collection system and transformed to transmission voltage prior to leaving the project area. The Selected Alternative facilities include the following major components or systems: PV modules/arrays; solar trackers and/or fixed support structures; an electrical collection system; a step-up transformation/on-site switchyard; a 500-kilovolt generation tie-line/utility interconnection; administration buildings and local warehouses; and drainage collection and discharge facilities. A single evaporation pond of approximately 1 acre is required. The PV does not use heat transfer fluid; therefore, no land-treatment unit is required. The Selected Alternative in the ROD will use approximately 33 acre-feet per year of water for project operations, mostly for washing PV mirrors. That amounts to 1–2 percent of the water that the original proposed action would have used.

As described in the Final EIS, the BLM Selected Alternative, with its preferred gen-tie line, was developed in response to agency and public comments on water consumption. It was developed after the Draft EIS, due to advancements in technology and a change in market conditions that allowed for a reconsideration of PV technology as a viable alternative. The Selected Alternative also avoids other resource issues raised by the public and agency cooperators, including wildlife habitat and travel corridors, pending Federal Emergency Management Agency floodplains, air quality point sources and vapor plumes, and nearby residences.

The Notice of Availability of the Final EIS for the SSEP was published in the **Federal Register** on October 21, 2011 (76 FR 65532). Publication of the Notice of Availability initiated a 30-day comment period on the Final EIS. At the close of the 30-day period on November 21, 2011, four comments had been received. These comments and their responses are attached to the ROD.

Because this decision is approved by the Secretary of the Interior, it is not subject to administrative appeal (43 CFR 4.410(a)(3)).

Authority: 40 CFR 1506.6.

Robert V. Abbey,

Director, Bureau of Land Management.

[FR Doc. 2011–33094 Filed 12–23–11; 8:45 am]

BILLING CODE 4310–32–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[CACA 49698, LLCAD07000, L51010000.FX0000, LVRWB10B3810]

Notice of Availability of the Record of Decision for the Tule Wind, LLC's Tule Wind Project, San Diego County, CA

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Availability.

SUMMARY: The Bureau of Land Management (BLM) announces the availability of the Record of Decision (ROD) for the project, located in San Diego County. The Secretary of the Interior approved the ROD on December 19, 2011, which constitutes the Department's final decision.

ADDRESSES: Copies of the ROD are available upon request from the Field Manager, BLM El Centro Field Office, 1661 S. 4th Street, El Centro, California 92243, and the BLM California Desert District Office, 22835 Calle San Juan de Los Lagos, Moreno Valley, California 92553, or via the Internet at the following Web site: *http://www.ca.blm.gov/elcentro.*

FOR FURTHER INFORMATION CONTACT: Greg Thomsen, Project Manager, telephone (951) 697–5237; address BLM California Desert District Office, 22835 Calle San Juan de Los Lagos, Moreno Valley, California 92553–9046; email *catulewind@blm.gov.*

SUPPLEMENTARY INFORMATION: Tule Wind, LLC, a wholly owned subsidiary of Iberdrola Renewables, Inc., filed right-of-way (ROW) application CACA–51204 for the Tule Wind Project. The project will consist of up to 62 wind turbines (1.5 to 3.0 megawatts (MW) each) with a generating capacity of up to 186 MW, an overhead and underground 34.5-kilovolt (kV) collector system leading to a collector substation, an operations and maintenance facility, and a 138-kV transmission line as the generation tie-in to the existing Boulevard Substation. The Tule Wind Project will be on 12,200 acres of BLM-managed lands. The project site is located in the In-Ko-Pah Mountains near the McCain Valley in San Diego County, north of the unincorporated community of Boulevard.

The BLM selected the preferred alternative that was evaluated in the Final EIS. The Notice of Availability of the Final EIS for the Tule Wind Project was published in the **Federal Register** on October 24, 2011 (76 FR 65746). In addition to the Tule Wind Project, the Final Environmental Impact Statement (EIS)/Environmental Impact Report evaluated a ROW application by San Diego Gas & Electric (SDG&E) to construct the ECO Project, which includes a 138-kV transmission line that would traverse approximately 1.5 miles of public land managed by the BLM. The BLM will issue a separate decision on the SDG&E's ROW application.

As a result of the ROD, access to certain recreation areas including, but not limited to, the Lark Canyon OHV Area, Lark Canyon Campground, Cottonwood Campground, Carrizo Overlook, and Sacatone Overlook could be reduced during construction, and in some instances, access roads off McCain Valley Road to these areas may be temporarily closed (resulting in an inability to access these areas and facilities by vehicles) during the period of time construction is authorized. Specific routes and times will be announced when a more detailed construction schedule is completed.

Because this decision is approved by the Secretary of the Interior, it is not subject to administrative appeal (43 CFR 4.410(a)(3)).

Authority: 40 CFR 1506.6.

Robert V. Abbey,

Director, Bureau of Land Management.

[FR Doc. 2011–33093 Filed 12–23–11; 8:45 am]

BILLING CODE 4310–40–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NRNHL–1211–9044; 2200–3200–665]

National Register of Historic Places; Notification of Pending Nominations and Related Actions

Nominations for the following properties being considered for listing or related actions in the National Register were received by the National Park Service before December 2, 2011. Pursuant to section 60.13 of 36 CFR part 60, written comments are being accepted concerning the significance of the nominated properties under the National Register criteria for evaluation. Comments may be forwarded by United States Postal Service, to the National Register of Historic Places, National Park Service, 1849 C St. NW., MS 2280, Washington, DC 20240; by all other carriers, National Register of Historic Places, National Park Service, 1201 Eye St. NW., 8th floor, Washington DC 20005; or by fax, (202) 371–6447. Written or faxed comments should be submitted by January 11, 2012. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

J. Paul Loether,

Chief, National Register of Historic Places, National Historic Landmarks Program.

COLORADO

Jefferson County

Denver and Intermountain Railroad Interurban No. 25, W. 6th Ave. & Kipling St., Lakewood, 11001016

MISSOURI

Jackson County

Bancroft School, 4300 Tracy Ave., Kansas City, 11001017

Lowe and Campbell Sporting Goods Building, 1509–13 Baltimore Ave., Kansas City, 11001018

Old Town Historic District (Boundary Increase IV), Roughly bounded by E. 2nd, Locust, & Walnut Sts. & E. Missouri Ave., Kansas City, 11001019

Monroe County

Farmers and Merchants Bank Building, 201–207 S. Main St., Monroe City, 11001020

St. Louis Independent City

Cote Brilliante Avenue in The Ville Historic District, (The Ville, St. Louis, Missouri MPS AD) 4200 W. blk. of Cote Brilliante Ave. & 1700 blk. of Annie Malone Dr., St. Louis (Independent City), 11001021

Marshall School Neighborhood in The Ville Historic District, (The Ville, St. Louis, Missouri MPS AD) Parts of 4300 blks. of Aldine & Cote Brilliante Aves. & 1500 & 1700 blks. of Billups Ave., St. Louis (Independent City), 11001022

St. Ferdinand Avenue in The Ville Historic District, (The Ville, St. Louis, Missouri MPS AD) 4200 W. blk. of St. Ferdinand Ave., St. Louis (Independent City), 11001023

NEW YORK

Onondaga County

People's African Methodist Episcopal Zion Church, 711 E. Fayette St., Syracuse, 11001024

Saratoga County

Garnsey, Nathan, House, 1453 NY 146, Rexford, 11001025

OREGON

Josephine County

Oregon Caves Historic District (Boundary Increase), 19000 Caves Hwy., Cave Junction, 11001028

WISCONSIN

Eau Claire County

Chambers, Pearl and Eva, House, 1615 State St., Eau Claire, 11001027

[FR Doc. 2011–33022 Filed 12–23–11; 8:45 am]

BILLING CODE 4312–51–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701–TA–388–391 and 731–TA–817–821 (Second Review)]

Cut-To-Length Carbon-Quality Steel Plate From India, Indonesia, Italy, Japan, and Korea

Determination

On the basis of the record [1] developed in the subject five-year review, the United States International Trade Commission (Commission) determines, pursuant to section 751(c) of the Tariff Act of 1930 (19 U.S.C. 1675(c)), that revocation of the countervailing duty orders and antidumping duty orders on cut-to-length carbon-quality steel plate from India, Indonesia, and Korea would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time. The Commission also determines that revocation of the countervailing duty order and antidumping duty order on cut-to-length carbon-quality steel plate from Italy would not be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.[2] The Commission further determines that revocation of the antidumping duty order on cut-to-length carbon-quality steel plate from Japan would not be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.[3]

Background

The Commission instituted these reviews on November 1, 2010 (75 FR 67108) and determined on February 4, 2011 that it would conduct full reviews (76 FR 8772, February 15, 2011). Notice of the scheduling of the Commission's reviews and of a public hearing to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the **Federal Register** on April 18, 2011 (76 FR 22725, revised scheduling notice 76 FR 56797, September 14, 2011). The hearing was held in Washington, DC, on October 19, 2011, and all persons who requested the opportunity were permitted to appear in person or by counsel.

The Commission transmitted its determinations in these reviews to the Secretary of Commerce on December 20, 2011. The views of the Commission are contained in USITC Publication 4296 (December 2011), entitled *Cut-to-Length Carbon-Quality Steel Plate from India, Indonesia, Italy, Japan, and Korea: Investigation Nos. 701–TA–388–391 and 731–TA–817–821 (Second Review).*

By order of the Commission.

Issued: December 20, 2011.

James R. Holbein,

Secretary to the Commission.

[FR Doc. 2011–33082 Filed 12–23–11; 8:45 am]

BILLING CODE 7020–02–P

[1] The record is defined in sec. 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR 207.2(f)).

[2] Vice Chairman Williamson and Commissioner Lane dissenting with respect to Italy.

[3] Commissioner Lane and Commissioner Pinkert dissenting with respect to Japan.

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–821]

Certain Dynamic Random Access Memory Devices, and Products Containing Same; Institution of Investigation Pursuant to 19 U.S.C. 1337

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on November 21, 2011, under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, on behalf of Nanya Technology Corporation of Kueishan, Taiwan. The complaint alleges violations of section 337 based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain dynamic random access memory devices, and products containing same by reason of infringement of certain claims of U.S. Patent No. 5,677,566 (''the '566 patent''); U.S. Patent No. 6,399,983 (''the '983 patent''); U.S. Patent No. 6,586,796 (''the '796 patent''); and U.S. Patent No. 6,664,634 (''the '634 patent''). The complaint further alleges that an industry in the United States exists as required by subsection (a)(2) of section 337.

The complainant requests that the Commission institute an investigation and, after the investigation, issue an exclusion order and cease and desist orders.

ADDRESSES: The complaint, except for any confidential information contained therein, is available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW., Room 112, Washington, DC 20436, telephone (202) 205–2000. Hearing impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at (202) 205–2000. General information concerning the Commission may also be obtained by accessing its internet server at *http://www.usitc.gov.* The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.*

FOR FURTHER INFORMATION CONTACT: The Office of the Secretary, Docket Services Division, U.S. International Trade Commission, telephone (202) 205–1802.

Authority: The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930, as amended, and in section 210.10 of the Commission's Rules of Practice and Procedure, 19 CFR 210.10 (2011).

Scope of Investigation: Having considered the complaint, the U.S. International Trade Commission, on December 20, 2011, *ordered that*—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain dynamic random access memory devices, and products containing same that infringe one or more of claims 5–10, 13, 14, and 16 of the '566 patent; claims 1–7 and 9–14 of the '983 patent; claims 1, 2, 4, and 7 of the '796 patent; and claims 1, 2, 4–6, 9, 13, and 15 of the '634 patent, and whether an industry in the United States exists as required by subsection (a)(2) of section 337;

(2) For the purpose of the investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) The complainant is: Nanya Technology Corporation, Hwa Ya Technology Park, 669, Fu Hsing 3rd Road, Kueishan, Taoyuan 333, Taiwan.

(b) The respondents are the following entities alleged to be in violation of section 337, and are the parties upon which the complaint is to be served:

Elpida Memory, Inc., Sumitomo Seimei Yaesu Building, 3rd Floor, 2–1 Yaesu 2-chome Chuo-ku, Tokyo, Japan.

Elpida Memory (USA) Inc., 1175 Sonora Court, Sunnyvale, CA 94086.

Kingston Technology Co., Inc., 17600 Newhope Street, Fountain Valley, CA 92708.

(3) For the investigation so instituted, the Chief Administrative Law Judge, U.S. International Trade Commission, shall designate the presiding Administrative Law Judge.

(4) The Office of Unfair Import Investigations will not participate as a party in this investigation.

Responses to the complaint and the notice of investigation must be submitted by the named respondents in accordance with section 210.13 of the Commission's Rules of Practice and Procedure, 19 CFR 210.13. Pursuant to 19 CFR 201.16(d)–(e) and 210.13(a), such responses will be considered by the Commission if received not later than 20 days after the date of service by the Commission of the complaint and the notice of investigation. Extensions of time for submitting responses to the complaint and the notice of investigation will not be granted unless good cause therefor is shown.

Failure of a respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and to authorize the administrative law judge and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter an initial determination and a final determination containing such findings, and may result in the issuance of an exclusion order or a cease and desist order or both directed against the respondent.

By order of the Commission.
Issued: December 21, 2011.

James R. Holbein,

Secretary to the Commission.

[FR Doc. 2011–33080 Filed 12–23–11; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Under the Clean Air Act

Notice is hereby given that on December 20, 2011, a proposed Consent Decree (''Consent Decree'') in *United States* v. *Dover Chemical Corporation,* Civil Action No. 5:11-cv-02754–BYP, was lodged with the United States District Court for the Northern District of Ohio.

In this action, the United States sought injunctive relief and penalties from Dover Chemical Corporation (''Dover'') for alleged violations of Sections 111 and 112 of the Clean Air Act (''CAA''), 42 U.S.C. 7411 and 7412; Title V of the CAA, 42 U.S.C. 7661 *et seq.;* and Title VI of the CAA, 42 U.S.C. 7671 *et seq.,* at Dover's chemical manufacturing facility in Dover, Ohio. Under the Consent Decree, Dover will implement enhanced leak detection and repair practices more stringent than the minimum required by the regulations; accept and comply with the Hazardous and Miscellaneous Organic NESHAP at various process units; accept ''major source'' status under the CAA and apply

for a Title V permit; and pay a civil penalty of $620,000.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and either emailed to *pubcomment-ees.enrd@usdoj.gov* or mailed to P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States* v. *Dover Chemical Corporation,* No. 5:11-cv-02754–BYP (N.D. Ohio) D.J. Ref. No. 90–5–2–1–09309.

During the public comment period, the Consent Decree may be examined on the following Department of Justice Web site: *http://www.usdoj.gov/enrd/Consent_Decrees.html.* A copy of the Consent Decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, or by faxing or emailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax number (202) 514–0097, phone confirmation number (202) 514–1547. If requesting a copy from the Consent Decree Library by mail, please enclose a check in the amount of $10.50 (25 cents per page reproduction cost) payable to the U.S. Treasury, or, if requesting by email or fax, forward a check in that amount to the Consent Decree Library at the address given above.

Maureen M. Katz,

Assistant Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2011–33072 Filed 12–23–11; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Federal Bureau of Investigation

[OMB Number 1110–0047]

Agency Information Collection Activities; Proposed collection: Applicant Questionnaire: Race, National Origin, Gender, and Disability Demographics; Revision of a Currently Approved Collection; Comments Requested

ACTION: 60 day notice.

The Department of Justice, Federal Bureau of Investigation, Human Resources Division will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with established review procedures of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). The proposed information collection is published to obtain comments from the public and other government agencies. Comments are encouraged and will be accepted for ''sixty days'' until February 27, 2012. This process is conducted in accordance with 5 CFR 1320.10.

All comments and suggestions, or questions regarding additional information should be directed to Angela Graham, Human Resources Specialist (Special Projects/Policy), Human Capital Planning Section (HCPS), Human Resources Division (HRD), Federal Bureau of Investigation, 935 Pennsylvania Ave. NW., Room 10975, Washington, DC 20535.

To view the proposed collection instrument with instructions, please visit the following link: *http://www.fbi.gov/fbijobs_proposedcollection.htm.*

Written comments and suggestions from the public and affected agencies concerning the revised collection of information are encouraged. Comments should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have a practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of this information collection

(1) *Type of information collection:* Revision of a currently approved collection.

(2) *The title of the form/collection:* Applicant Questionnaire: Race, National Origin, Gender and Disability Demographics

(3) *The agency form number, if any, and the applicable component of the department sponsoring the collection:* Form 3–873, *Sponsor:* Human Resources Division, Federal Bureau of Investigation, Department of Justice.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Any person registering and/or applying for a position at the Federal Bureau of Investigation.

Abstract: The Equal Employment Opportunity Commission Management Directive 715 (MD 715), requires agencies to maintain a system that: (1) Collects and maintains accurate information on race, national origin, gender and disability of an applicant/or employee in accordance with 29 CFR, paragraph 1614.601; (2) tracks applicant flow data; and, (3) tracks recruitment activities to permit analyses of these efforts in any examination of potential barriers to equality of opportunity. Agencies must also ''conduct an internal review and analysis of the effects of all current and proposed policies, practices, and conditions that directly or indirectly,'' related to the employment of individuals with disabilities based on their race, national origin, gender and disabilities. However, an Agency may not collect demographics information, unless it displays a valid OMB control number. In order to comply with MD 715, the FBI is requesting clearance from OMB in accordance with established review procedures of the Paperwork Reduction Act of 1995. Once cleared for use, the revised form will be used to collect race, national origin, gender, and disability demographic information from applicants registering in the FBI's automated hiring system. All job applicants, whether internal or external, would be asked to complete, on a voluntary basis, an ''Applicant Questionnaire: Race, National Origin, Gender, and Disability Demographics.'' The FBI must collect and evaluate information and data necessary to make an informed assessment the extent to which the Agency is meeting its responsibility to provide employment opportunities for qualified applicants and employees with disabilities, especially those with target disabilities.

(5) *An estimate of the total number of respondents and the amount of time estimated for or an average respondent to respond:* There are approximately 455,937 respondents that submit a one-time completion of questionnaire per respondent for a total of responses with an estimated response time of 5 minutes per response.

(6) *An estimate of the total public burden (in hours) associated with this collection:* There are approximately 37,994.75 annual burden hours associated with this collection.

If additional information is required contact: Jerri Murray, Department Clearance Officer, Policy and Planning Staff, Justice Management Division,

United States Department of Justice, Two Constitution Square, 145 N Street NE., Room 2E–502, NE., Washington, DC 20530.

Jerri Murray,

Department Clearance Officer, United States Department of Justice.

[FR Doc. 2011–33024 Filed 12–23–11; 8:45 am]

BILLING CODE 4410–02–P

DEPARTMENT OF JUSTICE

Federal Bureau of Investigation

[OMB Number 1110–0005]

Agency Information Collection Activities; Proposed Collection: Age, Sex, and Race of Persons Arrested 18 Years of Age and Over; Age, Sex, and Race of Persons Arrested Under 18 Years of Age; Revision of a Currently Approved Collection; Comments Requested

ACTION: 60-day Notice of Information Collection Under Review.

The Department of Justice, Federal Bureau of Investigation, Criminal Justice Information Services Division (CJIS) will be submitting the following Information Collection Request to the Office of Management and Budget (OMB) for review and clearance in accordance with established review procedures of the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted until February 27, 2012. This process is conducted in accordance with 5 CFR 1320.10.

All comments, suggestions, or questions regarding additional information, to include obtaining a copy of the proposed information collection instrument with instructions, should be directed to Mr. Gregory E. Scarbro, Unit Chief, Federal Bureau of Investigation, CJIS Division, Module E–3, 1000 Custer Hollow Road, Clarksburg, West Virginia 26306, or facsimile to (304) 625–3566.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Comments should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques of other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of this information collection:

(1) *Type of information collection:* Revision of a currently approved collection.

(2) *The title of the form/collection:* Age, Sex, and Race of Persons Arrested 18 Years of Age and Over; Age, Sex, and Race of Persons Arrested Under 18 Years of Age.

(3) *The agency form number, if any, and the applicable component of the department sponsoring the collection:* Forms 1–708 and 1–708a;

Sponsor: Criminal Justice Information Services Division, Federal Bureau of Investigation, Department of Justice.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* City, county, state, federal, and tribal law enforcement agencies. *Brief Abstract:* This collection gathers data obtained from law enforcement in which an arrest has occurred.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* There are approximately 18,108 law enforcement agency respondents at 12 minutes for 1–708a and 15 minutes for 1–708.

(6) *An estimate of the total public burden (in hours) associated with this collection:* There are approximately 97,783 hours, annual burden, associated with this information collection.

If additional information is required contact: Mrs. Jerri Murray, Department Clearance Officer, Policy and Planning Staff, Justice Management Division, United States Department of Justice, Two Constitutional Square, 145 N Street NE., Room 2E–508, Washington, DC 20530.

Jerri Murray,

Department Clearance Officer, United States Department of Justice.

[FR Doc. 2011–33023 Filed 12–23–11; 8:45 am]

BILLING CODE 4410–02–P

DEPARTMENT OF JUSTICE

National Institute of Corrections

Solicitation for a Cooperative Agreement—Jail as Part of County Government: Review and Revision

AGENCY: National Institute of Corrections, U.S. Department of Justice.

ACTION: Solicitation for a Cooperative Agreement.

SUMMARY: The National Institute of Corrections (NIC) Jails Division is seeking applications for the revision of its Jail as Part of County Government training program. The project will be for a 9-month period and will be completed with the NIC Jails Division. The awardee will work closely with NIC staff on all aspects of the project. To be considered, applicants must demonstrate, at a minimum, in-depth knowledge of: (1) The purpose, functions, and operational complexities of local jails, (2) liability issues common in jails, (3) the nature of the relationship between jail officials and their funding authorities, (4) the challenges inherent in the unique relationship between an elected sheriff and the local funding authority, (5) the resource constraints faced by many local governments and their jails, and (6) strategies for creating a productive working relationship between jail officials and their funding authority. Also, the applicant must demonstrate expertise and experience in developing curricula based on adult learning principles, specifically the Instructional Theory into Practice (ITIP) model.

DATES: Applications must be received by 4 p.m. (EDT) on Thursday, January 19, 2012.

ADDRESSES: Mailed applications must be sent to: Director, National Institute of Corrections, 320 First Street NW., Room 5002, Washington, DC 20534. Applicants are encouraged to use Federal Express, UPS, or similar service to ensure delivery by the due date as mail at NIC is sometimes delayed due to security screening.

Applicants who wish to hand-deliver their applications should bring them to 500 First Street NW., Washington, DC 20534, and dial (202) 307–3106, ext. 0, at the front desk for pickup.

Faxed or emailed applications will not be accepted; however, electronic applications can be submitted via *http://www.grants.gov.*

FOR FURTHER INFORMATION CONTACT: A copy of this announcement and the required application forms can be downloaded from the NIC Web site at *http://www.nicic.gov/*

cooperativeagreements. Questions about this project and the application procedures should be directed to Erika McDuffe, Correctional Program Specialist, National Institute of Corrections. Questions must be emailed to Ms. McDuffe at *emcduffe@bop.gov.* Ms. McDuffe will respond by email to the individual. Also, all questions and responses will be posted on NIC's Web site at *http://www.nicic.gov* for public review. (The names of those submitting the questions will not be posted). The Web site will be updated regularly and postings will remain on the Web site until the closing date of this cooperative agreement solicitation.

SUPPLEMENTARY INFORMATION:

Background: NIC's Jail as Part of County Government is a 3-day training program that focuses on the relationship between local jail officials and their funding authority. It is held in various regions throughout the county and is attended by 3-person teams from each of 8–10 jurisdictions. Each team consists of the county sheriff, jail administrator, and the county supervisor or county commissioner.

The goal of the program is to foster a more positive and productive working relationship between jail officials and their funding authority. This relationship is often strained due to (1) competition among county departments for scarce resources, (2) the funding authority's lack of understanding of the jail's mission, operations, and resource needs, and (3) jail officials' lack of understanding of the challenges that funding officials face. As a result of the lack of understanding between jail and funding officials, jails often receive inadequate resources to operate safely and securely.

Current topics in Jail as Part of County Government include (1) the jail's role in the local criminal justice system, (2) liability issues in jails as they apply to both jail and funding officials, (3) factors in determining adequate staffing levels for the jail, (4) jail budgeting, (5) key elements of effective jail operations, and (6) building effective working relationships between jails and funding officials.

NIC now wishes to update the content of this program and ensure its design conforms to the ITIP model. The following reference materials are posted with this announcement on NIC's Web site: Jail as Part of County Government: Lesson Plans; Jail as Part of County Government: Participant Manual; Jail as Part of County Government: Presentation Slides; Jail as Part of County Government: Activities.

Scope of Work: The cooperative agreement awardee will revise the content of the current program to ensure it is current, accurate, and relevant. The awardee also will ensure module sequencing is logical and enhances the flow of the program. Finally, the awardee will revise the program's design to conform to the ITIP model. The awardee will ensure that content, module sequencing, and instructional strategies effectively contribute to meeting the program's goal. To achieve this, the awardee will complete the following activities, at a minimum.

Initial Meeting: The cooperative agreement awardee, with the subject matter expert and the curriculum specialist, will attend an initial meeting with NIC staff for a project overview and preliminary planning. This will occur shortly after the cooperative agreement is awarded. The meeting will last up to one half day and will be conducted via WebEx.

Initial curriculum review: The awardee will review and become familiar with the current lesson plans, presentation slides, participant manual, and other training materials. The awardee will document any comments based on this review for discussion at the initial curriculum review.

Curriculum review meeting with NIC staff: After becoming familiar with the curriculum, the awardee (project director, subject matter experts, and curriculum specialist) will meet with NIC staff for 3 days in Washington, DC, to discuss the program's goal, audience, and design. The awardee and NIC staff will identify needed revisions to content, instructional strategies, presentation slides, the participant manual, and other training materials.

In the cooperative agreement application, the awardee is required to project milestones and dates for the completion of all project activities. Based on the decisions made during the initial meeting, the awardee and NIC staff may set additional dates for completion of specific activities.

The awardee will document primary discussion points and all decisions made during the meeting and will give NIC this documentation within 2 weeks of the meeting.

Draft revisions and NIC review: Based on decisions made during the initial meeting, the awardee will draft revisions to the curriculum. Lesson plan revisions will be completed first. The awardee will send revised lesson plans to NIC staff for review and approval before any other materials are developed. Once the lesson plans are approved, the awardee will draft revisions to the presentation slides and participant manual. The awardee will also send these draft revisions to NIC staff for review and approval. Finally, the awardee will draft participant evaluation forms to be completed after each module and at the end of the program and will send these to NIC staff for approval.

Program Pilot: The awardee will conduct one pilot of the revised curriculum at a location yet to be determined. The awardee, with NIC staff, will identify trainers for this pilot. The awardee will hire these trainers and pay their fees and expenses.

The awardee will also pay fees and expenses for the project director and curriculum specialist, both of whom are required to attend the entire program. If qualified, the project director or others on the cooperative agreement team may be included among the trainers.

The awardee will print all program materials for the instructors and the participants and will assume the cost of this. The awardee will send one full set of these materials to NIC staff prior to the program for approval.

During the pilot, the awardee, curriculum specialist, and trainers will meet regularly with NIC staff to discuss their observations about the revised program and the participants' responses. They will also review and discuss the module evaluations each day.

The awardee will document the main discussion points and decisions from these meetings. The awardee will also summarize all participant evaluations (module and end-of-program). The awardee will submit the documentation of the meetings, the evaluation summaries, and all participant evaluations to NIC within 2 weeks after the program.

Final program revisions: Based on the results of the pilot program and discussion with NIC staff, the awardee will draft additional curriculum revisions. The awardee will send the drafts to NIC staff for review and approval before creating the final curriculum.

Final product: The final curriculum will include a program description (overview), detailed narrative lesson plans, presentation slides for each lesson plan, a participant manual that follows the lesson plans, and other training materials as identified through this project. The curriculum will be designed according to the ITIP model for adult learners. Lesson plans will be in a format that NIC provides. The awardee will deliver all materials in hard copy (1) and on a disk. The awardee must also ensure that all products meet NIC's standards for accessibility and Section 508 compliance.

Meetings: In addition to the initial WebEx meeting and the curriculum review meeting noted above, the awardee will attend other meetings with NIC staff as needed for project development and updates. These meetings will include, at a minimum: 1 two-day meeting in Washington, DC, and several WebEx meetings. The WebEx meetings will be hosted by NIC and will last up to 4 hours each. NIC will pay to host the WebEx meetings, but fees for project staff who attend will be charged to the cooperative agreement. For all meetings, the awardee should plan to have the project director, subject matter experts, and the curriculum specialist attend.

Application Requirements: An application package must include OMB Standard Form 425, Application for Federal Assistance; a cover letter that identifies the audit agency responsible for the applicant's financial accounts as well as the audit period or fiscal year under which the applicant operates (*e.g.,* July 1 through June 30); and an outline of projected costs with the budget and strategy narratives described in this announcement. The following additional forms must also be included: OMB Standard Form 424A, Budget Information—Non-Construction Programs; OMB Standard Form 424B, Assurances—Non-Construction Programs (both available at *http://www.grants.gov*); DOJ/FBOP/NIC Certification Regarding Lobbying, Debarment, Suspension and Other Responsibility Matters; and the Drug-Free Workplace Requirements (available at *http://nicic.gov/Downloads/General/certif-frm.pdf*)

Applications should be concisely written, typed double spaced, and reference the NIC opportunity number and title referenced in this announcement. If you are hand delivering or submitting via Fed-Ex, please include an original and three copies of your full proposal (program and budget narrative, application forms, assurances and other descriptions). The original should have the applicant's signature in blue ink. Electronic submissions will be accepted only via *http://www.grants.gov.*

The narrative portion of the application should include, at a minimum a brief paragraph indicating the applicant's understanding of the project's purpose; a brief paragraph that summarizes the project goals and objectives; a clear description of the methodology that will be used to complete the project and achieve its goals; a statement or chart of measurable project milestones and timelines for the completion of each milestone; a description of the qualifications of the applicant organization and a resume for the principle and each staff member assigned to the project (including instructors) that documents relevant knowledge, skills, and abilities to complete the project; and a budget that details all costs for the project, shows consideration for all contingencies for the project, and notes a commitment to work within the proposed budget.

In addition to the narrative and attachments, the applicant must submit only one full curriculum developed by the primary curriculum developer named in the application. This curriculum must be in ITIP format and include lesson plans, presentation slides, and a participant manual, at a minimum.

Authority: Public Law 93–415.

Funds Available: NIC is seeking the applicant's best ideas regarding accomplishment of the scope of work and the related costs for achieving the goals of this solicitation. Funds may be used only for the activities that are linked to the desired outcome of the project. The funding amount should not exceed $ 80,000.

Eligibility of Applicants: An eligible applicant is any state or general unit of local government, private agency, educational institution, organization, individual, or team with expertise in the described areas. Applicants must have demonstrated ability to implement a project of this size and scope.

Review Considerations: Applications will be subject to the NIC review process. The criteria for the evaluation of each application are:

Project Design and Management—25 Points

Is there a clear understanding of the purpose of the project and the nature and scope of project activities? Does the applicant give a clear and complete description of all work to be performed for this project? Does the applicant clearly describe a work plan, including objectives, tasks, and milestones necessary to project completion?

Applicant Organization & Project Staff Background—25 Points

Is there a description of the background and expertise of all project personnel as they relate to this project? Does the applicant have an established reputation or skill that makes the applicant particularly well qualified for the project? Does the staffing plan propose sufficient and realistic time commitments from key personnel?

Budget—20 Points

Does the application provide adequate cost detail to support the proposed budget? Does the application include a chart that aligns the budget with project activities along a timeline with, at a minimum, quarterly benchmarks? In terms of program value, is the estimated cost reasonable in relation to work performed and project products?

Sample Curriculum—30 Points

Does the sample curriculum include all components specified in the RFP (lesson plans, presentation slides, and participant manual)? Are the lesson plans designed according to the ITIP model? Are the lesson plans detailed, clear, and well written (spelling, grammar, punctuation)? Is the participant manual clear, and does it follow the lesson plans?

Note: NIC will NOT award a cooperative agreement to an applicant who does not have a Dun and Bradstreet Database Universal Number (DUNS) and is not registered in the Central Contractor Registry (CCR). Applicants can obtain a DUNS number at no cost by calling the dedicated toll-free DUNS number request line at (800) 333–0505. Applicants who are sole proprietors should dial (866) 705–5711 and select option #1.

Applicants may register in the CCR online at the CCR Web site at *http://www.ccr.gov.* Applicants can also review a CCR handbook and worksheet at this Web site.

Number of Awards: One.

NIC Opportunity Number: 12JA02. This number should appear as a reference line in the cover letter, where the opportunity number is requested on Standard Form 424, and on the outside of the envelope in which the application is sent.

Catalog of Federal Domestic Assistance Number: 16.601.

Executive Order 12372: This project is not subject to the provisions of the executive order.

Thomas J. Beauclair,

Deputy Director, National Institute of Corrections.

[FR Doc. 2011–33114 Filed 12–23–11; 8:45 am]

BILLING CODE 4410–36–P

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Copyright Royalty Board

[Docket Nos. 2007–3 CRB CD 2004–2005, 2008–4 CRB CD 2006, 2009–6 CRB CD 2007, 2010–6 CRB CD 2008, 2011–7 CRB 2009; 2010–2 CRB SD 2004–2007, 2010–7 CRB 2008, 2011–8 CRB SD 2009]

Distribution of the 2004–2009 Cable and Satellite Royalty Funds

AGENCY: Copyright Royalty Board, Library of Congress.

ACTION: Notice requesting comments on Phase I and II controversies and soliciting objections on motions for further distribution.

SUMMARY: The Copyright Royalty Judges are soliciting objections on motions of the Phase I claimants for further distributions in connection with the 2004–2009 cable and satellite royalty funds as well as requesting comments as to the existence of Phase I and Phase II controversies with respect to the distribution of these royalty funds.

DATES: Comments and objections are due on or before January 26, 2012.

ADDRESSES: Comments and objections may be sent electronically to *crb@loc.gov.* In the alternative, send an original, five copies, and an electronic copy on a CD either by mail or hand delivery. Please do not use multiple means of transmission. Comments and objections may not be delivered by an overnight delivery service other than the U.S. Postal Service Express Mail. If by mail (including overnight delivery), comments and objections must be addressed to: Copyright Royalty Board, P.O. Box 70977, Washington, DC 20024–0977. If hand delivered by a private party, comments and objections must be brought to the Library of Congress, James Madison Memorial Building, LM–401, 101 Independence Avenue SE., Washington, DC 20559–6000. If delivered by a commercial courier, comments and objections must be delivered to the Congressional Courier Acceptance Site located at 2nd and D Street, NE., Washington, DC. The envelope must be addressed to: Copyright Royalty Board, Library of Congress, James Madison Memorial Building, LM–403, 101 Independence Avenue SE., Washington, DC 20559–6000.

FOR FURTHER INFORMATION CONTACT: LaKeshia Keys, Program Specialist, by telephone at (202) 707–7658 or by email at *crb@loc.gov.*

SUPPLEMENTARY INFORMATION:

Background

Each year cable systems and satellite carriers must submit royalty payments to the Copyright Office as required by the statutory licenses set forth in sections 111 and 119, respectively, of the Copyright Act, title 17 of the United States Code, for the retransmission to cable and satellite subscribers of over-the-air television broadcast stations (cable subscribers also receive radio broadcast signals). These royalties are then distributed to copyright owners whose works were included in such a qualifying transmission and who timely filed a claim for royalties. Distribution of the royalties for each calendar year is conducted by the Copyright Royalty Judges in two phases. At Phase I, the royalties are divided among the representatives of the major categories of copyrightable content (movies, sports programming, music, *etc.*) requesting the distribution. At Phase II, the royalties are divided among the various copyright owners within each category.

Distribution of royalties in any given royalty year may be made through a negotiated settlement among the parties. 17 U.S.C. 111(d)(4)(A), 119(b)(4)(A). If, however, the claimants do not reach an agreement with respect to the proper distribution of the royalties, either at Phase I or Phase II, the Copyright Royalty Judges are required to conduct a proceeding to determine the distribution of any royalties that remain in controversy. 17 U.S.C. 111(d)(4)(B), 119(b)(4)(B).

Notices of Phase I Settlement and Motions for Further Distribution

On November 4, 2011, representatives of the Phase I claimant categories (the ''Phase I Parties'') [1] filed with the Judges separate ''Phase I Parties' Notice of Phase I Settlement and Motion for Further Distribution'' [2] with respect to the 2004–2009 cable and satellite royalty funds. Specifically, the Phase I Parties stated that they had reached a global ''settlement of all outstanding Phase I controversies regarding distribution of the 2004–2009'' cable and satellite royalty funds. Motions at 2. Consequently, they requested that the Judges: (1) Reserve specified amounts ($20 million of the cable royalties and $13 million of the satellite royalties)—to be divided equally among each of the six years—to satisfy previously identified Phase II controversies and (2) authorize the lump-sum distribution of all remaining 2004–2009 cable and satellite royalties to the Phase I Parties through a common agent. *Id.* The reserve amounts [3] would be allocated among three categories in which Phase II controversies have been identified previously. With regard to the cable royalties, the reserve amounts would be: $3 million for the Program Suppliers category; $1 million for the Joint Sports category; and $16 million for the Devotional category. Cable Motion at 4. Similarly, the reserve amounts for the satellite royalties would be: $3 million for the Program Suppliers category; $1 million for the Joint Sports category; and $9 million for the Devotional category. Satellite Motion at 4.

The Independent Producers Group (''IPG'') opposes both of the Phase I Parties' motions. IPG, which has asserted Phase II claims in each of the categories for which reserve amounts are proposed, bases its opposition, in part, on its concerns that the proposed reserve amounts are inadequate to resolve outstanding Phase II claims. *See* IPG Opposition at 4–5.

On December 14, 2011, the Judges held a hearing on the Phase I Parties' motions, where the Phase I Parties and IPG reiterated their respective positions. In light of IPG's continued opposition to the Phase I Parties' motions and to determine whether any other controversies with respect to the 2004 through 2009 cable and satellite royalty funds may be outstanding, the Judges are directing publication of this notice. In particular, the Judges solicit comments to determine whether there are any controversies, either at Phase I or Phase II, with respect to each of the royalty funds that are the subject of the motions (*i.e.,* cable or satellite 2004 through 2009).

[1] The ''Phase I Parties'' with regard to the motion for cable royalties are the Program Suppliers, Joint Sports Claimants, Public Television Claimants, Commercial Television Claimants, Canadian Claimants Group, Music Claimants (American Society of Composers, Authors and Publishers; Broadcast Music, Inc.; and SESAC, Inc.), Devotional Claimants, and National Public Radio.

Public Television Claimants, Canadian Claimants Group, and National Public Radio are not signatories to the motion for distribution of satellite royalties as they are not eligible to receive these royalties.

[2] The further distributions are requested pursuant to section 801(b)(3)(A) of the Copyright Act, which allows the Judges to authorize the distribution of cable and satellite royalties ''to the extent that the Copyright Royalty Judges have found that the distribution of such fees is not subject to controversy.'' 17 U.S.C. 801(b)(3)(A). Prior partial distributions of 50% of the cable and satellite royalties have been made for each of the years 2004–2009 pursuant to section 801(b)(3)(C). *See Distribution Orders* cited *infra.*

[3] As of October 27, 2011, the remaining 50% for the 2004–2009 cable royalties amounted to approximately $462 million and the remaining 50% for the 2004–2009 satellite royalties amounted to approximately $270 million.

Request Regarding Reasonable Objections to the Proposed Settlements

The Judges also seek to determine whether any interested claimant has a reasonable objection that would preclude the requested distributions of the 2004–2009 cable and satellite royalty funds to the Phase I Parties. Such objections should address whether the reserve amounts proposed by the Phase I Parties are adequate by year. If not, then what would be an adequate reserve amount to settle all outstanding claims for each of the years covered by the proposed settlement? The Judges must be advised of the existence and extent of all such objections by the end of the comment period. The Judges will not consider any objections with respect to the requested distributions that come to their attention after the close of that period.

Finally, the Judges have authorized prior partial distributions of 50% of each of the 2004–2009 cable and satellite royalties pursuant to their authority under section 801(b)(3)(C). *See, Distribution Orders,* Docket No. 2007–3 CRB CD 2004–2005 (April 10, 2008, and April 16, 2008); *Distribution Order,* Docket No. 2008–4 CRB CD 2006 (December 2, 2008); *Distribution Order,* Docket No. 2009–6 CRB CD 2007 (October 22, 2009); *Distribution Order,* Docket No. 2010–6 CRB CD 2008 (January 11, 2011); *Distribution Order,* Docket No. 2011–7 CRB CD 2009 (October 13, 2011); *Distribution Order,* Docket No. 2010–2 CRB SD 2004–2007 (March 23, 2010); *Distribution Order,* Docket No. 2010–7 CRB SD 2008 (January 11, 2011); and *Distribution Order,* Docket No. 2011–8 CRB SD 2009 (October 13, 2011). As a condition of receiving a partial distribution under that provision of the Copyright Act, the parties must ''sign an agreement obligating them to return any excess amounts to the extent necessary to comply with the final determination on the distribution of the fees made under [section 801(b)(3)(B)].'' 17 U.S.C. 801(b)(3)(C)(ii). The Judges seek comment on what conditions, if any, should be imposed on the Phase I Parties to ensure that they are obligated to repay any amounts with interest that they received in the proposed settlement if such amount is later determined to be in excess of what a particular Phase I Party is due. For example, should each Phase I Party be required to represent that it will repay any overpayment or is such obligation already covered by the representations that each Phase I Party signed as a condition to receiving its respective shares of the earlier partial distributions for 2004 through 2009?

Each Phase I Parties' Notice of Phase I Settlement and Motion for Further Distribution is posted on the Copyright Royalty Board (''CRB'') Web site at *http://www.loc.gov/crb.* Comments received in response to this Notice also may be posted on the Web site.

Dated: December 20, 2011.

William J. Roberts, Jr.,

U.S. Copyright Royalty Judge.

[FR Doc. 2011–33037 Filed 12–23–11; 8:45 am]

BILLING CODE 1410–72–P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Records Schedules; Availability and Request for Comments

AGENCY: National Archives and Records Administration (NARA).

ACTION: Notice of availability of proposed records schedules; request for comments.

SUMMARY: The National Archives and Records Administration (NARA) publishes notice at least once monthly of certain Federal agency requests for records disposition authority (records schedules). Once approved by NARA, records schedules provide mandatory instructions on what happens to records when no longer needed for current Government business. They authorize the preservation of records of continuing value in the National Archives of the United States and the destruction, after a specified period, of records lacking administrative, legal, research, or other value. Notice is published for records schedules in which agencies propose to destroy records not previously authorized for disposal or reduce the retention period of records already authorized for disposal. NARA invites public comments on such records schedules, as required by 44 U.S.C. 3303a(a).

DATES: Requests for copies must be received in writing on or before January 26, 2012. Once the appraisal of the records is completed, NARA will send a copy of the schedule. NARA staff usually prepare appraisal memorandums that contain additional information concerning the records covered by a proposed schedule. These, too, may be requested and will be provided once the appraisal is completed. Requesters will be given 30 days to submit comments.

ADDRESSES: You may request a copy of any records schedule identified in this notice by contacting Records Management Services (ACNR) using one of the following means:

Mail: NARA (ACNR), 8601 Adelphi Road, College Park, MD 20740–6001.

Email: request.schedule@nara.gov.

FAX: (301) 837–3698.

Requesters must cite the control number, which appears in parentheses after the name of the agency which submitted the schedule, and must provide a mailing address. Those who desire appraisal reports should so indicate in their request.

FOR FURTHER INFORMATION CONTACT: Margaret Hawkins, Director, National Records Management Program (ACNR), National Archives and Records Administration, 8601 Adelphi Road, College Park, MD 20740–6001. Telephone: (301) 837–1799. Email: *request.schedule@nara.gov.*

SUPPLEMENTARY INFORMATION: Each year Federal agencies create billions of records on paper, film, magnetic tape, and other media. To control this accumulation, agency records managers prepare schedules proposing retention periods for records and submit these schedules for NARA's approval, using the Standard Form (SF) 115, Request for Records Disposition Authority. These schedules provide for the timely transfer into the National Archives of historically valuable records and authorize the disposal of all other records after the agency no longer needs them to conduct its business. Some schedules are comprehensive and cover all the records of an agency or one of its major subdivisions. Most schedules, however, cover records of only one office or program or a few series of records. Many of these update previously approved schedules, and some include records proposed as permanent.

The schedules listed in this notice are media neutral unless specified otherwise. An item in a schedule is media neutral when the disposition instructions may be applied to records regardless of the medium in which the records are created and maintained. Items included in schedules submitted to NARA on or after December 17, 2007, are media neutral unless the item is limited to a specific medium. (See 36 CFR 1225.12(e).)

No Federal records are authorized for destruction without the approval of the Archivist of the United States. This approval is granted only after a thorough consideration of their administrative use by the agency of origin, the rights of the Government and of private persons directly affected by the Government's activities, and

whether or not they have historical or other value.

Besides identifying the Federal agencies and any subdivisions requesting disposition authority, this public notice lists the organizational unit(s) accumulating the records or indicates agency-wide applicability in the case of schedules that cover records that may be accumulated throughout an agency. This notice provides the control number assigned to each schedule, the total number of schedule items, and the number of temporary items (the records proposed for destruction). It also includes a brief description of the temporary records. The records schedule itself contains a full description of the records at the file unit level as well as their disposition. If NARA staff has prepared an appraisal memorandum for the schedule, it too includes information about the records. Further information about the disposition process is available on request.

Schedules Pending

1. Department of the Army, Agency-wide (N1–AU–10–70, 1 item, 1 temporary item). Master files of electronic information systems related to supply and materiel life cycle management operations.

2. Department of the Army, Agency-wide (N1–AU–10–71, 1 item, 1 temporary item). Master files of an electronic information system used to project individual fillers and replacements into theaters of operation.

3. Department of the Army, Agency-wide (N1–AU–10–72, 1 item, 1 temporary item). Master files of an electronic information system used to manage official photographs of individuals for promotion purposes.

4. Department of the Army, Agency-wide (N1–AU–10–73, 1 item, 1 temporary item). Master files of an electronic information system used to track the movement of munitions from depots and plants to customers from the military services.

5. Department of the Army, Agency-wide (N1–AU–10–74, 1 item, 1 temporary item). Master files of an electronic information system that contains information used to validate troop readiness and certify personnel for deployments.

6. Department of the Army, Agency-wide (N1–AU–10–76, 1 item, 1 temporary item). Master files of an electronic information system used to track soldiers enrolled in the Wounded Warrior Lifecycle Program.

7. Department of Commerce, Bureau of the Census (N1–29–10–4, 15 items, 10 temporary items). Records of an electronic information system used to manage data collected for the Economic Census and the Annual Survey of Manufactures. Records include system and program code files, data input files, a variety of system processing files, and final data files preliminary in nature. Proposed for permanent retention are final data files containing the entire content of the Economic Census and Annual Survey of Manufactures, final aggregated data files, and data documentation.

8. Department of Health and Human Services, Administration for Children and Families (N1–292–10–2, 2 items, 2 temporary items). Master files of an electronic information system containing employment information used in enforcing state and Federal child support requirements.

9. Department of Homeland Security, Transportation Security Administration (N1–560–12–1, 2 items, 2 temporary items). Records of Family Medical Leave Act program files and case files containing reports, memos, agency communications, policy and guidance, employee applications, medical documentation, personnel actions, and correspondence.

10. Office of the Director of National Intelligence, Office of Systems and Resource Analyses (N1–576–11–1, 13 items, 7 temporary items). Records related to calendars, operative and facilitative activities, reference files, internal briefings and speeches, internal and external web page material, and non-substantive working papers and drafts. Proposed for permanent retention are records related to final reports, external briefings and speeches, major issues and foundational studies working groups and other senior bodies, and substantive working papers.

11. Office of the Director of National Intelligence, Office of the Assistant Director of National Intelligence for Acquisition, Technology, and Facilities (N1–576–11–6, 16 items, 11 temporary items). Records relating to general incoming correspondence, staff-level working groups and committees, advisory program background information, non-substantive working papers, facility and operating files, reference files, supervisor copies of personnel files, applications for employment, preliminary budget background records, and calendars. Proposed for permanent retention are correspondence management files and master files of an electronic information system used to manage correspondence; records documenting the work of boards, committees, and working groups at the senior level; records documenting activities with direct effect on the National Intelligence Program; and substantive working papers.

Dated: December 20, 2011.

Paul M. Wester, Jr.,

Chief Records Officer for the U.S. Government.

[FR Doc. 2011–33117 Filed 12–23–11; 8:45 am]

BILLING CODE 7515–01–P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Information Security Oversight Office

State, Local, Tribal, and Private Sector Policy Advisory Committee (SLTPS–PAC)

AGENCY: National Archives and Records Administration, Information Security Oversight Office.

ACTION: Notice of Meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act (5 U.S.C. app 2) and implementing regulation 41 CFR 101–6, announcement is made for the committee meeting of the State, Local, Tribal, and Private Sector Policy Advisory Committee. To discuss the matters relating to the Classified National Security Information Program for State, Local, Tribal, and Private Sector Entities.

DATES: The meeting will be held on January 18, 2012, 10 a.m. to 12 noon.

ADDRESSES: National Archives and Records Administration, 700 Pennsylvania Avenue NW., Jefferson Room, Washington, DC 20408.

FOR FURTHER INFORMATION CONTACT: Robert J. Skwirot, Senior Program Analyst, ISOO, National Archives Building, 700 Pennsylvania Avenue NW., Washington, DC 20408, on (202) 357–5398, or at *robert.skwirot@nara.gov*. Contact ISOO at *ISOO@nara.gov*.

SUPPLEMENTARY INFORMATION: The meeting will be open to the public. However, due to space limitations and access procedures, the name and telephone number of individuals planning to attend must be submitted to the Information Security Oversight Office (ISOO) no later than Friday, January 13, 2012. ISOO will provide additional instructions for gaining access to the location of the meeting.

Dated: December 19, 2011.

Mary Ann Hadyka,

Committee Management Officer.

[FR Doc. 2011–33116 Filed 12–23–11; 8:45 a.m.]

BILLING CODE 7515–01–P

NATIONAL CREDIT UNION ADMINISTRATION

Agency Information Collection Activities: Submission to OMB for a Extension of a Currently Approved Collection; Comment Request

AGENCY: National Credit Union Administration (NCUA).

ACTION: Request for comment.

SUMMARY: The NCUA is submitting the following information collection to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. Chapter 35). This information collection is published to obtain comments from the public.

DATES: Comments will be accepted until January 26, 2012.

ADDRESSES: Interested parties are invited to submit written comments to the NCUA or OMB contacts listed below:

NCUA Contact: Tracy Crews, National Credit Union Administration, 1775 Duke Street, Alexandria, VA 22314–3428, Fax No. (703) 837–2861, Email: *OCIOMail@ncua.gov.*

OMB Contact: ATTN: Desk Officer for the National Credit Union Administration (NCUA), Office of Management and Budget, Office of Information and Regulatory Affairs, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or a copy of the information collection request should be directed to Tracy Crews at the National Credit Union Administration, 1775 Duke Street, Alexandria, VA 22314–3428, or at (703) 518–6444.

SUPPLEMENTARY INFORMATION: Proposal for the following collection of information:

Title: Large Credit Union Financials and Board Packages.

OMB Number: 3133–0179.

Form Number: None.

Type of Review: Extension of a currently approved collection.

Description: The region needs the information to effectively monitor financial trends and emerging issues of federally insured credit unions (FICUs) $1 billion or greater between onsite visitations. These institutions present greater risk to the NCUSIF due to their asset size and complexity.

Respondents: Federally insured credit unions (FICUs) with $1 billion or greater in assets.

Estimated No. of Respondents/Record keepers: 35.

Estimated Burden Hours per Response: ½ hour (30 minutes).

Frequency of Response: Monthly.

Estimated Total Annual Burden Hours: 210 hours.

Estimated Total Annual Cost: 0.

By the National Credit Union Administration Board on December 20, 2011.

Mary Rupp,

Secretary of the Board.

[FR Doc. 2011–33029 Filed 12–23–11; 8:45 am]

BILLING CODE 7535–01–P

NATIONAL SCIENCE FOUNDATION

National Science Board; Sunshine Act Meetings; Notice

The National Science Board's Committee on Science and Engineering Indicators (SEI), pursuant to NSF regulations (45 CFR part 614), the National Science Foundation Act, as amended (42 U.S.C. 1862n–5), and the Government in the Sunshine Act (5 U.S.C. 552b), hereby gives notice in regard to the scheduling of a teleconference for the transaction of National Science Board business and other matters specified, as follows:

DATES: *Date & Time:* December 28, 2011; 1–2 p.m. EST.

SUBJECT MATTER: (1) Discussion of the revised Companion Piece to Science and Engineering Indicators 2012 by the Committee on Science and Engineering Indicators (SEI); (2) Consideration for Recommendation for Board Approval subject to final edits approved by the Chairman of the Board and the Committee Chair; (3) Next Steps.

STATUS: Open.

LOCATION: This meeting will be held by teleconference at the National Science Board Office, National Science Foundation, 4201 Wilson Blvd., Arlington, VA 22230. A public listening room will be available for this teleconference meeting. All visitors must contact the Board Office [call (703) 292–7000 or send an email message to *nationalsciencebrd@nsf.gov*] at least 24 hours prior to the teleconference for the public room number and to arrange for a visitor's badge. All visitors must report to the NSF visitor desk located in the lobby at the 9th and N. Stuart Streets entrance on the day of the teleconference to receive a visitor's badge.

UPDATES & POINT OF CONTACT: Please refer to the National Science Board Web site *http://www.nsf.gov/nsb* for additional information and schedule updates (time, place, subject matter or status of meeting) may be found at *http://www.nsf.gov/nsb/notices/*. Point of contact for this meeting is: Matthew B. Wilson, National Science Board Office, 4201 Wilson Blvd., Arlington, VA 22230. Telephone: (703) 292–7000.

Susanne Bolton,

Committee Management Officer.

[FR Doc. 2011–33247 Filed 12–22–11; 4:15 pm]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2011–0290]

Biweekly Notice; Applications and Amendments to Facility Operating Licenses Involving No Significant Hazards Considerations

Background

Pursuant to Section 189a. (2) of the Atomic Energy Act of 1954, as amended (the Act), the U.S. Nuclear Regulatory Commission (the Commission or NRC) is publishing this regular biweekly notice. The Act requires the Commission publish notice of any amendments issued, or proposed to be issued and grants the Commission the authority to issue and make immediately effective any amendment to an operating license upon a determination by the Commission that such amendment involves no significant hazards consideration, notwithstanding the pendency before the Commission of a request for a hearing from any person.

This biweekly notice includes all notices of amendments issued, or proposed to be issued from December 1, 2011 to December 14, 2011. The last biweekly notice was published on December 13, 2011 (76 FR 77565).

Addresses: Please include Docket ID NRC–2011–0290 in the subject line of your comments. Comments submitted in writing or in electronic form will be posted on the NRC Web site and on the Federal rulemaking Web site *http://www.regulations.gov.* Because your comments will not be edited to remove any identifying or contact information, the NRC cautions you against including any information in your submission that you do not want to be publicly disclosed.

The NRC requests that any party soliciting or aggregating comments received from other persons for submission to the NRC inform those persons that the NRC will not edit their comments to remove any identifying or contact information, and therefore, they should not include any information in their comments that they do not want publicly disclosed.

You may submit comments by any one of the following methods.

Federal Rulemaking Web site: Go to *http://www.regulations.gov* and search for documents filed under Docket ID NRC–2011–0290. Address questions about NRC dockets to Carol Gallagher (301) 492–3668; email *Carol.Gallagher@nrc.gov.*

Mail comments to: Cindy Bladey, Chief, Rules, Announcements, and Directives Branch (RADB), Office of Administration, Mail Stop: TWB–05–B01M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, or by fax to RADB at (301) 492–3446.

You can access publicly available documents related to this notice using the following methods:

NRC's Public Document Room (PDR): The public may examine and have copied for a fee publicly available documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

NRC's Agencywide Documents Access and Management System (ADAMS): Publicly available documents created or received at the NRC are accessible electronically through ADAMS in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html.* From this page, the public can gain entry into ADAMS, which provides text and image files of the NRC's public documents. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC's PDR reference staff at 1–(800) 397–4209, (301) 415–4737, or by email to *pdr.resource@nrc.gov.* From this page, the public can gain entry into ADAMS, which provides text and image files of NRC's public documents. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC's PDR reference staff at 1-(800) 397–4209, (301) 415–4737, or by email to *pdr.resource@nrc.gov.*

Federal Rulemaking Web site: Public comments and supporting materials related to this notice can be found at *http://www.regulations.gov* by searching on Docket ID: NRC–2011–0290.

Notice of Consideration of Issuance of Amendments to Facility Operating Licenses, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing

The Commission has made a proposed determination that the following amendment requests involve no significant hazards consideration. Under the Commission's regulations in Title 10 of the Code of Federal Regulations (10 CFR) 50.92, this means that operation of the facility in accordance with the proposed amendment would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. The basis for this proposed determination for each amendment request is shown below.

The Commission is seeking public comments on this proposed determination. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination.

Normally, the Commission will not issue the amendment until the expiration of 60 days after the date of publication of this notice. The Commission may issue the license amendment before expiration of the 60-day period provided that its final determination is that the amendment involves no significant hazards consideration. In addition, the Commission may issue the amendment prior to the expiration of the 30-day comment period should circumstances change during the 30-day comment period such that failure to act in a timely way would result, for example in derating or shutdown of the facility. Should the Commission take action prior to the expiration of either the comment period or the notice period, it will publish in the **Federal Register** a notice of issuance. Should the Commission make a final No Significant Hazards Consideration Determination, any hearing will take place after issuance. The Commission expects that the need to take this action will occur very infrequently.

Within 60 days after the date of publication of this notice, any person(s) whose interest may be affected by this action may file a request for a hearing and a petition to intervene with respect to issuance of the amendment to the subject facility operating license. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's ''Rules of Practice for Domestic Licensing Proceedings'' in 10 CFR part 2. Interested person(s) should consult a current copy of 10 CFR 2.309, which is available at the NRC's PDR, located at One White Flint North, Room O1–F21, 11555 Rockville Pike (first floor), Rockville, Maryland 20852. NRC regulations are accessible electronically from the NRC Library on the NRC Web site at *http://www.nrc.gov/reading-rm/doc-collections/cfr/.* If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or a presiding officer designated by the Commission or by the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the Chief Administrative Judge of the Atomic Safety and Licensing Board will issue a notice of a hearing or an appropriate order.

As required by 10 CFR 2.309, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following general requirements: (1) The name, address, and telephone number of the requestor or petitioner; (2) the nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding; (3) the nature and extent of the requestor's/petitioner's property, financial, or other interest in the proceeding; and (4) the possible effect of any decision or order which may be entered in the proceeding on the requestor's/petitioner's interest. The petition must also identify the specific contentions which the requestor/petitioner seeks to have litigated at the proceeding.

Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the requestor/petitioner shall provide a brief explanation of the bases for the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the requestor/petitioner intends to rely in proving the contention at the hearing. The requestor/petitioner must also provide references to those specific sources and documents of which the petitioner is aware and on which the requestor/petitioner intends to rely to establish those facts or expert opinion. The petition must include sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the amendment under consideration. The contention must be one which, if proven, would entitle the requestor/petitioner to relief. A requestor/petitioner who fails to satisfy these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to

intervene, and have the opportunity to participate fully in the conduct of the hearing.

If a hearing is requested, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held. If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment. If the final determination is that the amendment request involves a significant hazards consideration, then any hearing held would take place before the issuance of any amendment.

All documents filed in the NRC adjudicatory proceedings, including a request for hearing, a petition for leave to intervene, any motion or other document filed in the proceeding prior to the submission of a request for hearing or petition to intervene, and documents filed by interested governmental entities participating under 10 CFR 2.315(c), must be filed in accordance with the NRC E-Filing rule (72 FR 49139, August 28, 2007). The E-Filing process requires participants to submit and serve all adjudicatory documents over the Internet, or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek an exemption in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least 10 days prior to the filing deadline, the participant should contact the Office of the Secretary by email at *hearing.docket@nrc.gov,* or by telephone at (301) 415–1677, to request (1) a digital identification (ID) certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a request or petition for hearing (even in instances in which the participant, or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the hearing in this proceeding if the Secretary has not already established an electronic docket.

Information about applying for a digital ID certificate is available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals/apply-certificates.html.* System requirements for accessing the E-Submittal server are detailed in the NRC's ''Guidance for Electronic Submission,'' which is available on the agency's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* Participants may attempt to use other software not listed on the Web site, but should note that the NRC's E-Filing system does not support unlisted software, and the NRC Meta System Help Desk will not be able to offer assistance in using unlisted software.

If a participant is electronically submitting a document to the NRC in accordance with the E-Filing rule, the participant must file the document using the NRC's online, Web-based submission form. In order to serve documents through the Electronic Information Exchange System, users will be required to install a Web browser plug-in from the NRC Web site. Further information on the Web-based submission form, including the installation of the Web browser plug-in, is available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.*

Once a participant has obtained a digital ID certificate and a docket has been created, the participant can then submit a request for hearing or petition for leave to intervene. Submissions should be in Portable Document Format (PDF) in accordance with the NRC guidance available on the NRC public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* A filing is considered complete at the time the documents are submitted through the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an email notice confirming receipt of the document. The E-Filing system also distributes an email notice that provides access to the document to the NRC Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the documents on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing request/petition to intervene is filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically using the agency's adjudicatory E-Filing system may seek assistance by contacting the NRC Meta System Help Desk through the ''Contact Us'' link located on the NRC Web site at *http://www.nrc.gov/site-help/e-submittals.html,* by email at *MSHD.Resource@nrc.gov,* or by a toll-free call at 1–(866) 672–7640. The NRC Meta System Help Desk is available between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday, excluding government holidays.

Participants who believe that they have a good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland, 20852, Attention: Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service. A presiding officer, having granted an exemption request from using E-Filing, may require a participant or party to use E-Filing if the presiding officer subsequently determines that the reason for granting the exemption from use of E-Filing no longer exists.

Documents submitted in adjudicatory proceedings will appear in the NRC's electronic hearing docket which is available to the public at *http://ehd1.nrc.gov/ehd/,* unless excluded pursuant to an order of the Commission, or the presiding officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings, unless an NRC regulation or other law requires submission of such information. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include

copyrighted materials in their submission.

Petitions for leave to intervene must be filed no later than 60 days from the date of publication of this notice. Non-timely filings will not be entertained absent a determination by the presiding officer that the petition or request should be granted or the contentions should be admitted, based on a balancing of the factors specified in 10 CFR 2.309(c)(1)(i)–(viii).

For further details with respect to this license amendment application, see the application for amendment which is available for public inspection at the NRC's PDR, located at One White Flint North, Room O1–F21, 11555 Rockville Pike (first floor), Rockville, Maryland 20852. Publicly available documents created or received at the NRC are accessible electronically through ADAMS in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html.* Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS, should contact the NRC PDR Reference staff at 1–(800) 397–4209, (301) 415–4737, or by email to *pdr.resource@nrc.gov.*

Entergy Gulf States Louisiana, LLC, and Entergy Operations, Inc., Docket No. 50–458, River Bend Station, Unit 1, West Feliciana Parish, Louisiana

Date of amendment request: September 12, 2011, as supplemented by letter dated October 13, 2011.

Description of amendment request: The amendment would revise the River Bend Station emergency plan to relocate its alternate Emergency Operations Facility (EOF) from 23 miles to 28 miles from the Technical Support Center (TSC).

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed amendment involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed change does not increase the probability or consequences of an accident. The change only impacts the implementation of the Emergency Plan by relocating the alternate EOF to another facility. It has no impact on plant equipment or the operation of plant equipment and thus has no impact on the probability or consequences of an event. The capabilities of the alternate EOF have not been revised from the current Emergency Plan. The proposed facility will have the capabilities to obtain and display plant data and radiological information to assess plant and radiological release conditions, perform offsite dose projections, make public protective action recommendations and perform offsite notifications to State and Local agencies.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The change only impacts the implementation of the Emergency Plan by relocating the alternate EOF. The change does not impact any plant equipment or systems needed to respond to an accident, nor does it involve any analysis of plant accidents. The proposed change does not create a new or different kind of accident from any previously evaluated because this change only impacts the location of the Alternate EOF.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

The change to the Emergency Plan does not reduce the margin of safety currently provided by the Plan as it maintains the capabilities of the current alternate EOF. Offsite dose calculations, offsite notifications to state and local agencies, and public protective action recommendations will continue to be performed by alternate EOF personnel. Therefore, the proposed changes do not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Joseph A. Aluise, Associate General Counsel—Nuclear, Entergy Services, Inc., 639 Loyola Avenue, New Orleans, Louisiana 70113.

NRC Branch Chief: Michael T. Markley.

Entergy Nuclear Operations, Inc., Docket No. 50–247, Indian Point Nuclear Generating Unit 2, Westchester County, New York

Date of amendment request: October 18, 2011.

Description of amendment request: The proposed amendment would change the Technical Specification (TS) Section 3.3.3, Table 3.3–1, to revise the existing requirement for two channels of the Containment Water Level (Containment Sump) function and two channels of the Containment Sump Water Level (Recirculation Sump) function to two Containment Water Level channels. This is consistent with the Standard Technical Specification NUREG 1431.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed amendment involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed change will revise the requirements for water level monitors from 4 to 2. These level indicators are provided for monitoring the post-accident water level in the bottom of the containment to aid operator action to initiate recirculation and to assess the potential for excessive level. The presence or absence of these instruments has no bearing on accident precursor conditions or events. The proposed requirement will maintain redundancy and, utilizing the RWST [Refueling Water Storage Tank] level indication, diversity to continue to provide information to the plant operators to monitor and manage accident conditions.

Therefore, the proposed change does not involve a significant increase in the probability or consequences of previously evaluated accidents.

2. Does the proposed amendment create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed change will revise the requirements for water level monitors from four to two. The change reduces the number of channels required but retains redundancy and, coupled with the RWST level indication, diversity of indication. The Technical Specification does not require the instruments for normal plant operations and does not affect how the plant is operated. The removal of the two indicators does not create the possibility of any equipment failure or effect on other equipment.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any previously evaluated.

3. Does the proposed amendment involve a significant reduction in a margin of safety?

Response: No.

The proposed change will revise the required number of water level monitors. The revised requirement will remain consistent with the requirements found in the Standard Technical Specification for level monitors provided for monitoring the post-accident water level. The level monitors no longer required by the TS will continue to serve as backup instrumentation for the instruments on the same power supply as long as they continue to meet surveillance requirements. Other instrument channels will remain in service and provide diverse indication for operator response and to support existing accident mitigation strategies. The proposed change does not involve changes to existing setpoints for automatic or operator actions.

Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Mr. William C. Dennis, Assistant General Counsel, Entergy Nuclear Operations, Inc., 440 Hamilton Avenue, White Plains, NY 10601.

NRC Branch Chief: Nancy L. Salgado.

Entergy Nuclear Operations, Inc., Docket Nos. 50–247 and 50–286, Indian Point Nuclear Generating Unit 2 and 3 [IP2 and IP3], Westchester County, New York

Date of amendment request: September 16, 2011.

Description of amendment request: The proposed amendment would delete the references to the American Society of Mechanical Engineers (ASME) Boiler and Pressure Vessel Code, Section XI and incorporates references to the ASME Code for Operation and Maintenance of Nuclear Power Plants (ASME OM Code) and indicates that the allowance for a 25% extension of surveillance intervals may be applied to accelerated frequencies utilized in the inservice testing program.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed amendment involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed change revises [IP2], TS [Technical Specification] 5.5.6 and [IP3], TS 5.5.7, Inservice Testing Program, for consistency with the requirements of 10 CFR 50.55a(f)(4) for pumps and valves which are classified as American Society of Mechanical Engineers (ASME) Code Class 1, Class 2 and Class 3. The proposed change incorporates revisions to the ASME Code that result in a net improvement in the measures for testing pumps and valves.

The proposed change does not impact any accident initiators or analyzed events or assumed mitigation of accident or transient events. The proposed change does not involve the addition or removal of any equipment, or any design changes to the facility.

Therefore, this proposed change does not represent a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed amendment create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed change revises [P2], TS 5.5.6 and [IP3], TS 5.5.7, Inservice Testing Program, for consistency with the requirements of 10 CFR 50.55a(f)(4) for pumps and valves which are classified as American Society of Mechanical Engineers (ASME) Code Class 1, Class 2 and Class 3. The proposed change incorporates revisions to the ASME Code that result in a net improvement in the measures for testing pumps and valves.

The proposed change does not involve a modification to the physical configuration of the plant (*i.e.,* no new equipment will be installed) or change in the methods governing normal plant operation. The proposed change will not impose any new or different requirements or introduce a new accident initiator, accident precursor, or malfunction mechanism. Additionally, there is no change in the types or increases in the amounts of any effluent that may be released off-site and there is no increase in individual or cumulative occupational exposure.

Therefore, this proposed change does not create the possibility of an accident of a different kind than previously evaluated.

3. Does the proposed amendment involve a significant reduction in a margin of safety?

Response: No.

The proposed change revises [IP2], TS 5.5.6 and [IP3], TS 5.5.7, Inservice Testing Program, for consistency with the requirements of 10 CFR 50.55a(f)(4) for pumps and valves which are classified as American Society of Mechanical Engineers (ASME) Code Class 1, Class 2 and Class 3. The proposed change incorporates revisions to the ASME Code that result in a net improvement in the measures for testing pumps and valves. The safety function of the affected pumps and valves are maintained.

Therefore, this proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Mr. William C. Dennis, Assistant General Counsel, Entergy Nuclear Operations, Inc., 440 Hamilton Avenue, White Plains, NY 10601.

NRC Branch Chief: Nancy L. Salgado.

NextEra Energy Seabrook, LLC, Docket No. 50–443, Seabrook Station, Unit 1, Rockingham County, New Hampshire

Date of amendment request: November 17, 2011.

Description of amendment request: The proposed change would revise Technical Specification 3.3.3.5, ''Remote Shutdown System Table 3.3–9,'' by removing the location information of transfer switches, control circuits and instruments.

Basis for proposed no significant hazards consideration (NSHC) determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of NSHC, which is presented below with NRC edits in brackets:

1. The proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

The proposed change does not impact the physical function of plant structures, systems, or components (SSCs) or the manner in which SSCs perform their design function. The proposed change neither adversely affects accident initiators or precursors, nor alters design assumptions. The proposed change does not alter or prevent the ability of operable SSCs to perform their intended function to mitigate the consequences of an initiating event within assumed acceptance limits.

The proposed change would remove the specific location information listed in Technical Specification 3.3.3.5, Remote Shutdown Systems; Table 3.3–9 for transfer switches/control circuits and instruments. The requirements in this Technical Specification would not change with the removal of the location information and the location information does not meet any of the criteria in 10 CFR 50.36c(2)(ii) for items that must be retained in the Technical Specifications. Removing the location information will have no adverse effect on plant operation, the availability or operation of any accident mitigation equipment, or plant response to a design basis accident.

Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. The proposed change does not create the possibility of a new or different kind of accident from any previously evaluated.

The proposed change will not impact the accident analysis. The change does not involve a physical alteration of the plant (*i.e.,* no new or different type of equipment will be installed), a significant change in the method of plant operation, or new operator actions. The proposed change will not introduce failure modes that could result in a new accident. The change does not alter assumptions made in the safety analysis.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. The proposed change[does] not involve a significant reduction in the margin of safety.

Margin of safety is associated with confidence in the ability of the fission product barriers (*i.e.,* fuel cladding, reactor coolant system pressure boundary, and containment structure) to limit the level of radiation dose to the public. The proposed change does not involve a change in the method of plant operation, and no accident analyses will be affected by the proposed changes.

Additionally, the proposed changes will not relax any criteria used to establish safety limits and will not relax any safety system settings. The safety analysis acceptance criteria are not affected by this change. The proposed change will not result in plant operation in a configuration outside the design basis. The proposed change does not adversely affect systems that respond to safely shutdown the plant and to maintain the plant in a safe shutdown condition.

Therefore, these proposed changes do not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves NSHC.

Attorney for licensee: M.S. Ross, Florida Power & Light Company, P.O. Box 14000, Juno Beach, FL 33408–0420.

NRC Branch Chief: Harold K. Chernoff.

Nine Mile Point Nuclear Station, LLC, (NMPNS) Docket Nos. 50–220 and 50–410, Nine Mile Point Nuclear Station, Unit 1 and 2 (NMP 1 and 2), Oswego County, New York

Date of amendment request: July 20, 2011, as supplemented on November 3, 2011.

Description of amendment request: The proposed amendment would revise the NMP1 Technical Specification (TS) Section 5.1, ''Site,'' and associated TS Figure 5.1–1, ''Site Boundaries, Nine Mile Point—Unit 1,'' and the NMP2 TS Figure 4.1–1, ''Site Area and Land Portion of Exclusion Area Boundaries,'' to reflect the transfer of a portion of the Nine Mile Point Nuclear Station, LLC (NMPNS) site real property located outside of the NMPNS Protected Area but within the current NMPNS Owner Controlled Area, as well as specified easements over the remainder of the NMPNS site, to Nine Mile Point 3 Nuclear Project, LLC (NMP3), a subsidiary of UniStar Nuclear Energy, LLC.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed [change] involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed amendments are intended only to reflect the transfer of a portion of the NMPNS site real property to NMP3, relocate certain design details from the TS to the NMP1 and NMP2 safety analysis reports, and make other changes that are administrative in nature. No physical or operational changes to the facility will result from the proposed amendments, and the exclusion area boundary and low population zone will not be altered. The proposed amendments do not modify the design assumptions for systems or components used to mitigate the consequences of accidents, and the initial conditions and methodologies used in the NMP1 and NMP2 accident analyses remain unchanged.

2. Does the proposed [change] create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed amendments do not involve a physical alteration of the plants (no new or different type of equipment will be installed) or changes in methods governing normal plant operation. The safety functions of NMP1 and NMP2 structures, systems, or components are not changed in any manner, and the reliability of structures, systems, or components is not reduced. Thus, no new failure modes or potential accident initiators are introduced.

3. Does the proposed [change] involve a significant reduction in a margin of safety?

Response: No.

No physical or operational changes to NMP1 and NMP2 will result from the proposed amendments, and the exclusion area boundary and low population zone will not be altered. The proposed amendments do not affect any safety limits, setpoints, or safety analysis assumptions.

Therefore, the proposed amendments do not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Carey W. Fleming, Senior Counsel, Constellation Energy Nuclear Group, LLC, 100 Constellation Way, Suite 200C, Baltimore, MD 21202.

NRC Branch Chief: Nancy L. Salgado.

Tennessee Valley Authority (TVA), Docket No. 50–327, Sequoyah Nuclear Plant, Unit 1, Hamilton County, Tennessee

Date of amendment request: September 29, 2011 (TS–SQN–2011–05).

Description of amendment request: During Sequoyah Nuclear Plant (SQN), Unit 2, fall 2012 refueling outage (RFO), the replacement steam generators will be installed. To support this activity, heavy load lifts will be conducted. The proposed amendment would add a one-time license condition to the SQN, Unit 1 operating license for the conduct of heavy load lifts for the SQN, Unit 2 steam generator replacement project (SGRP). The one-time license condition establishes special provisions and requirements for the safe operation of SQN, Unit 1, while large heavy load lifts are performed on SQN, Unit 2. In addition, a one-time change to SQN, Unit 1 Technical Specification 3.7.5, ''Ultimate Heat Sink,'' is also proposed to implement additional restrictions with respect to maximum average essential raw cooling water (ERCW) system supply header water temperature during large heavy load lifts performed to support the SQN, Unit 2 SGRP during fall 2012 RFO.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

No changes in event classification as discussed in SQN Updated Final Safety Analysis Report Chapter 15, ''Accident Analyses,'' will occur due to the proposed one-time change to support the conduct of large heavy load lifts associated with the SQN, Unit 2, steam generator replacement project.

Accidents previously evaluated that are relevant to this determination are related to plant external events and load handling. The probability of an occurrence of a seismic event is determined by regional geologic conditions and has not changed. Weather related events are determined by regional meteorological conditions and the probability of occurrence of severe weather events has not changed.

The consequences of an earthquake have not changed. A seismic evaluation performed to support the SQN, Unit 2, steam generator replacement activities has determined that the Outside Lift System (OLS) would not collapse or result in a drop of the load during a seismic design basis Safe Shutdown Earthquake event for the lift configurations to be used during the SQN, Unit 2, steam generator replacement project. Similar qualification is demonstrated for the mobile crane, which will be used for handling smaller loads during the SQN, Unit 2, steam generator replacement project.

The consequences of a tornado or high winds have not changed. A lift will not commence if analysis of weather data for the expected duration of the lift indicates the potential for wind conditions in excess of the maximum operating wind speed. Rigging operations will not be performed when wind speeds exceed the maximum operating wind speed for the OLS. If wind speeds increase during a rigging operation such that the wind speed may exceed the maximum operating speed, rigging operations will be suspended

and the unloaded OLS will be secured by implementing administrative controls specified by the manufacturer. Further, should there be an unexpected detrimental change in weather while the OLS is loaded, the lift will be completed and the OLS will be placed in its optimum safe configuration or the load will be grounded and the crane will be placed in a safe configuration. Similar qualification and administrative controls are also applied to the mobile crane used for handling smaller loads during the SQN, Unit 2, steam generator replacement project.

An old steam generator (OSG) drop has been postulated to occur to address the radiological consequences associated with the drop. The dose analysis demonstrated that the OSG drop accident consequences remain below applicable regulatory limits and are bounded by similar, previously evaluated accidents at SQN.

In addition, the proposed change establishes requirements to ensure that the ERCW System remains capable of supporting the continued operation and safe shutdown of SQN, Unit 1, and remains capable of maintaining the required cooling water flow to essential structures, systems, and components (SSCs) following a potential large heavy load drop. As such, the ERCW System will remain capable of performing its required safety function to support equipment credited in the mitigation of consequences of design basis events.

Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

Three postulated scenarios related to heavy load handling during the SQN, Unit 2, steam generator replacement activities were examined for their potential to represent a new or different kind of accident from those previously evaluated: 1) a breach of an OSG, resulting in the release of contained radioactive material, 2) flooding in the Auxiliary Building caused by the failure of piping in the ERCW tunnel, and 3) loss of ERCW to support safe shutdown of the operating Unit (SQN, Unit 1) and the continued supply of cooling water from the ERCW System to essential SSCs.

Failure of an OSG that results in a breach of the primary side of the steam generator could potentially result in a release of a contained source outside containment. The consequences of this event, both offsite and in the control room, were examined and were found to be within the consequences of the failure of other contained sources outside containment at the SQN site.

To preclude flooding of the Auxiliary Building due to a large heavy load drop, a temporary wall will be installed in the pipe tunnel near the Auxiliary Building interface. Thus, the postulated flooding of the ERCW tunnel will not result in flooding of the Auxiliary Building beyond those events previously evaluated.

The potential for a large heavy load drop to cause loss of ERCW supply to SQN, Unit 1, and other essential SSCs is considered an unlikely accident for the following reasons.

- The lifting equipment was specifically chosen for the subject heavy lifts,
- Crane operators will be specially trained in the operation of the lift equipment and in the SQN site conditions,
- Qualifying analyses and administrative controls will be used to protect the lifts from the effects of external events, and
- The areas over which a load drop could cause loss of ERCW are a small part of the total travel path of the loads.

In addition, protection against the potential for loss of ERCW is established by the proposed License Condition requirements and proposed Technical Specifications requirements. These requirements ensure that that ERCW System remains capable of supporting the continued operation and safe shutdown of SQN, Unit 1, and remains capable of maintaining the required cooling water flow to essential SSCs following a potential large heavy load drop.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed amendment involve a significant reduction in a margin of safety?

Response: No.

The proposed change to the SQN, Unit 1, Operating License and Technical Specifications supports safe operation and safe shutdown capabilities of SQN, Unit 1, during replacement of the SQN, Unit 2, steam generators. These proposed requirements do not result in changes in the design basis for SSCs and do not change the minimum amount of operating equipment credited in the safety analyses for accident or transient mitigation. The proposed change does not alter the assumptions contained in the safety analyses. The proposed change does not alter the manner in which safety limits, limiting safety system settings or limiting conditions for operation are determined. The proposed change does not impact the safety analysis-credited redundancy or availability of SSCs required for accident or transient mitigation, or the ability of the unit to cope with design basis events as assumed in safety analyses. Consequently, the proposed change will not affect any margins of safety for SSCs.

Therefore, the proposed change does not involve a significant reduction in the margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: General Counsel, Tennessee Valley Authority, 400 West Summit Hill Drive, 6A West Tower, Knoxville, Tennessee 37902.

NRC Branch Chief: Douglas A. Broaddus.

Previously Published Notices of Consideration of Issuance of Amendments to Facility Operating Licenses, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing

The following notices were previously published as separate individual notices. The notice content was the same as above. They were published as individual notices either because time did not allow the Commission to wait for this biweekly notice or because the action involved exigent circumstances. They are repeated here because the biweekly notice lists all amendments issued or proposed to be issued involving no significant hazards consideration.

For details, see the individual notice in the **Federal Register** on the day and page cited. This notice does not extend the notice period of the original notice.

Union Electric Company, Docket No. 50–483, Callaway Plant, Unit 1, Callaway County, Missouri

Date of amendment request: December 10, 2010, as supplemented by letters dated June 16 and October 27, 2011.

Brief description of amendment request: The proposed amendment would add a new Surveillance Requirement (SR) 3.3.8.6 to Technical Specification (TS) 3.3.8, ''Emergency Exhaust System (EES) Actuation Instrumentation.'' The new SR would require the performance of response time testing on the portion of the EES required to isolate the normal fuel building ventilation exhaust flow path and initiate the fuel building ventilation isolation signal (FBVIS) mode of operation. The proposed amendment also would revise TS Table 3.3.8–1 to indicate that new SR 3.3.8.6 applies to automatic actuation Function 2, ''Automatic Actuation Logic and Actuation Relays (BOP ESFAS),'' and Function 3, ''Fuel Building Exhaust Radiation—Gaseous.'' In addition, the specified frequency of new SR 3.3.8.6 would be relocated and controlled in accordance with the licensee's Surveillance Frequency Control Program in accordance with guidance in Nuclear Energy Institute (NEI) 04–10, ''Risk-Informed Technical Specifications Initiative 5b, Risk-Informed Method for Control of Surveillance Frequencies.'' Finally, there would be corresponding changes to the Final Safety Analysis Report (FSAR).

*Date of publication of individual notice in **Federal Register**:* November 29, 2011 (76 FR 73733).

Expiration dates of individual notice: Comments: December 29, 2011; Hearings: January 30, 2012.

Attorney for licensee: John O'Neill, Esq., Pillsbury Winthrop Shaw Pittman LLP, 2300 N Street NW., Washington, DC 20037.

NRC Branch Chief: Michael T. Markley.

Notice of Issuance of Amendments to Facility Operating Licenses

During the period since publication of the last biweekly notice, the Commission has issued the following amendments. The Commission has determined for each of these amendments that the application complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR chapter I, which are set forth in the license amendment.

Notice of Consideration of Issuance of Amendment to Facility Operating License, Proposed No Significant Hazards Consideration Determination, and Opportunity for A Hearing in connection with these actions was published in the **Federal Register** as indicated.

Unless otherwise indicated, the Commission has determined that these amendments satisfy the criteria for categorical exclusion in accordance with 10 CFR 51.22. Therefore, pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment need be prepared for these amendments. If the Commission has prepared an environmental assessment under the special circumstances provision in 10 CFR 51.22(b) and has made a determination based on that assessment, it is so indicated.

For further details with respect to the action see: (1) The applications for amendment, (2) the amendment, and (3) the Commission's related letter, Safety Evaluation and/or Environmental Assessment as indicated. All of these items are available for public inspection at the NRC's Public Document Room (PDR), located at One White Flint North, Room O1–F21, 11555 Rockville Pike (First Floor), Rockville, Maryland 20852. Publicly available documents created or received at the NRC are accessible electronically through the Agencywide Documents Access and Management System (ADAMS) in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html.* If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the PDR's Reference staff at 1–(800) 397–4209, (301) 415–4737 or by email to *pdr.resource@nrc.gov.*

Exelon Generation Company, LLC, Docket Nos. 50–373 and 50–374, LaSalle County Station, Units 1 and 2, LaSalle County, Illinois

Date of application for amendments: April 4, 2011, as supplemented by letter dated August 15, 2011.

Brief description of amendments: The amendments revised Technical Specifications (TSs) to define a new time limit for restoring inoperable reactor coolant system (RCS) leakage detection instrumentation to operable status; establish alternate methods of monitoring RCS leakage when one or more required monitors are inoperable and make conforming TS Bases changes, which reflect the proposed changes; and more accurately reflect the contents of the facility design basis related to operability of the RCS leakage detection instrumentation. These changes are consistent with the NRC-approved Revision 3 to Technical Specification Task Force (TSTF) Standard Technical Specification Change Traveler TSTF–514, ''Revise BWR [Boiling-Water Reactor] Operability Requirements and Actions for RCS Leakage Instrumentation.''

Date of issuance: December 7, 2011.

Effective date: As of the date of issuance and shall be implemented within 60 days of issuance.

Amendment Nos.: 204/191.

Facility Operating License Nos. NPF–11 and NPF–18: The amendments revised the Technical Specifications and Facility Operating License.

*Date of initial notice in **Federal Register**:* May 17, 2011 (76 FR 28473).

The August 15, 2011, supplement provided additional information that clarified the application, did not expand the scope of the application as originally noticed and did not change the NRC staff's initial proposed no significant hazards consideration determination.

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated December 7, 2011.

No significant hazards consideration comments received: No.

FirstEnergy Nuclear Operating Company, et al., Docket No. 50–346, Davis-Besse Nuclear Power Station, Unit 1 (DBNPS), Ottawa County, Ohio

Date of application for amendment: April 29, 2011.

Brief description of amendment: This amendment revises the DBNPS Technical Specification (TS) 3.4.15, ''[Reactor Coolant System] RCS Leakage Detection Instrumentation'' to define a new time limit for restoring inoperable RCS leakage detection instrumentation to operable status and establish alternate methods of monitoring RCS leakage when one or more required monitors are inoperable.

The amendment also makes TS Bases changes, which reflect the proposed TS changes, and more accurately reflect the contents of the facility design basis related to operability of the RCS leakage detection instrumentation.

The amendment is consistent with the guidance contained in Nuclear Regulatory Commission (NRC) approved Technical Specifications Task Force (TSTF) Change Traveler TSTF–513, Revision 3, ''Revise [Pressurized-Water Reactor] PWR Operability Requirements and Actions for RCS Leakage Instrumentation.'' TSTF–513, Revision 3, was made available by the NRC on January 3, 2011 (76 FR 189) as part of the consolidated line item improvement process.

Date of issuance: December 9, 2011.

Effective date: As of the date of issuance and shall be implemented within 90 days.

Amendment No.: 284.

Facility Operating License No. NPF–3: Amendment revised the Technical Specifications and License.

*Date of initial notice in **Federal Register**:* July 12, 2011 (76 FR 40940).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated December 9, 2011.

No significant hazards consideration comments received: No.

Nine Mile Point Nuclear Station, LLC, Docket No. 50–410, Nine Mile Point Nuclear Station, Unit 2 (NMP2), Oswego County, New York

Date of application for amendment: March 30, 2011.

Brief description of amendment: The amendment changes the NMP2 Technical Specification (TS) Section 3.4.7, ''RCS Leakage Detection Instrumentation,'' to define a new time limit for restoring inoperable Reactor Coolant System (RCS) leakage detection instrumentation to operable status and establish alternate methods of monitoring RCS leakage when required monitors are inoperable. These changes are consistent with TS Task Force (TSTF) Standard Technical Specification Change Traveler TSTF–514, Revision 3, ''Revise BWR Operability Requirements and Actions for RCS Leakage Instrumentation.''

Date of issuance: November 30, 2011.

Effective date: As of the date of issuance to be implemented within 90 days.

Amendment No.: 139.

Renewed Facility Operating License No. NPF–069: The amendment revises the License and TSs.

*Date of initial notice in **Federal Register**:* June 28, 2011 (76 FR 37849).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated November 30, 2011.

No significant hazards consideration comments received: No.

Northern States Power Company—Minnesota, Docket Nos. 50–282 and 50–306, Prairie Island Nuclear Generating Plant, Units 1 and 2, Goodhue County, Minnesota

Date of application for amendments: February 4, 2011.

Brief description of amendments: The amendments make administrative changes to TSs 5.2.1 and 5.3 that: (1) Allow certain requirements of onsite and offsite organizations to be documented in the Quality Assurance Topical Report (QATR); and (2) remove reference to specific education and experience requirements for operator license applicants.

Date of issuance: December 1, 2011.

Effective date: As of the date of issuance and shall be implemented within 90 days.

Amendment Nos.: 205 and 192.

Facility Operating License Nos. DPR–42 and DPR–60: Amendments revised the Technical Specifications.

*Date of initial notice in **Federal Register**:* March 22, 2011 (76 FR 16008).

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated December 1, 2011.

No significant hazards consideration comments received: No.

For the Nuclear Regulatory Commission.

Dated at Rockville, Maryland, this 15th day of December 2011.

Michele G. Evans,

Director, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. 2011–33090 Filed 12–23–11; 8:45 am]

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NUCLEAR REGULATORY COMMISSION

[Docket No. 50–416; NRC–2010–0082]

Notice of Acceptance for Docketing of the Application, Notice of Opportunity for Hearing, Regarding Renewal of Facility Operating License No. NPF–29 for an Additional 20-Year Period; Entergy Operations, Inc.; Grand Gulf Nuclear Station, Unit 1

The U.S. Nuclear Regulatory Commission (NRC or the Commission) is considering an application for the renewal of an operating license, which authorizes Entergy Operations, Inc. (Entergy), to operate the Grand Gulf Nuclear Station, Unit 1 (GGNS), at 3898 megawatts thermal. The renewed license would authorize the applicant to operate GGNS, for an additional 20 years beyond the period specified in the current license. GGNS is located in Claiborne County, Mississippi and its current operating license expires on November 1, 2024.

Entergy submitted the application dated October 28, 2011, pursuant to Title 10 of the Code of Federal Regulations (10 CFR) part 54, to renew operating license NPF–29. A notice of receipt and availability of the license renewal application (LRA) was published in the **Federal Register** on November 17, 2011 (76 FRN 71379).

The Commission's staff has determined that Entergy has submitted sufficient information in accordance with 10 CFR sections 54.19, 54.21, 54.22, 54.23, and 51.53(c), to enable the staff to undertake a review of the application, and that the application is therefore acceptable for docketing. The current Docket Number, 50–416, for operating license NPF–29 will be retained. The determination to accept the LRA for docketing does not constitute a determination that a renewed license should be issued, and does not preclude the NRC staff from requesting additional information as the review proceeds.

Before issuance of the requested renewed license, the NRC will have made the findings required by the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. In accordance with 10 CFR 54.29, the NRC may issue a renewed license on the basis of its review if it finds that actions have been identified and have been or will be taken with respect to: (1) Managing the effects of aging during the period of extended operation on the functionality of structures and components that have been identified as requiring aging management review, and (2) time-limited aging analyses that have been identified as requiring review, such that there is reasonable assurance that the activities authorized by the renewed license will continue to be conducted in accordance with the current licensing basis (CLB) and that any changes made to the plants CLB will comply with the Act and the Commission's regulations.

Additionally, in accordance with 10 CFR 51.95(c), the NRC will prepare an environmental impact statement that is a supplement to the Commission's NUREG–1437, ''Generic Environmental Impact Statement for License Renewal of Nuclear Power Plants,'' dated May 1996. In considering the LRA, the Commission must find that the applicable requirements of Subpart A of 10 CFR part 51 have been satisfied, and that matters raised under 10 CFR 2.335 have been addressed. Pursuant to 10 CFR 51.26, and as part of the environmental scoping process, the staff intends to hold a public scoping meeting. Detailed information regarding the environmental scoping meeting will be the subject of a separate **Federal Register** notice.

Within 60 days after the date of publication of this **Federal Register** notice, any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request for a hearing and a petition for leave to intervene with respect to the renewal of the license. Requests for a hearing or petitions for leave to intervene must be filed in accordance with the Commission's ''Rules of Practice for Domestic Licensing Proceedings and Issuance of Orders'' in 10 CFR part 2. Interested persons should consult a current copy of 10 CFR 2.309, which is available at the Commission's Public Document Room (PDR), located at One White Flint North, 11555 Rockville Pike (first floor), Rockville, MD 20852 and is accessible from the NRC's Agencywide Documents Access and Management System (ADAMS) Public Electronic Reading Room online in the NRC library at *http://www.nrc.gov/reading-rm/adams.html.* Persons who do not have access to the Internet or who encounter problems in accessing the documents located in ADAMS should contact the NRC's PDR reference staff by telephone at 1–(800) 397–4209, or (301) 415–4737, or by email at *PDR@nrc.gov.* If a request for a hearing/petition for leave to intervene is filed within the 60-day period, the Commission or a presiding officer designated by the Commission or by the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel will rule on the request and/or petition; and the Secretary or the Chief

Administrative Judge of the Atomic Safety and Licensing Board Panel will issue a notice of a hearing or an appropriate order. In the event that no request for a hearing or petition for leave to intervene is filed within the 60-day period, the NRC may, upon completion of its evaluations and upon making the findings required under 10 CFR parts 51 and 54, renew the license without further notice.

As required by 10 CFR 2.309, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding, taking into consideration the limited scope of matters that may be considered pursuant to 10 CFR parts 51 and 54. The petition must specifically explain the reasons why intervention should be permitted with particular reference to the following factors: (1) The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding; (2) the nature and extent of the requestor's/petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any decision or order which may be entered in the proceeding on the requestor's/petitioner's interest. The petition must also set forth the specific contentions which the petitioner/requestor seeks to have litigated at the proceeding.

Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the requestor/petitioner shall provide a brief explanation of the basis for each contention and a concise statement of the alleged facts or the expert opinion that supports the contention on which the requestor/petitioner intends to rely in proving the contention at the hearing. The requestor/petitioner must also provide references to those specific sources and documents of which the requestor/petitioner is aware and on which the requestor/petitioner intends to rely to establish those facts or expert opinion. The requestor/petitioner must provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact.[1] Contentions shall be limited to matters within the scope of the action under consideration. The contention must be one that, if proven, would entitle the requestor/petitioner to relief. A requestor/petitioner who fails to satisfy these requirements with respect to at least one contention will not be permitted to participate as a party.

The Commission requests that each contention be given a separate numeric or alpha designation within one of the following groups: (1) Technical (primarily related to safety concerns); (2) environmental; or (3) miscellaneous.

As specified in 10 CFR 2.309, if two or more requestors/petitioners seek to co-sponsor a contention or propose substantially the same contention, the requestors/petitioners will be required to jointly designate a representative who shall have the authority to act for the requestors/petitioners with respect to that contention.

All documents filed in NRC adjudicatory proceedings, including a request for hearing, a petition for leave to intervene, any motion or other document filed in the proceeding prior to the submission of a request for hearing or petition to intervene, and documents filed by interested governmental entities participating under 10 CFR 2.315(c), must be filed in accordance with the NRC E-Filing rule (72 FR 49139, August 28, 2007). The E-Filing process requires participants to submit and serve all adjudicatory documents over the internet, or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek an exemption in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least ten (10) days prior to the filing deadline, the participant should contact the Office of the Secretary by email at *hearing.docket@nrc.gov,* or by telephone at (301) 415–1677, to request (1) a digital ID certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a request or petition for hearing (even in instances in which the participant, or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the hearing in this proceeding if the Secretary has not already established an electronic docket. Information about applying for a digital ID certificate is available on NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals/apply-certificates.html.* System requirements for accessing the E-Submittal server are detailed in NRC's ''Guidance for Electronic Submission,'' which is available on the agency's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* Participants may attempt to use other software not listed on the Web site, but should note that the NRC's E-Filing system does not support unlisted software, and the NRC Meta System Help Desk will not be able to offer assistance in using unlisted software.

If a participant is electronically submitting a document to the NRC in accordance with the E-Filing rule, the participant must file the document using the NRC's online, Web-based submission form. In order to serve documents through EIE, users will be required to install a Web browser plug-in from the NRC Web site. Further information on the Web-based submission form, including the installation of the Web browser plug-in, is available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.*

Once a participant has obtained a digital ID certificate and a docket has been created, the participant can then submit a request for hearing or petition for leave to intervene. Submissions should be in Portable Document Format (PDF) in accordance with NRC guidance available on the NRC public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* A filing is considered complete at the time the documents are submitted through the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an email notice confirming receipt of the document. The E-Filing system also distributes an email notice that provides access to the document to the NRC Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing request/petition to intervene is filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically using the agency's adjudicatory E-Filing system may seek assistance by contacting the NRC Meta System Help Desk through the ''Contact Us'' link located on the NRC Web site at *http://www.nrc.gov/site-help/e-*

[1] To the extent that the application contains attachments and supporting documents that are not publicly available because they are asserted to contain safeguards or proprietary information, petitioners desiring access to this information should contact the applicant or applicant's counsel to discuss the need for a protective order.

submittals.html, by email at *MSHD.Resource@nrc.gov,* or by a toll-free call at (866) 672–7640. The NRC Meta System Help Desk is available between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday, excluding government holidays.

Participants who believe that they have good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First-class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852, Attention: Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service. A presiding officer, having granted an exemption request from using E-Filing, may require a participant or party to use E-Filing if the presiding officer subsequently determines that the reason for granting the exemption from use of E-Filing no longer exists.

Documents submitted in adjudicatory proceedings will appear in NRC's electronic hearing docket which is available to the public at *http://ehd1.nrc.gov/EHD/,* unless excluded pursuant to an order of the Commission, or the presiding officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings, unless an NRC regulation or other law requires submission of such information. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

Detailed information about the license renewal process can be found under the Nuclear Reactors icon at *http://www.nrc.gov/reactors/operating/licensing/renewal.htm*l on the NRC's Web site. Copies of the application to renew the operating license for GGNS are available for public inspection at the Commission's PDR, located at One White Flint North, 11555 Rockville Pike (first floor), Rockville, MD 20852–2738, and at *http://www.nrc.gov/reactors/operating/licensing/renewal/applications.html,* the NRC's Web site, while the application is under review. The application may be accessed in ADAMS through the NRC's Public Electronic Reading Room on the Internet at *http://www.nrc.gov/reading-rm/adams.html* under ADAMS Accession Number ML113080132. As stated above, persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS may contact the NRC's Public Document Room (PDR) reference staff by telephone at 1–(800) 397–4209 or (301) 415–4737, or by email to *PDR@nrc.gov.*

The NRC staff has verified that a copy of the license renewal application is also available to local residents near GGNS, at the Harriette Person Memorial Library, 606 Main St., Port Gibson, MS 39150.

For the Nuclear Regulatory Commission.

Dated at Rockville, Maryland, this 16th day of December, 2011.

Melanie A. Galloway,

Acting Director, Division of License Renewal, Office of Nuclear Reactor Regulation.

[FR Doc. 2011–33085 Filed 12–23–11; 8:45 am]

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NUCLEAR REGULATORY COMMISSION

[Docket Nos. 030–37882 & 030–37957; License Nos. 052–31352–01MD/52–31352–02; EA–11–086; NRC–2011–0292]

International Cyclotron, Inc., Hato Rey, Puerto Rico; Order Suspending Licensed Activities

I

International Cyclotron, Inc. (International Cyclotron; Licensee) is the holder of Byproduct Materials License Nos. 52–31352–01MD and 52–31352–02, issued on August 20, 2009, by the U.S. Nuclear Regulatory Commission (NRC or the Commission) pursuant to Title 10 of the Code of Federal Regulations (CFR) part 30. License No. 52–31352–01MD authorizes the preparation and distribution of radioactive drugs and radiochemicals for medical and non-medical use and the possession and storage of byproduct materials incidental to radionuclide production. License No. 52–31352–02 authorizes the use of an accelerator to produce pharmaceutical radionuclides, the packaging and distribution of produced radiochemicals and sealed sources, possession and storage of byproduct materials incidental to radionuclide production, and calibration and checking of the licensee's instruments. The licenses are scheduled to expire on August 31, 2019.

II

NRC regulations specified in 10 CFR 30.35 require that applicants for authorization to possess and use byproduct radioactive material above specified amounts must provide a guarantee or other financial arrangement that funds for decommissioning will be available when needed (i.e., financial assurance). The requirement to provide financial assurance is in addition to the licensee's regulatory obligation to decommission its facilities, and is to ensure that a suitable mechanism for financing the decommissioning of licensed facilities is in place in the event that a licensee is unable or unwilling to complete decommissioning.

When International Cyclotron submitted its NRC license application related to the cyclotron, it requested authorization to possess and use radioactive material of half-life greater than 120 days and in quantities exceeding 10^5 times the applicable quantities set forth in appendix B to part 30. NRC regulations at 10 CFR 30.35(a)(1), require International Cyclotron to submit a Decommissioning Funding Plan (DFP) which, as described in 10 CFR 30.35(e), must consist of:

1. A cost estimate for decommissioning;
2. A description of the method for assuring funds for decommissioning;
3. A description of the means for adjusting cost estimates and associated funding levels periodically over the life of the facility;
4. A certification that financial assurance for decommissioning has been provided in the amount of the cost estimate; and,
5. A signed original of the financial assurance instrument, which meets the regulatory requirements of 10 CFR 30.35(f).

International Cyclotron failed to submit the required DFP with its application. The NRC addressed this deficiency after issuing International Cyclotron the NRC license; in a letter dated December 7, 2009, notified International Cyclotron of its requirement to provide financial assurance, advised International Cyclotron was in non-compliance with 10 CFR 30.35, and requested that International Cyclotron come into compliance with NRC regulations and

submit the necessary supporting documentation.

Between December 7, 2009, and October 12, 2011, the NRC contacted International Cyclotron on multiple occasions through letters, telephone calls, and electronic mail explaining the regulatory requirements for providing financial assurance. International Cyclotron has not provided NRC with information that demonstrates International Cyclotron has established financial assurance, as required by NRC regulations at 10 CFR 30.35.

By letter dated September 2, 2011 (ML112450249), the NRC issued a Request for Additional Information (RAI) to International Cyclotron, which identified significant deficiencies in your draft decommissioning cost estimate and stated that ''you must re-submit your DFP and cost estimate in full, with all tables and any additional pages to provide sufficient description of the bases for your work and cost estimates.'' Additionally, the RAI advised International Cyclotron that the certification of financial assurance (CFA) is not accepted because: a) it is not an original, signed document by a management representative; and b) the CFA states that financial assurance in the amount of $1,125,000 has been obtained. Confirm that you will submit a revised CFA, and that it will be an original document with a signature from a management representative, in accordance with Appendix A.2.2, A.2.3, A.2.4 and A.2.5 of NUREG–1757, Vol.3; and that it will reflect the amount of decommissioning funding you are actually providing (at a minimum, the funding required will be the amount of the cost estimate as accepted by the NRC). The RAI letter required that International Cyclotron respond to the NRC within 30 days and stated that enforcement action would be initiated against International Cyclotron, if financial assurance requirements were not established.

International Cyclotron failed to respond within 30 days. On October 14, 2011, International Cyclotron submitted a late response containing a signed cost estimate for decommissioning with a description of the method for assuring funds for decommissioning and the means for periodically adjusting the cost estimate (items 1, 2, and 3 as noted above). The NRC reviewed those documents and found them to be acceptable. On October 24, 2011, International Cyclotron submitted another response containing a signed certification statement (item 4 from above). The October 24, 2011 response, however, was incomplete and International Cyclotron remains in non-compliance because a financial assurance instrument fulfilling the requirements of 10 CFR 30.35(f) was not provided; International Cyclotron has not submitted the financial assurance instrument (item 5 from above) as of December 19, 2011.

III

Based on the above factors, it appears that International Cyclotron has failed to meet the NRC requirements pertaining to financial assurance for decommissioning, contrary to 10 CFR 30.35. The NRC must be able to rely upon licensees to comply with NRC requirements. International Cyclotron's failure to obtain and submit a financial assurance instrument in the amount of the cost estimate has prevented the NRC from ensuring that funds will be available at the time of shutdown to provide for orderly and timely decommissioning to protect public health and the environment.

IV

Accordingly, pursuant to sections 81, 161b, 161i, 161o, 182 and 186 of the Atomic Energy Act of 1954, as amended, and the Commission's regulations in 10 CFR 2.202 and 10 CFR part 30, *it is hereby ordered that:*

1. The authority to prepare and distribute radioactive drugs and radiochemicals under License No. 52–31352–01MD and to produce or handle radiochemicals and sealed sources, and package and distribute produced radiochemicals and sealed sources under License No. 52–31352–02 will be suspended, effective 60 days from the date of this Order, if the Licensee does not, within this 60-day period, provide a financial assurance instrument for decommissioning which the NRC determines is acceptable. The only activities that are not suspended are possession and storage of byproduct materials, and calibration and checking of the Licensee's instruments.

2. From the date of suspension, until notified by the Commission in writing that a financial assurance instrument has been accepted; the Licensee shall restrict all activities except possession and storage of byproduct materials, and calibration and checking of the Licensee's instruments.

3. The Licensee shall not receive any additional NRC-licensed material while the suspension is in effect.

The Director, OE, may, in writing, relax or rescind any of the above conditions upon demonstration by the Licensee of good cause.

V

In accordance with 10 CFR 2.202, the Licensee must, and any other person adversely affected by this Order may, submit an answer to this Order within 60 days of service of this Order. In addition, the Licensee and any other person adversely affected by this Order may request a hearing on this Order within 60 days of its publication in the **Federal Register**. Where good cause is shown, consideration will be given to extending the time to answer or request a hearing. A request for extension of time must be directed to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, and include a statement of good cause for the extension.

All documents filed in NRC adjudicatory proceedings, including a request for hearing, a petition for leave to intervene, any motion or other document filed in the proceeding prior to the submission of a request for hearing or petition to intervene, and documents filed by interested governmental entities participating under 10 CFR 2.315(c), must be filed in accordance with the NRC E-Filing rule (72 FR 49139, August 28, 2007). The E-Filing process requires participants to submit and serve all adjudicatory documents over the internet, or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings, unless they seek an exemption in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least 10 days prior to the filing deadline, the participant should contact the Office of the Secretary by email at *hearing.docket@nrc.gov,* or by telephone at (301) 415–1677, to request (1) a digital ID certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a request or petition for hearing (even in instances in which the participant, or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the hearing in this proceeding if the Secretary has not already established an electronic docket.

Information about applying for a digital ID certificate is available on NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals/*

apply-certificates.html. System requirements for accessing the E–Submittal server are detailed in NRC's ''Guidance for Electronic Submission,'' which is available on the agency's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* Participants may attempt to use other software not listed on the Web site, but should note that the NRC's E-Filing system does not support unlisted software, and the NRC Meta System Help Desk will not be able to offer assistance in using unlisted software.

If a participant is electronically submitting a document to the NRC in accordance with the E-Filing rule, the participant must file the document using the NRC's online, web-based submission form. In order to serve documents through EIE, users will be required to install a web browser plug-in from the NRC Web site. Further information on the web-based submission form, including the installation of the Web browser plug-in, is available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.*

Once a participant has obtained a digital ID certificate and a docket has been created, the participant can then submit a request for hearing or petition for leave to intervene. Submissions should be in Portable Document Format (PDF) in accordance with NRC guidance available on the NRC public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* A filing is considered complete at the time the documents are submitted through the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an email notice confirming receipt of the document. The E-Filing system also distributes an email notice that provides access to the document to the NRC Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the documents on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing request/petition to intervene is filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically using the agency's adjudicatory E-Filing system may seek assistance by contacting the NRC Meta System Help Desk through the ''Contact Us'' link located on the NRC web site at *http://www.nrc.gov/site-help/e-submittals.html,* by email at *MSHD.Resource@nrc.gov,* or by a toll-free call at (866) 672–7640. The NRC Meta System Help Desk is available between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday, excluding government holidays.

Participants who believe that they have a good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland, 20852, Attention: Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service. A presiding officer, having granted an exemption request from using E-Filing, may require a participant or party to use E-Filing if the presiding officer subsequently determines that the reason for granting the exemption from use of E-Filing no longer exists.

Documents submitted in adjudicatory proceedings will appear in NRC's electronic hearing docket, which is available to the public at *http://ehd.nrc.gov/EHD_Proceeding/home.asp,* unless excluded pursuant to an order of the Commission, or the presiding officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings, unless an NRC regulation or other law requires submission of such information. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

If a person other than the Licensee requests a hearing, that person shall set forth with particularity the manner in which his interest is adversely affected by this Order and shall address the criteria set forth in 10 CFR 2.309(d).

If a hearing is requested by a licensee or a person whose interest is adversely affected, the Commission will issue an Order designating the time and place of any hearings. If a hearing is held, the issue to be considered at such hearing shall be whether this Order should be sustained. An answer or a request for hearing shall not stay the effectiveness of this order.

Dated this 19th day of December 2011.

For the Nuclear Regulatory Commission.

Roy P. Zimmerman,

Director, Office of Enforcement.

[FR Doc. 2011–33088 Filed 12–23–11; 8:45 am]

BILLING CODE 7590–01–P

POSTAL REGULATORY COMMISSION

Sunshine Act Meetings

TIME AND DATE: Wednesday, January 4, 2012, at 11 a.m.

PLACE: Commission Hearing Room, 901 New York Avenue NW., Suite 200, Washington, DC 20268–0001.

STATUS: Part of this meeting will be open to the public. The rest of the meeting will be closed to the public. The open session will be audiocast. The audiocast may be accessed via the Commission's Web site at *http://www.prc.gov.*

MATTERS TO BE CONSIDERED: The agenda for the Commission's January 2012 meeting includes the items identified below.

PORTIONS OPEN TO THE PUBLIC:

1. Report on legislative activities.
2. Report on public participation.
3. Publication of the Annual Report.
4. Report on international activities.
5. Report on pending dockets.
6. Report on the activities of the Office of the Secretary.

PORTION CLOSED TO THE PUBLIC:

7. Discussion of pending litigation.
8. Discussion of confidential aspects of Commission contracts.

CONTACT PERSON FOR MORE INFORMATION: Stephen L. Sharfman, General Counsel, Postal Regulatory Commission, 901 New York Avenue NW., Suite 200, Washington, DC 20268–0001, at (202) 789–6820 (for agenda-related inquiries) and Shoshana M. Grove, Secretary of the Commission, at (202) 789–6800 or *shoshana.grove@prc.gov* (for inquiries related to meeting location, access for handicapped or disabled persons, the audiocast, or similar matters).

Dated: December 22, 2011.

By the Commission.

Shoshana M. Grove,

Secretary.

[FR Doc. 2011–33338 Filed 12–22–11; 4:15 pm]

BILLING CODE 7710–FW–P

POSTAL REGULATORY COMMISSION

[Docket No. CP2012–5; Order No. 1060]

New Postal Product

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recently-filed Postal Service request to enter into an outstanding International Business Reply Service competitive agreement. This document invites public comments on the request and addresses several related procedural steps.

DATES: *Comments are due:* December 28, 2011, 4:30 p.m., Eastern Time.

ADDRESSES: Submit comments electronically by accessing the ''Filing Online'' link in the banner at the top of the Commission's Web site (*http://www.prc.gov*) or by directly accessing the Commission's Filing Online system at *https://www.prc.gov/prc-pages/filing-online/login.aspx.* Commenters who cannot submit their views electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section as the source for case-related information for advice on alternatives to electronic filing.

FOR FURTHER INFORMATION CONTACT: Stephen L. Sharfman, General Counsel, at (202) 789–6820 (case-related information) or *DocketAdmins@prc.gov* (electronic filing assistance).

SUPPLEMENTARY INFORMATION:

I. Introduction
II. Additional Matters
III. Ordering Paragraphs

I. Introduction

On December 15, 2011, the Postal Service filed notice, pursuant to 39 CFR 3015.5, of contingency prices under an outstanding International Business Reply Service (IBRS) competitive contract.[1] The prices cover calendar year 2012 postage on certain postage-prepaid items returned from overseas locations to a U.S.-based entity. The Postal Service expects the prices to apply to an extremely small number of postal items due to the mailer's profile and the passage of time since the expiration of the contract. *Id.* at 4.

Supporting documentation. Attachments to the Notice include:

- Attachment 1—a redacted copy of a notice to the customer, including enclosures consisting of a disclosure statement and price table;
- Attachment 2—the certified statement, required under Commission rules, attesting to the accuracy of supporting data and explaining why, after the change, competitive products in total will be in compliance with 39 U.S.C. 3633(a)(1) and (3);[2]
- Attachment 3—the certification of the Governors' vote in Governors' Decision No. 08–24, a redacted copy of the referenced Governors' Decision, revised and redacted Mail Classification language, redacted copies of price formulas and a related analysis, and a redacted certification.
- Attachment 4—an application for non-public treatment of certain materials.

The Postal Service also provided a redacted copy of the Agreement and supporting financial documentation as an Excel file. *Id.* at 5.

IBRS contracts. The Commission added the parent product—International Business Reply Service Contract 1—to the Competitive Products in Order No. 178, following consideration in two baseline cases.[3] The controlling Governors' Decision is No. 08–24. *Id.* at 1–2.

IBRS competitive contracts are for U.S.-based entities that seek a channel for returned merchandise or other articles from their overseas customers. These entities typically supply preprinted, prepaid IBRS packaging in which overseas customers can place used or defective consumer items and enter them in the mailstream at no direct cost. *Id.* at 1. Thus, IBRS is a return service for overseas customers. *Id.* at 2. The contract customer is the recipient of IBRS items, not the mailer; therefore, the customer has no control over the contingency that extraneous IBRS items might be tendered after expiration of the contract. *Id.* Given that costs are incurred in accepting and delivering these items, the Postal Service and its IBRS customers have agreed to let the Postal Service set prices to cover costs and potentially incentivize customers to enter into new arrangements. *Id.*

The Postal Service notes that the contract underlying the instant contingency prices was executed before the Commission's current rules for competitive and market dominant products took effect. *Id.* It says the contract expired March 31, 2008; no successor contract has been executed; and the instant prices therefore occur under a surviving contractual term. *Id.* at 2.

The Postal Service explains that contingency arrangements like the one presented here consist of (1) a provision in each IBRS contract to govern the contingency that a new agreement might not be concluded and approved before expiration and, in the case of this customer, (2) subsequent communication with the customer to update the contingency prices. *Id.*

The Postal Service has filed two notices of changes in contingency prices under the underlying expired contract: one for calendar year 2010 and the other for calendar year 2011. *Id.* at 3. Both notices expressed the Postal Service's view that the contingency pricing arrangement for the next calendar year was functionally equivalent to the IBRS contracts considered in Docket Nos. CP2009–20 and CP2009–22, and include a request that the Commission include each of the contingency pricing arrangements within the IBRS Competitive Contracts 1 designation on the Competitive Products List. *Id.* The Commission, as requested, added both contingency pricing arrangements to the Competitive Product List under the IBRS Competitive Contract 1 product. *Id.* at 4, n.8.

The Postal Service addresses several points about the status of the underlying contract under Commission rules, but concludes that filing materials under 39 CFR 3015.5, as it has done here, resolves any inconsistency. *Id.* at 4. It therefore requests the Commission to include the instant contingency arrangement within the IBRS Competitive Contract 1 designation on the Competitive Products List based on its functional equivalence to the IBRS contracts in Docket Nos. CP2009–20 and CP2009–22.

Functional equivalency. The Postal Service asserts that the instant IBRS contingency arrangement is essentially identical to those envisioned in the contracts the Commission included in the IBRS Competitive Contract 1 product in Docket Nos. CP2009–20 and CP2009–22, with minor procedural variations due to different negotiation outcomes. *Id.* at 5. It says the nature of the IBRS service provided in all three contracts is essentially the same, and

[1] Notice of United States Postal Service of Prices under Functionally Equivalent International Business Reply Service Competitive Contract 1 Negotiated Service Agreement, December 15, 2011 (Notice).

[2] Commission rule 3015.5(c)(2) addresses the required certification. Section 3633(a)(1) includes a prohibition against the subsidization of competitive products by market dominant products. Section 3633(a)(3) includes the requirement that all competitive products collectively cover what the Commission determines to be an appropriate share of the institutional costs of the Postal Service.

[3] Docket Nos. M2009–14 and CP2009–20.

the instant IBRS contingency arrangement bears similar market characteristics to the two other IBRS Competitive Contract 1 agreements. *Id.* at 5–6. The Postal Service also incorporates by reference its arguments about functional equivalence in Docket No. CP2009–22. *Id.* at 6.

Postal Service's position. The Postal Service maintains that, based on the reasons provided in its Notice and the financial data filed under seal, it has established that the instant contingency prices under an expired IBRS contract are in compliance with the requirements of 39 U.S.C. 3633. *Id.* It further asserts that the contingency arrangement is also functionally equivalent to those contemplated by the IBRS contracts filed in Docket Nos. CP2009–20 and CP2009–22. *Id.* The Postal Service therefore asserts that this arrangement should be added to the IBRS Competitive Contract 1 product on the Competitive Products List. *Id.*

II. Additional Matters

Interested persons may submit comments on whether the Postal Service's filing in the captioned docket is consistent with the policies of 39 U.S.C. 3632 and 3633 and 39 CFR part 3015. Comments are due no later than December 28, 2011.

The public portions of the Postal Service filing can be accessed via the Commission's Web site (*http://www.prc.gov*).

The Commission appoints James F. Callow to serve as Public Representative in this docket.

III. Ordering Paragraphs

It is ordered:

1. The Commission establishes Docket No. CP2012–5 to consider matters raised by the Postal Service's Notice.

2. Pursuant to 39 U.S.C. 505, James F. Callow is appointed to serve as officer of the Commission (Public Representative) to represent the interests of the general public.

3. Comments by interested persons in this proceeding are due no later than December 28, 2011.

4. The Secretary shall arrange for publication of this order in the **Federal Register.**

By the Commission.

Shoshana M. Grove,

Secretary.

[FR Doc. 2011–33061 Filed 12–23–11; 8:45 am]

BILLING CODE 7710–FW–P

POSTAL REGULATORY COMMISSION

[Docket No. A2012–86; Order No. 1042]

Post Office Closing

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: This document informs the public that an appeal of the closing of the McCallsburg, Iowa post office has been filed. It identifies preliminary steps and provides a procedural schedule. Publication of this document will allow the Postal Service, petitioners, and others to take appropriate action.

DATES: Deadline for notices to intervene: January 9, 2012, 4:30 p.m., Eastern Time. *See* the Procedural Schedule in the **SUPPLEMENTARY INFORMATION** section for other dates of interest.

ADDRESSES: Submit comments electronically by accessing the ''Filing Online'' link in the banner at the top of the Commission's Web site (*http://www.prc.gov*) or by directly accessing the Commission's Filing Online system at *https://www.prc.gov/prc-pages/filing-online/login.aspx.* Commenters who cannot submit their views electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section as the source for case-related information for advice on alternatives to electronic filing.

FOR FURTHER INFORMATION CONTACT: Stephen L. Sharfman, General Counsel, at (202) 789–6820 (case-related information) or *DocketAdmins@prc.gov* (electronic filing assistance).

SUPPLEMENTARY INFORMATION: Notice is hereby given that, pursuant to 39 U.S.C. 404(d), on November 29, 2011 the Commission received a petition for review of the Postal Service's determination to close the McCallsburg post office in McCallsburg, Iowa. The petition for review was filed by Robin Pruisner (Petitioner) and is postmarked November 21, 2011. The Commission hereby institutes a proceeding under 39 U.S.C. 404(d)(5) and establishes Docket No. A2012–86 to consider Petitioner's appeal. If Petitioner would like to further supplement information or facts, Petitioner may either file a Participant Statement on PRC Form 61 or file a brief with the Commission no later than January 3, 2012.

Categories of issues apparently raised. Petitioner contends that (1) the Postal Service failed to consider whether it will continue to provide a maximum degree of effective and regular postal service to the community (*see* 39 U.S.C. 404(d)(2)(A)(iii); and (2) failed to follow procedures required by law regarding closures (*see* 39 U.S.C. 404(d)(5)(B)).

After the Postal Service files the administrative record and the Commission reviews it, the Commission may find that there are more legal issues than those set forth above, or that the Postal Service's determination disposes of one or more of those issues. The deadline for the Postal Service to file the applicable administrative record with the Commission is December 14, 2011. *See* 39 CFR 3001.113. In addition, the due date for any responsive pleading by the Postal Service to this notice is December 14, 2011.

Availability; Web site posting. The Commission has posted the appeal and supporting material on its Web site at *http://www.prc.gov.* Additional filings in this case and participant's submissions also will be posted on the Web site, if provided in electronic format or amenable to conversion, and not subject to a valid protective order. Information on how to use the Commission's Web site is available online or by contacting the Commission's webmaster via telephone at (202) 789–6873 or via electronic mail at *prc-webmaster@prc.gov.*

The appeal and all related documents are also available for public inspection in the Commission's docket section. Docket section hours are 8 a.m. to 4:30 p.m., Eastern Time, Monday through Friday, except on Federal government holidays. Docket section personnel may be contacted via electronic mail at *prc-dockets@prc.gov* or via telephone at (202) 789–6846.

Filing of documents. All filings of documents in this case shall be made using the Internet (Filing Online) pursuant to Commission rules 9(a) and 10(a) at the Commission's Web site, *http://www.prc.gov,* unless a waiver is obtained. *See* 39 CFR 3001.9(a) and 3001.10(a). Instructions for obtaining an account to file documents online may be found on the Commission's Web site, *http://www.prc.gov,* or by contacting the Commission's docket section at *prc-dockets@prc.gov* or via telephone at (202) 789–6846.

Commission reserves the right to redact personal information which may infringe on an individual's privacy rights from documents filed in this proceeding.

Intervention. Persons, other than the Petitioners and respondents, wishing to be heard in this matter are directed to file a notice of intervention. *See* 39 CFR 3001.111(b). Notices of intervention in this case are to be filed on or before January 9, 2012. A notice of intervention shall be filed using the Internet (Filing Online) at the Commission's Web site,

http://www.prc.gov, unless a waiver is obtained for hardcopy filing. *See* 39 CFR 3001.9(a) and 3001.10(a).

Further procedures. By statute, the Commission is required to issue its decision within 120 days from the date it receives the appeal. *See* 39 U.S.C. 404(d)(5). A procedural schedule has been developed to accommodate this statutory deadline. In the interest of expedition, in light of the 120-day decision schedule, the Commission may request the Postal Service or other participants to submit information or memoranda of law on any appropriate issue. As required by Commission rules, if any motions are filed, responses are due 7 days after any such motion is filed. *See* 39 CFR 3001.21.

It is ordered:

1. The Postal Service shall file the applicable administrative record regarding this appeal no later than December 14, 2011.

2. Any responsive pleading by the Postal Service to this notice is due no later than December 14, 2011.

3. The procedural schedule listed below is hereby adopted.

4. Pursuant to 39 U.S.C. 505, Malin Moench is designated officer of the Commission (Public Representative) to represent the interests of the general public.

5. The Secretary shall arrange for publication of this notice and order and Procedural Schedule in the **Federal Register.**

By the Commission.

Shoshana M. Grove,

Secretary.

PROCEDURAL SCHEDULE

November 29, 2011	Filing of Appeal.
December 14, 2011	Deadline for the Postal Service to file the applicable administrative record in this appeal.
December 14, 2011	Deadline for the Postal Service to file any responsive pleading.
January 9, 2012	Deadline for notices to intervene (*see* 39 CFR 3001.111(b)).
January 3, 2012	Deadline for Petitioners' Form 61 or initial brief in support of petition (*see* 39 CFR 3001.115(a) and (b)).
January 23, 2012	Deadline for answering brief in support of the Postal Service (*see* 39 CFR 3001.115(c)).
February 7, 2012	Deadline for reply briefs in response to answering briefs (*see* 39 CFR 3001.115(d)).
February 14, 2012	Deadline for motions by any party requesting oral argument; the Commission will schedule oral argument only when it is a necessary addition to the written filings (*see* 39 CFR 3001.116).
March 20, 2012	Expiration of the Commission's 120-day decisional schedule (*see* 39 U.S.C. 404(d)(5)).

[FR Doc. 2011–33055 Filed 12–23–11; 8:45 am]

BILLING CODE 7710–FW–P

POSTAL SERVICE

International Product Change—Global Expedited Package Services—Non-Published Rates

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add Global Expedited Package Services—Non-Published Rates 3 (GEPS—NPR 3) to the Competitive Products List.

DATES: December 27, 2011.

FOR FURTHER INFORMATION CONTACT: Margaret M. Falwell, (202) 268–2576.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642, on December 20, 2011, it filed with the Postal Regulatory Commission a Request of the United States Postal Service to add Global Expedited Package Services—Non-Published Rates 3 (GEPS—NPR 3) to the Competitive Products List and Notice of Filing GEPS—NPR 3 Model Contract and Application for Non-public Treatment of Materials Filed Under Seal. Documents are available at *http://www.prc.gov*, Docket Nos. MC2012–4 and CP2012–8.

Stanley F. Mires,

Attorney, Legal Policy & Legislative Advice.

[FR Doc. 2011–33161 Filed 12–23–11; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: December 27, 2011.

FOR FURTHER INFORMATION CONTACT: Elizabeth A. Reed, (202) 268–3179.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 20, 2011, it filed with the Postal Regulatory Commission a *Request of the United States Postal Service to Add Priority Mail Contract 37 to Competitive Product List.* Documents are available at *http://www.prc.gov,* Docket Nos. MC2012–2, CP2012–6.

Stanley F. Mires,

Attorney, Legal Policy & Legislative Advice.

[FR Doc. 2011–33031 Filed 12–23–11; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: December 27, 2011.

FOR FURTHER INFORMATION CONTACT: Elizabeth A. Reed, (202) 268–3179.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 20, 2011, it filed with the Postal Regulatory Commission a *Request of the United States Postal Service to Add Priority Mail Contract 36 to Competitive Product List.* Documents are available at *http://*

www.prc.gov, Docket Nos. MC2012–2, CP2012–6.

Stanley F. Mires,

Attorney, Legal Policy & Legislative Advice.

[FR Doc. 2011–33030 Filed 12–23–11; 8:45 am]

BILLING CODE 7710–12–P

RAILROAD RETIREMENT BOARD

Proposed Collection; Comment Request

Summary: In accordance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 which provides opportunity for public comment on new or revised data collections, the Railroad Retirement Board (RRB) will publish periodic summaries of proposed data collections.

Comments are invited on: (a) Whether the proposed information collection is necessary for the proper performance of the functions of the agency, including whether the information has practical utility; (b) the accuracy of the RRB's estimate of the burden of the collection of the information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden related to the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

1. *Title and purpose of information collection:* Supplemental Information on Accident and Insurance; OMB 3220–0036.

Under Section 12(o) of the Railroad Unemployment Insurance Act (RUIA), the Railroad Retirement Board (RRB) is entitled to reimbursement of the sickness benefits paid to a railroad employee if the employee receives a sum or damages for the same infirmity for which the benefits are paid. Section 2(f) of the RUIA requires employers to reimburse the RRB for days in which salary, wages, pay for time lost or other remuneration is later determined to be payable. Reimbursements under section 2(f) generally result from the award of pay for time lost or the payment of guaranteed wages. The RUIA prescribes that the amount of benefits paid be deducted and held by the employer in a special fund for reimbursement to the RRB.

The RRB currently utilizes Forms SI–1c, Supplemental Information on Accident and Insurance; SI–5, Report of Payments to Employee Claiming Sickness Benefits Under the RUIA; ID–3s, Request for Lien Information; Report of Settlement; ID–3s–1, Lien Information Under Section 12(o) of the RUIA; ID–3u, Request for Section 2(f) Information; ID–30k, Notice to Request Supplemental Information on Injury or Illness; and ID–30k–1, Notice to Request Supplemental Information on Injury or Illness; to obtain the necessary information from claimants and railroad employers. Completion is required to obtain benefits. One response is requested of each respondent. The RRB proposes no changes to the forms in the collection.

ESTIMATE OF ANNUAL RESPONDENT BURDEN

[The estimated annual respondent burden is as follows]

Form number	Annual responses	Time (minutes)	Burden (hours)
SI–1c	500	5	42
SI–5	7	5	1
ID–3s (Paper & Telephone)	7,000	3	350
ID–3s (E-mail)	7,000	3	350
ID–3s.1 (Paper & Telephone)	500	3	25
ID–3u (Paper & Telephone)	1,100	3	55
ID–3u (E-mail)	1,100	3	55
ID–30k	100	5	8
ID–30k.1	75	5	6
Total	17,382	.....	892

2. *Title and purpose of information collection:* Continuing Disability Report; OMB 3220–0187.

Under Section 2 of the Railroad Retirement Act, an annuity is not payable or is reduced for any month in which the annuitant works for a railroad or earns more than prescribed dollar amounts from either non-railroad employment or self-employment. Certain types of work may indicate an annuitant's recovery from disability. The provisions relating to the reduction or non-payment of an annuity by reason of work, and an annuitant's recovery from disability for work, are prescribed in 20 CFR 220.17–220.20. The RRB conducts continuing disability reviews (CDR) to determine whether an annuitant continues to meet the disability requirements of the law. Provisions relating to when and how often the RRB conducts CDRs are prescribed in 20 CFR 220.186.

Form G–254, Continuing Disability Report, is used by the RRB to develop information for a CDR determination, including a determination prompted by a report of work, return to railroad service, allegation of medical improvement, or a routine disability review call-up. The RRB proposes non-burden impacting editorial and formatting changes.

Form G–254a, Continuing Disability Update Report, is used to help identify a disability annuitant whose work activity and/or recent medical history warrants completion of Form G–254 for a more extensive review. The RRB proposes adding a request for the applicant's daytime telephone number to resolve any ambiguous issues.

Completion is required to retain a benefit. One response is requested of each respondent to Forms G–254 and G–254a.

ESTIMATE OF ANNUAL RESPONDENT BURDEN

[The estimated annual respondent burden is as follows]

Form number	Annual responses	Time (minutes)	Burden (hours)
G–254	1,500	5–35	623
G–254a	1,500	5	125
Total	3,000		748

Additional Information or Comments: To request more information or to obtain a copy of the information collection justification, forms, and/or supporting material, contact Charles Mierzwa, the RRB Clearance Officer, at (312) 751–3363 or *Charles.Mierzwa@RRB.GOV.* Comments regarding the information collection should be addressed to Patricia Henaghan, Railroad Retirement Board, 844 North Rush Street, Chicago, Illinois 60611–2092 or emailed to *Patricia.Henaghan@RRB.GOV.* Written comments should be received within 60 days of this notice.

Charles Mierzwa,

Clearance Officer.

[FR Doc. 2011–33040 Filed 12–23–11; 8:45 am]

BILLING CODE 7905–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–66006; File No. SR–NYSEAmex–2011–97]

Self-Regulatory Organizations; NYSE Amex LLC; Notice of Filing and Order Granting Accelerated Approval of a Proposed Rule Amendment to NYSE Amex Rule 452 and Corresponding Section 723 of the Company Guide and Amex Rule 577 Relating to Discretionary Proxy Voting on Executive Compensation Matters

December 20, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 6, 2011, NYSE Amex LLC (''Exchange'' or ''NYSE Amex'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons and is approving the proposed rule change on an accelerated basis.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Rule 452—NYSE Amex Equities and corresponding Section 723 of the NYSE Amex Company Guide (''Company Guide'') and to replace the text of Rule 577 of the NYSE Amex Rules with a cross-reference indicating that Rule 452—NYSE Amex Equities and Section 723 of the Company Guide apply to all NYSE Amex member organizations. The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, and *www.nyse.com.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

NYSE Amex is proposing to amend Rule 452—NYSE Amex Equities and corresponding Section 723 of the Company Guide, each entitled ''*Giving Proxies by Member Organization,*'' to prohibit member organizations from voting uninstructed shares if the matter voted on relates to executive compensation. The foregoing changes are required by the provisions of Section 957 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (''Dodd-Frank Act''), which was signed by the President on July 21, 2010. The Exchange is also proposing to add the words ''or authorize'' in certain places throughout the rules to clarify that the rules cover not only the giving of a proxy but also the authorization of such proxy.

Under current NYSE Amex and Commission proxy rules, brokers must deliver proxy materials to beneficial owners and request voting instructions in return. If voting instructions have not been received by the tenth day preceding the meeting date, Rule 452—NYSE Amex Equities and corresponding Section 723 of the Company Guide provide that a broker may vote on certain matters when the broker has no knowledge of any contest as to the action to be taken at the meeting and provided such action is adequately disclosed to stockholders, and does not include authorization for a merger, consolidation or any matter which may affect substantially the rights or privileges of such stock. In addition, Rule 452.11—NYSE Amex Equities and Commentary .11 to Section 723 of the Company Guide currently identify 20 matters with respect to which brokers may not vote without instructions from beneficial owners. Prior to the July 21, 2010 enactment of the Dodd-Frank Act, under Rule 452—NYSE Amex Equities and corresponding Section 723 of the Company Guide and the Exchange's prior interpretations, member organizations were permitted to cast votes on some matters, including some executive compensation proposals, without specific instructions from beneficial owners of the stock.

Section 957 of the Dodd-Frank Act amends Section 6(b)[3] of the Exchange Act to require the rules of each national securities exchange to prohibit any member organization that is not the beneficial owner of a security registered under Section 12[4] of the Exchange Act from granting a proxy to vote the security in connection with certain stockholder votes, unless the beneficial owner of the security has instructed the member organization to vote the proxy in accordance with the voting

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78f(b).

[4] 15 U.S.C. 78l.

instructions of the beneficial owner. The stockholder votes covered by Section 957 include any vote with respect to (i) the election of a member of the board of directors of an issuer (other than an uncontested election of a director of an investment company registered under the Investment Company Act), (ii) executive compensation or (iii) any other significant matter, as determined by the Commission, by rule.

Rule 452—NYSE Amex Equities and corresponding Section 723 of the Company Guide already prohibit member organizations from voting uninstructed shares if the matter voted on is the election of directors (other than in the case of an issuer registered under the Investment Company Act, provided the matter is not the subject of a counter-solicitation). The Commission has not at this time determined by rule any other significant matters with respect to which a national securities exchange must prohibit member organizations from voting uninstructed shares. Accordingly, in order to carry out the requirements of Section 957 of the Dodd-Frank Act, the Exchange proposes to amend Rule 452—NYSE Amex Equities and corresponding Section 723 of the Company Guide to also prohibit member organizations from voting uninstructed shares if the matter voted on relates to executive compensation.

Specifically, the Exchange is proposing to add to Rule 452.11—NYSE Amex Equities and corresponding Commentary .11 to Section 723 of the Company Guide (both entitled ''*When member organization may not vote without customer instructions*'') a new Item 21 and accompanying commentary to provide that a member organization may not give or authorize a proxy to vote without instructions from the beneficial owner when the matter to be voted upon relates to executive compensation. The proposed commentary to Item 21 of Rule 452.11—NYSE Amex Equities and corresponding Section 723 of the Company Guide would clarify that a matter relating to executive compensation would include, among other things, the items referred to in Section 14A of the Exchange Act (added by Section 951 of the Dodd-Frank Act), including (i) an advisory vote to approve the compensation of executives, (ii) a vote on whether to hold such an advisory vote every one, two or three years, and (iii) an advisory vote to approve any type of compensation (whether present, deferred, or contingent) that is based on or otherwise relates to an acquisition, merger, consolidation, sale, or other disposition of all or substantially all of the assets of an issuer and the aggregate total of all such compensation that may (and the conditions upon which it may) be paid or become payable to or on behalf of an executive officer. In addition, a member organization may not give or authorize a proxy to vote without instructions on a matter relating to executive compensation, even if such matter would otherwise qualify for an exception from the requirements of Item 12, Item 13 or any other Item under Rule 452.11—NYSE Amex Equities or corresponding Section 723 of the Company Guide. The Exchange proposes to add new Commentary to each of Item 12 and Item 13 under Rule 452.11—NYSE Amex Equities and corresponding Section 723 of the Company Guide to specify that any vote on these or similar executive compensation-related matters would be subject to the requirements of Rule 452—NYSE Amex Equities, as amended, or corresponding Section 723 of the Company Guide, as amended.

The Exchange also proposes in this filing to delete the text of NYSE Amex Rule 577 (entitled ''*Giving Proxies by Member Organizations*'') from the NYSE Amex Rulebook and replace it with a cross-reference indicating that Rule 452—NYSE Amex and Section 723 of the Company Guide apply to all NYSE Amex member organizations. Rule 452—NYSE Amex Equities and Section 723 of the Company Guide include all of the restrictions contained in NYSE Amex Rule 577 and some additional restrictions that have been added in recent years that have not been added to NYSE Amex Rule 577.[5] In light of the fact that all of the requirements of NYSE Amex Rule 577 are duplicated in Rule 452—NYSE Amex Equities and Section 723 of the Company Guide, the Exchange believes that it is appropriate to replace the text of NYSE Amex Rule 577 with the proposed cross-reference and that doing so will avoid any confusion associated with having two duplicative rules governing the same activity.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Exchange Act,[6] in general and with Section 6(b)(10)[7] of the Exchange Act, in particular. Specifically, the Exchange believes the proposed rule change is consistent with the requirements of Section 6(b)(10) that all national securities exchanges adopt rules prohibiting members from voting, without receiving instructions from the beneficial owner of shares, on the election of a member of a board of directors of an issuer (except for a vote with respect to the uncontested election of a member of the board of directors of any investment company registered under the Investment Company Act of 1940), executive compensation, or any other significant matter, as determined by the Commission, by rule. The Exchange also believes that the proposed rule change is consistent with the requirements under Section 6(b)(5)[8] that an exchange have rules that are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanism of a free and open market and, in general, to protect investors and the public interest. The Exchange is adopting this proposed rule change to comply with the requirements of Section 957 of the Dodd-Frank Act, and therefore believes the proposed rule change to be consistent with the Exchange Act, particularly with respect to the protection of investors and the public interest. The requirements of NYSE Amex Rule 577 are all duplicative of Rule 452—NYSE Amex Equities and Section 723 of the Company Guide and its replacement by a simple cross-reference to those other rules serves the purpose of avoiding potential confusion without changing the substantive requirements in any way and is therefore consistent with the protection of investors and the public interest. The addition of the words ''or authorize'' in certain places throughout Rule 452—NYSE Amex and Section 723 of the Company Guide is a clarification and not a substantive change and is therefore consistent with the protection of investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

[5] In addition to the requirements of NYSE Amex Rule 577, Rule 452—NYSE Amex Equities prohibits brokers from voting uninstructed shares with respect to (i) the election of directors (except an uncontested director election of an investment company registered under the Investment Company Act of 1940) and (ii) any material amendment to an investment advisory contract with an investment company.

[6] 15 U.S.C. 78f.

[7] 15 U.S.C. 78f(b)(10).

[8] 15 U.S.C. 78f(b)(5).

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSEAmex–2011–97 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, Station Place, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEAmex–2011–97. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of Phlx. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available. All submissions should refer to File Number SR–NYSEAmex–2011–97 and should be submitted on or before January 17, 2012.

IV. Commission's Findings and Order Granting Accelerated Approval of the Proposed Rule Change

In its filing, the Exchange requested that the Commission approve the proposal on an accelerated basis so that the Exchange could comply with the requirements of the Dodd-Frank Act. After careful consideration, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[9] The Commission believes that the proposal is consistent with Section 6(b)(10) [10] of the Act, which requires that national securities exchanges adopt rules prohibiting members that are not beneficial holders of a security from voting uninstructed proxies with respect to the election of a member of the board of directors of an issuer (except for uncontested elections of directors for companies registered under the Investment Company Act), executive compensation, or any other significant matter, as determined by the Commission, by rule. The Commission also believes that the proposal is consistent with Section 6(b)(5) [11] of the Act, which provides, among other things, that the rules of the Exchange must be designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest, and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission believes that the proposal is consistent with Section 6(b)(10) of the Act because it adopts revisions that comply with that section. As noted in the accompanying Senate Report, Section 957, which adopts Section 6(b)(10), reflects the principle that ''final vote tallies should reflect the wishes of the beneficial owners of the stock and not be affected by the wishes of the broker that holds the shares.'' [12] The proposed rule change will make NYSE Amex rules compliant with the new requirements of Section 6(b)(10) by prohibiting broker-dealers, who are not beneficial owners of a security, from voting uninstructed shares with respect to any matter on executive compensation.[13]

The Commission believes that the proposal is consistent with Section 6(b)(5) of the Act because the proposal will further investor protection and the public interest by assuring that shareholder votes on executive compensation matters are made by those with an economic interest in the company, rather than by a broker that has no such economic interest, which should enhance corporate governance and accountability to shareholders.[14]

The Commission notes that NYSE Amex's new rules prohibiting uninstructed broker votes on executive compensation covers the specific items identified in Section 951 of the Dodd-Frank Act, as well as any other matter concerning executive compensation, and has been drafted broadly to reflect the requirements of Section 6(b)(10) of the Act. The proposed rule language also specifically states that a broker vote on any executive compensation matter would not be permitted even if it would otherwise qualify for an exception from any item under NYSE Amex Rule 452 and corresponding Section 723 of the Company Guide. The Commission believes this provision will make clear that any past practice or interpretation that may have permitted a broker vote on an executive compensation matter, under existing rules, will no longer be applicable and is superseded by the newly adopted provisions.

The Commission also notes that the Exchange will replace the text of Amex Rule 577 with Rule 452 NYSE Amex and corresponding Section 723 of the Company Guide by cross-reference. The Exchange has represented that the requirements of NYSE Amex Rule 577 are duplicative of Rule 452—NYSE Amex Equities and Section 723 of the

[9] In approving this rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[10] 15 U.S.C. 78f(b)(10).

[11] 15 U.S.C. 78f(b)(5).

[12] *See* S. Rep. No. 111–176, at 136 (2010).

[13] As noted above, Section 6(b)(10) also prohibits broker voting for director elections, except for uncontested director elections of registered investment companies, and also ''any other significant matter, as determined by the Commission, by rule.'' NYSE Amex already prohibits broker voting in director elections except for uncontested director elections for registered investment companies. *See* NYSE Amex Rule 452.11(19) and corresponding Section 723 of the Company Guide. As to other matters, the Commission has not, to date, adopted rules concerning other significant matters where uninstructed broker votes should be prohibited, although it may do so in the future. Should the Commission adopt such rules, we would expect NYSE Amex to adopt coordinating rules promptly to comply with the statute.

[14] As the Commission stated in approving NYSE rules prohibiting broker voting in the election of directors, having those with an economic interest in the company vote the shares, rather than the broker who has no such economic interest, furthers the goal of enfranchising shareholders. *See* Securities Exchange Act Release No. 60215 (July 1, 2009), 74 FR 33293 (July 10, 2009) (SR–NYSE–2006–92).

Company Guide. Accordingly, the Commission believes that the proposed change should avoid potential confusion associated with having duplicative rules and is therefore, consistent with Section 6 of the Act.

Finally, the Commission notes that the change to reflect that NYSE Amex rules prohibit not only the giving of a proxy, but also the authorization of the proxy, should help to clarify the intent of NYSE Amex proxy rules and is consistent with the requirements of Section 6 of the Act.

Based on the above, the Commission believes that the NYSE Amex's proposal will further the purposes of Sections 6(b)(5) and 6(b)(10) of the Act by ensuring that brokers, holding shares on behalf of beneficial owners, are not voting uninstructed shares on matters relating to executive compensation, which should enhance corporate accountability to shareholders. The rule filing should also serve to fulfill the Congressional intent in adopting Section 6(b)(10) of the Act.

The Commission also finds good cause, pursuant to Section 19(b)(2) of the Act,[15] for approving the proposed rule change prior to the 30th day after the date of publication of notice in the **Federal Register.** Section 6(b)(10) of the Act, enacted under Section 957 of the Dodd-Frank Act, does not provide for a transition phase, and requires rules of national securities exchanges to prohibit, among other things, broker voting on executive compensation. The Commission believes that good cause exists to grant accelerated approval to the Exchange's proposal, because it will conform NYSE Amex rules to the requirements of Section 6(b)(10) of the Act. Moreover, the Commission notes that the proposed changes are based on NYSE Rule 452.[16]

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[17] that the proposed rule change (SR–NYSEAmex–2011–97) be, and it hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[18]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2011–33045 Filed 12–23–11; 8:45 am]

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[15] 15 U.S.C. 78s(b)(2).

[16] *See* NYSE Rule 452, Securities Exchange Act Release No. 34–62874 (September 9, 2010), 75 FR 56152 (September 15, 2010) (SR–NYSE–2010–59).

[17] 15 U.S.C. 78s(b)(2).

[18] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–66013; File No. SR–NASDAQ–2011–146]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Approving a Proposed Rule Change to Modify Rule 7034 Regarding Low Latency Network Connections

December 20, 2011.

I. Introduction

On October 31, 2011, the NASDAQ Stock Market LLC (''NASDAQ'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to modify Exchange Rule 7034 entitled ''Co-Location Services'' to establish a program for offering low latency network connections and to establish the initial fees for such connections. The Exchange also proposed administrative modifications to Exchange Rule 7034. The proposed rule change was published for comment in the **Federal Register** on November 10, 2011.[3] The Commission received no comments on the proposal. This order approves the proposed rule change.

II. Description of the Proposed Rule Change

The Exchange proposed to modify Exchange Rule 7034, which governs the Exchange's program for co-location services, to offer new options for low latency network telecommunication connections and to establish the fees for such connections. As its initial offering, the Exchange proposed to offer point-to-point telecommunication connectivity from the co-location facility to select major financial trading and co-location venues in the New York and New Jersey metropolitan areas, Toronto, and Chicago.[4]

According to the Exchange, the enhanced point-to-point connectivity would provide the Exchange's co-location customers with the opportunity to obtain low latency network connectivity with greater ease than is currently the case, and at a competitive price.[5] The Exchange represented that co-location customers currently obtain similar services by negotiating fees, obtaining service level agreements, and executing service agreements directly with approved telecommunication carriers, and that such co-location customers are currently charged a monthly negotiated fee by the telecommunications carrier in addition to a cross connection fee by the Exchange.[6] The Exchange represented that for its low latency network connection services, it would obtain wholesale rates from the carriers and then charge a markup to compensate the Exchange for its efforts to negotiate and establish the arrangement, for integrating the connectivity into the Exchange co-location connectivity offering, and for administrative costs associated with establishing and maintaining each new connection.[7]

According to the Exchange, co-location customers would have the opportunity to request these new low latency network telecommunication connections through the same process used to request a new co-located cabinet and other co-location services.[8] Co-location customers would retain the option of contracting directly with telecommunication providers, including either the providers that participate in the program, the current providers in the data center who have not yet agreed to participate, or any new carrier that is approved to install equipment in the Exchange's data center.[9]

The Exchange proposed one-time fees for the installation of telecommunication connectivity to select major financial trading and co-location venues in the New York and New Jersey metropolitan areas, Toronto, and Chicago, as well as per-month connectivity fees, at connectivity levels of 100MB, 1G, and 10G, respectively.[10] The Exchange represented that the fees were based on anticipated bandwidth necessary for the connections and distances to these select venues. The Exchange indicated its belief that the fees are reasonable, because they are similar and competitive with fees charged for similar services by other entities.[11]

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 65688 (November 4, 2011), 76 FR 70199 (''Notice'').

[4] *Id.* at 70199. The Exchange represented that it currently provides a cross connect from a client's cabinet to its requested telecommunication carrier's cabinet (known as a ''telco cross connect''). According to the Exchange, clients would have the option to use the enhanced point-to-point connectivity service to receive low latency network connectivity from the Exchange's data center to the client's chosen venue(s), in addition to the telco cross connect. These connections could be utilized to send market data to and receive orders from the chosen venues.

[5] *Id.* at 70200.

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

The Exchange also proposed to eliminate references to certain fee waivers that expired July 31, 2011.[12]

III. Discussion and Commission's Findings

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[13] In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(4) of the Act,[14] which requires that the rules of a national securities exchange provide for the equitable allocation of reasonable dues, fees and other charges among its members and issuers and other persons using its facilities, and with Section 6(b)(5) of the Act,[15] which requires, among other things, that the rules of a national securities exchange be designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

In the Notice, the Exchange represented that the low latency network connections would be offered to market participants in a manner that is not unfairly discriminatory.[16] The Commission believes that this program to offer low latency network connectivity, in the manner described in the proposal, is consistent with Section 6(b)(5) the Exchange Act insofar as NASDAQ makes these connectivity options uniformly available to all members who voluntarily request them and pay the associated fees. Additionally, the Commission notes that members may choose not to obtain low latency network connectivity through the Exchange and instead negotiate connectivity options separately through other vendors on site.

Regarding the associated fees, the Exchange represented that they will be applied uniformly and will not unfairly discriminate between similarly situated market participants that use such co-location services.[17] The Exchange also represented that the fees are reasonable because, among other things, they enable the Exchange to recoup its share of the costs associated with the proposed low latency network telecommunication connections.[18] The Exchange further represented that the fees and associated costs of the co-location services are comparable to the costs and fees associated with comparable services offered by other trading venues.[19] Finally, the Exchange noted its expectation that this service will result in a reduction in fees charged to market participants due to enhanced competition.[20] In light of the Exchange's representations, the Commission believes that the fees associated with the low latency network connection services are consistent with Section 6(b)(4) of the Exchange Act.

IV. *Conclusion*

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[21] that the proposed rule change (SR–NASDAQ–2011–146) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[22]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2011–33145 Filed 12–23–11; 8:45 am]

BILLING CODE 8011–01–P

[12] *See* Notice, 76 FR at 70201; *see also* Securities Exchange Act Release No. 64630 (June 8, 2011), 76 FR 34783 (June 14, 2011) (SR–NASDAQ–2011–074); and Securities Exchange Act Release No. 64858 (July 12, 2011), 76 FR 42152 (July 18, 2011) (SR–NASDAQ–2011–094).

[13] In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[14] 15 U.S.C. 78f(b)(4).

[15] 15 U.S.C. 78f(b)(5).

[16] *See* Notice, 76 FR at 70201.

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] 15 U.S.C. 78s(b)(2).

[22] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–66010; File No. SR–NASDAQ–2011–160]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Modify Fees for Co-Location Services

December 20, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 9, 2011, The NASDAQ Stock Market LLC (''NASDAQ'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

The Exchange proposes to modify pricing for co-location services. The text of the proposed rule change is available at *http://nasdaq.cchwallstreet.com/,* at the Exchange's principal office, on the Commission's Web site at *http://www.sec.gov,* and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange is modifying its co-location fee schedule, Exchange Rule 7034(a), to include a fee for an optional cabinet choice. Currently co-location customers have the option of obtaining several cabinet sizes and power densities. The co-located customer may obtain a half cabinet, a low density cabinet, a medium density cabinet, a medium-high density cabinet and a high density cabinet.[3] Each cabinet may vary in size and maximum power capacity. The fees related to the cabinet and power usage are incremental, with additional charges being imposed based on higher levels of cabinet and/or power usage, the use of non-standard cabinet sizes or special cabinet cooling equipment. The co-location customer may obtain more power by choosing a combination of lower power density cabinets. However, the Exchange is providing a choice of a larger cabinet (30″W × 48″ D × 96″ H) with higher power instead of combining several units for more power (>10kW<=17.3kW)

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Exchange Rule 7034(a).

with an installation fee of $7,000; and an ongoing monthly fee of $15,000. The co-location customer also has the option of a smaller cabinet (24″ W × 42″ D × 84″ H) with the same power structure which would reduce the installation fee to $3,500 with the same ongoing monthly fee of $15,000 per month.

Additionally, the Exchange is proposing to include a fee for a super high density cabinet kit in Exchange Rule 7034(d). The optional super high density cabinet requires additional customized equipment to adequately cool the cabinet. The Exchange is proposing an installation fee of $7,000 for the required customized equipment kit. All fees are charged to recoup costs associated with the optional cabinets while providing increased efficiency; and to the extent the costs are covered, provide a profit to the Exchange.

The Exchange is making the super high density cabinets available as a convenience to customers, and notes that use of Exchange cabinets is completely voluntary.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[4] in general, and with Section 6(b)(4) of the Act,[5] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which the Exchange operates or controls.

The Exchange will incur costs for the super high-density cabinets due to the additional costs incurred for the change in design of the cabinets to meet the need of the client, and the costs incurred for infrastructure to accommodate the proposed units as the cabinet design is not of the same dimension as the current cabinets to accommodate new server sizes. The Exchange will also incur additional costs for personnel needed to monitor and support the new cabinets. The Exchange looks to recoup the additional costs from all market participants that opt to utilize the proposed cabinets. Thus, the price charged for the proposed cabinets is equitable and just in that the proposed fees that will be charged only to those that opt for the proposed super high-density cabinets and will be based on the costs to develop and maintain the system, as well as allowing the Exchange to earn a return on its investment. Furthermore, because the proposed super high- density cabinet option is entirely voluntary and available to all members, the Exchange's fees for the purposed cabinet are not only equitably allocated, but also non-discriminatory.

Additionally, the Exchange is providing the additional cabinet option to its co-located customers to provide greater efficiency for their trading operations. In order to receive similar service under the current structure, the co-located customer would need to combine several currently provided cabinets. While the price may appear initially similar, the co-located customer would incur additional monthly interconnectivity costs for cabling to connect all the cabinets. Additionally, having one super high-density cabinet to meet the space and power requirements to operate the newly designed servers reduces the additional latency that would be experienced by combining several cabinets to achieve a similar result. The new design of the super high-density cabinet allows the fit of more equipment in one unit before reaching power capacity. For all the above reasons, the proposed super high-density cabinets results in a more efficient operation overall for the co-located customer.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[6] At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NASDAQ–2011–160 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2011–160. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2011–160, and should be submitted on or before January 17, 2012.

[4] 15 U.S.C. 78f.

[5] 15 U.S.C. 78f(b)(4).

[6] 15 U.S.C. 78s(b)(3)(a)(ii).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[7]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2011–33144 Filed 12–23–11; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–66016; File No. SR–Phlx–2011–164]

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Modify the Fee Schedule for Co-Location Services

December 20, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 9, 2011, NASDAQ OMX PHLX (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed Fee Schedule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

The Exchange proposes to modify pricing for co-location services. The text of the proposed rule change is available at *http://www.nasdaqtrader.com/micro.aspx?id=PHLXRulefilingshttp://nasdaqbx.cchwallstreet.com/,* at the Exchange's principal office, on the Commission's Web site at *http://www.sec.gov,* and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange is modifying its Fee Schedule regarding co-location fees, Phlx Fee Schedule, Section X(a), to include a fee for an optional cabinet choice. Currently co-location customers have the option of obtaining several cabinet sizes and power densities. The co-located customer may obtain a half cabinet, a low density cabinet, a medium density cabinet, a medium-high density cabinet and a high density cabinet. Each cabinet may vary in size and maximum power capacity.[3] The fees related to the cabinet and power usage are incremental, with additional charges being imposed based on higher levels of cabinet and/or power usage, the use of non-standard cabinet sizes or special cabinet cooling equipment. The co-location customer may obtain more power by choosing a combination of lower power density cabinets. However, the Exchange is providing a choice of a larger cabinet (30″W x 48″ D x 96″ H) with higher power instead of combining several units for more power (>10kW <=17.3kW) with an installation fee of $7,000; and an ongoing monthly fee of $15,000. The co-location customer also has the option of a smaller cabinet (24″ W x 42″ D x 84″ H) with the same power structure which would reduce the installation fee to $3,500 with the same ongoing monthly fee of $15,000 per month.

Additionally, the Exchange is proposing to include a fee for a super high density cabinet kit in the Phlx Fee Schedule, Section X(c). The optional super high density cabinet requires additional customized equipment to adequately cool the cabinet. The Exchange is proposing an installation fee of $7,000 for the required customized equipment kit. All fees are charged to recoup costs associated with the optional cabinets while providing increased efficiency; and to the extent the costs are covered, provide a profit to the Exchange.

The Exchange is making the super high density cabinets available as a convenience to customers, and notes that use of Exchange cabinets is completely voluntary.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[4] in general, and with Section 6(b)(4) of the Act,[5] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which the Exchange operates or controls.

The Exchange will incur costs for the super high-density cabinets due to the additional costs incurred for the change in design of the cabinets to meet the need of the client, and the costs incurred for infrastructure to accommodate the proposed units as the cabinet design is not of the same dimension as the current cabinets to accommodate new server sizes. The Exchange will also incur additional costs for personnel needed to monitor and support the new cabinets. The Exchange looks to recoup the additional costs from all market participants that opt to utilize the proposed cabinets. Thus, the price charged for the proposed cabinets is equitable and just in that the proposed fees that will be charged only to those that opt for the proposed super high-density cabinets and will be based on the costs to develop and maintain the system, as well as allowing the Exchange to earn a return on its investment. Furthermore, because the proposed super high-density cabinet option is entirely voluntary and available to all members, the Exchange's fees for the purposed cabinet are not only equitably allocated, but also non-discriminatory.

Additionally, the Exchange is providing the additional cabinet option to its co-located customers to provide greater efficiency for their trading operations. In order to receive similar service under the current structure, the co-located customer would need to combine several currently provided cabinets. While the price may appear initially similar, the co-located customer would incur additional monthly interconnectivity costs for cabling to connect all the cabinets. Additionally, having one super high-density cabinet to meet the space and power requirements to operate the newly designed servers reduces the additional latency that would be experienced by combining several cabinets to achieve a similar result. The new design of the super high-density cabinet allows the fit of more equipment in one unit before reaching power capacity. For all the above reasons, the proposed super high-density cabinets results in a more

[7] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Exchange Fee Schedule, Section X(a).

[4] 15 U.S.C. 78f.

[5] 15 U.S.C. 78f(b)(4).

efficient operation overall for the co-located customer.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed Fee Schedule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing Fee Schedule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[6] At any time within 60 days of the filing of the proposed Fee Schedule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–Phlx–2011–164 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–Phlx–2011–164. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site *(http://www.sec.gov/rules/sro.shtml).* Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–Phlx–2011–164, and should be submitted on or before January 17, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[7]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2011–33121 Filed 12–23–11; 8:45 am]

BILLING CODE 8011–01–P

[6] 15 U.S.C. 78s(b)(3)(a)(ii).

[7] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–66015; File No. SR–BX–2011–081]

Self-Regulatory Organizations; NASDAQ OMX BX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Modify Fees for Co-Location Services

December 20, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 9, 2011, NASDAQ OMX BX, Inc. (''BX'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

The Exchange proposes to modify pricing for co-location services. The text of the proposed rule change is available at *http://nasdaq.cchwallstreet.com/*, at the Exchange's principal office, on the Commission's Web site at *http://www.sec.gov*, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange is modifying its co-location fee schedule, Exchange Rule 7034(a), to include a fee for an optional cabinet choice. Currently co-location customers have the option of obtaining several cabinet sizes and power densities. The co-located customer may obtain a half cabinet, a low density cabinet, a medium density cabinet, a medium-high density cabinet and a high density cabinet.[3] Each cabinet may vary in size and maximum power capacity. The fees related to the cabinet and power usage are incremental, with additional charges being imposed based on higher levels of cabinet and/or power usage, the use of non-standard cabinet sizes or special cabinet cooling equipment. The co-location customer may obtain more power by choosing a combination of lower power density cabinets. However, the Exchange is providing a choice of a larger cabinet (30″W × 48″ D × 96″ H) with higher power instead of combining several units for more power (≥10kW≤ = 17.3kW) with an installation fee of

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Exchange Rule 7034(a).

$7,000; and an ongoing monthly fee of $15,000. The co-location customer also has the option of a smaller cabinet (24″ W × 42″ D × 84″ H) with the same power structure which would reduce the installation fee to $3,500 with the same ongoing monthly fee of $15,000 per month.

Additionally, the Exchange is proposing to include a fee for a super high density cabinet kit in Exchange Rule 7034(d). The optional super high density cabinet requires additional customized equipment to adequately cool the cabinet. The Exchange is proposing an installation fee of $7,000 for the required customized equipment kit. All fees are charged to recoup costs associated with the optional cabinets while providing increased efficiency; and to the extent the costs are covered, provide a profit to the Exchange.

The Exchange is making the super high density cabinets available as a convenience to customers, and notes that use of Exchange cabinets is completely voluntary.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[4] in general, and with Section 6(b)(4) of the Act,[5] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which the Exchange operates or controls.

The Exchange will incur costs for the super high-density cabinets due to the additional costs incurred for the change in design of the cabinets to meet the need of the client, and the costs incurred for infrastructure to accommodate the proposed units as the cabinet design is not of the same dimension as the current cabinets to accommodate new server sizes. The Exchange will also incur additional costs for personnel needed to monitor and support the new cabinets. The Exchange looks to recoup the additional costs from all market participants that opt to utilize the proposed cabinets. Thus, the price charged for the proposed cabinets is equitable and just in that the proposed fees that will be charged only to those that opt for the proposed super high-density cabinets and will be based on the costs to develop and maintain the system, as well as allowing the Exchange to earn a return on its investment. Furthermore, because the proposed super high-density cabinet option is entirely voluntary and available to all members, the Exchange's fees for the purposed cabinet are not only equitably allocated, but also non-discriminatory.

Additionally, the Exchange is providing the additional cabinet option to its co-located customers to provide greater efficiency for their trading operations. In order to receive similar service under the current structure, the co-located customer would need to combine several currently provided cabinets. While the price may appear initially similar, the co-located customer would incur additional monthly interconnectivity costs for cabling to connect all the cabinets. Additionally, having one super high-density cabinet to meet the space and power requirements to operate the newly designed servers reduces the additional latency that would be experienced by combining several cabinets to achieve a similar result. The new design of the super high-density cabinet allows the fit of more equipment in one unit before reaching power capacity. For all the above reasons, the proposed super high-density cabinets results in a more efficient operation overall for the co-located customer.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[6] At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–BX–2011–081 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–BX–2011–081. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–BX–2011–081, and should be submitted on or before January 17, 2012.

[4] 15 U.S.C. 78f.

[5] 15 U.S.C. 78f(b)(4).

[6] 15 U.S.C. 78s(b)(3)(a)(ii).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[7]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2011–33120 Filed 12–23–11; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–66012; File No. SR–BX–2011–073]

Self-Regulatory Organizations; NASDAQ OMX BX, Inc.; Order Approving a Proposed Rule Change To Modify Rule 7034 Regarding Low Latency Network Connections

December 20, 2011.

I. Introduction

On October 31, 2011, NASDAQ OMX BX, Inc. (''BX'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to modify Exchange Rule 7034 entitled ''Co-Location Services'' to establish a program for offering low latency network connections and to establish the initial fees for such connections. The Exchange also proposed administrative modifications to Exchange Rule 7034. The proposed rule change was published for comment in the **Federal Register** on November 10, 2011.[3] The Commission received no comments on the proposal. This order approves the proposed rule change.

II. Description of the Proposed Rule Change

The Exchange proposed to modify Exchange Rule 7034, which governs the Exchange's program for co-location services, to offer new options for low latency network telecommunication connections and to establish the fees for such connections. As its initial offering, the Exchange proposed to offer point-to-point telecommunication connectivity from the co-location facility to select major financial trading and co-location venues in the New York and New Jersey metropolitan areas, Toronto, and Chicago.[4]

According to the Exchange, the enhanced point-to-point connectivity would provide the Exchange's co-location customers with the opportunity to obtain low latency network connectivity with greater ease than is currently the case, and at a competitive price.[5] The Exchange represented that co-location customers currently obtain similar services by negotiating fees, obtaining service level agreements, and executing service agreements directly with approved telecommunication carriers, and that such co-location customers are currently charged a monthly negotiated fee by the telecommunications carrier in addition to a cross connection fee by the Exchange.[6] The Exchange represented that for its low latency network connection services, it would obtain wholesale rates from the carriers and then charge a markup to compensate the Exchange for its efforts to negotiate and establish the arrangement, for integrating the connectivity into the Exchange co-location connectivity offering, and for administrative costs associated with establishing and maintaining each new connection.[7]

According to the Exchange, co-location customers would have the opportunity to request these new low latency network telecommunication connections through the same process used to request a new co-located cabinet and other co-location services.[8] Co-location customers would retain the option of contracting directly with telecommunication providers, including either the providers that participate in the program, the current providers in the data center who have not yet agreed to participate, or any new carrier that is approved to install equipment in the Exchange's data center.[9]

The Exchange proposed one-time fees for the installation of telecommunication connectivity to select major financial trading and co-location venues in the New York and New Jersey metropolitan areas, Toronto, and Chicago, as well as per-month connectivity fees, at connectivity levels of 100MB, 1G, and 10G, respectively.[10] The Exchange represented that the fees were based on anticipated bandwidth necessary for the connections and distances to these select venues. The Exchange indicated its belief that the fees are reasonable, because they are similar and competitive with fees charged for similar services by other entities.[11]

The Exchange also proposed to eliminate references to certain fee waivers that expired July 31, 2011.[12]

III. Discussion and Commission's Findings

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[13] In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(4) of the Act,[14] which requires that the rules of a national securities exchange provide for the equitable allocation of reasonable dues, fees and other charges among its members and issuers and other persons using its facilities, and with Section 6(b)(5) of the Act,[15] which requires, among other things, that the rules of a national securities exchange be designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

In the Notice, the Exchange represented that the low latency network connections would be offered to market participants in a manner that is not unfairly discriminatory.[16] The Commission believes that this program to offer low latency network connectivity, in the manner described in the proposal, is consistent with Section 6(b)(5) the Exchange Act insofar as NASDAQ makes these connectivity options uniformly available to all members who voluntarily request them and pay the associated fees. Additionally, the Commission notes that members may choose not to obtain low

[7] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 65687 (November 4, 2011), 76 FR 70184 (''Notice'').

[4] *Id.* at 70185. The Exchange represented that it currently provides a cross connect from a client's cabinet to its requested telecommunication carrier's cabinet (known as a ''telco cross connect''). According to the Exchange, clients would have the option to use the enhanced point-to-point connectivity service to receive low latency network connectivity from the Exchange's data center to the client's chosen venue(s), in addition to the telco cross connect. These connections could be utilized to send market data to and receive orders from the chosen venues.

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.* at 70186.

[12] *Id.; see also* Securities Exchange Act Release No. 64630 (June 8, 2011), 76 FR 34783 (June 14, 2011) (SR–NASDAQ–2011–074); and Securities Exchange Act Release No. 64858 (July 12, 2011), 76 FR 42152 (July 18, 2011) (SR–NASDAQ–2011–094).

[13] In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[14] 15 U.S.C. 78f(b)(4).

[15] 15 U.S.C. 78f(b)(5).

[16] *See* Notice, 76 FR at 70186.

latency network connectivity through the Exchange and instead negotiate connectivity options separately through other vendors on site.

Regarding the associated fees, the Exchange represented that they will be applied uniformly and will not unfairly discriminate between similarly situated market participants that use such co-location services.[17] The Exchange also represented that the fees are reasonable because, among other things, they enable the Exchange to recoup its share of the costs associated with the proposed low latency network telecommunication connections.[18] The Exchange further represented that the fees and associated costs of the co-location services are comparable to the costs and fees associated with comparable services offered by other trading venues.[19] Finally, the Exchange noted its expectation that this service will result in a reduction in fees charged to market participants due to enhanced competition.[20] In light of the Exchange's representations, the Commission believes that the fees associated with the low latency network connection services are consistent with Section 6(b)(4) of the Exchange Act.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[21] that the proposed rule change (SR–BX–2011–073) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[22]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2011–33119 Filed 12–23–11; 8:45 am]

BILLING CODE 8011–01–P

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.* at 70187.

[21] 15 U.S.C. 78s(b)(2).

[22] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–66011; File No. SR–Phlx–2011–142]

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Order Approving a Proposed Rule Change To Modify its Co-Location Fee Schedule Regarding Low Latency Network Connections

December 20, 2011.

I. Introduction

On October 31, 2011, NASDAQ OMX PHLX LLC (''Phlx'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to modify the Exchange Fee Schedule, Section X(b) entitled ''Co-Location Services'' to establish a program for offering low latency network connections and to establish the initial fees for such connections. The Exchange also proposed administrative modifications to the Exchange Fee Schedule, Section X(b). The proposed rule change was published for comment in the **Federal Register** on November 10, 2011.[3] The Commission received no comments on the proposal. This order approves the proposed rule change.

II. Description of the Proposed Rule Change

The Exchange proposed to modify the Exchange Fee Schedule, Section X(b), entitled ''Co-Location Services,'' to offer new options for low latency network telecommunication connections and to establish the fees for such connections. As its initial offering, the Exchange proposed to offer point-to-point telecommunication connectivity from the co-location facility to select major financial trading and co-location venues in the New York and New Jersey metropolitan areas, Toronto, and Chicago.[4]

According to the Exchange, the enhanced point-to-point connectivity would provide the Exchange's co-location customers with the opportunity to obtain low latency network connectivity with greater ease than is currently the case, and at a competitive price.[5] The Exchange represented that co-location customers currently obtain similar services by negotiating fees, obtaining service level agreements, and executing service agreements directly with approved telecommunication carriers, and that such co-location customers are currently charged a monthly negotiated fee by the telecommunications carrier in addition to a cross connection fee by the Exchange.[6] The Exchange represented that for its low latency network connection services, it would obtain wholesale rates from the carriers and then charge a markup to compensate the Exchange for its efforts to negotiate and establish the arrangement, for integrating the connectivity into the Exchange co-location connectivity offering, and for administrative costs associated with establishing and maintaining each new connection.[7]

According to the Exchange, co-location customers would have the opportunity to request these new low latency network telecommunication connections through the same process used to request a new co-located cabinet and other co-location services.[8] Co-location customers would retain the option of contracting directly with telecommunication providers, including either the providers that participate in the program, the current providers in the data center who have not yet agreed to participate, or any new carrier that is approved to install equipment in the Exchange's data center.[9]

The Exchange proposed one-time fees for the installation of telecommunication connectivity to select major financial trading and co-location venues in the New York and New Jersey metropolitan areas, Toronto, and Chicago, as well as per-month connectivity fees, at connectivity levels of 100MB, 1G, and 10G, respectively.[10] The Exchange represented that the fees were based on anticipated bandwidth necessary for the connections and distances to these select venues. The Exchange indicated its belief that the fees are reasonable, because they are similar and competitive with fees

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 65689 (November 4, 2011), 76 FR 70187 (''Notice'').

[4] *Id.* at 70188. The Exchange represented that it currently provides a cross connect from a client's cabinet to its requested telecommunication carrier's cabinet (known as a ''telco cross connect''). According to the Exchange, clients would have the option to use the enhanced point-to-point connectivity service to receive low latency network connectivity from the Exchange's data center to the client's chosen venue(s), in addition to the telco cross connect. These connections could be utilized to send market data to and receive orders from the chosen venues.

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

charged for similar services by other entities.[11]

The Exchange also proposed to eliminate references to certain fee waivers that expired July 31, 2011.[12]

III. Discussion and Commission's Findings

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[13] In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(4) of the Act,[14] which requires that the rules of a national securities exchange provide for the equitable allocation of reasonable dues, fees and other charges among its members and issuers and other persons using its facilities, and with Section 6(b)(5) of the Act,[15] which requires, among other things, that the rules of a national securities exchange be designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

In the Notice, the Exchange represented that the low latency network connections would be offered to market participants in a manner that is not unfairly discriminatory.[16] The Commission believes that this program to offer low latency network connectivity, in the manner described in the proposal, is consistent with Section 6(b)(5) the Exchange Act insofar as NASDAQ makes these connectivity options uniformly available to all members who voluntarily request them and pay the associated fees. Additionally, the Commission notes that members may choose not to obtain low latency network connectivity through the Exchange and instead negotiate connectivity options separately through other vendors on site.

Regarding the associated fees, the Exchange represented that they will be applied uniformly and will not unfairly discriminate between similarly situated market participants that use such co-location services.[17] The Exchange also represented that the fees are reasonable because, among other things, they enable the Exchange to recoup its share of the costs associated with the proposed low latency network telecommunication connections.[18] The Exchange further represented that the fees and associated costs of the co-location services are comparable to the costs and fees associated with comparable services offered by other trading venues.[19] Finally, the Exchange noted its expectation that this service will result in a reduction in fees charged to market participants due to enhanced competition.[20] In light of the Exchange's representations, the Commission believes that the fees associated with the low latency network connection services are consistent with Section 6(b)(4) of the Exchange Act.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[21] that the proposed rule change (SR–Phlx–2011–142) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[22]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2011–33118 Filed 12–23–11; 8:45 am]

BILLING CODE 8011–01–P

[11] *Id.* at 70189.

[12] *Id.; see also* Securities Exchange Act Release No. 64630 (June 8, 2011), 76 FR 34783 (June 14, 2011) (SR–NASDAQ–2011–074); and Securities Exchange Act Release No. 64858 (July 12, 2011), 76 FR 42152 (July 18, 2011) (SR–NASDAQ–2011–094).

[13] In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[14] 15 U.S.C. 78f(b)(4).

[15] 15 U.S.C. 78f(b)(5).

[16] *See* Notice, 76 FR at 70189.

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.* at 70189–90.

[21] 15 U.S.C. 78s(b)(2).

[22] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–66007; File No. SR–NSX–2011–15]

Self-Regulatory Organizations; National Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Its Fee and Rebate Schedule

December 20, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 15, 2011, National Stock Exchange, Inc. filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comment on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

National Stock Exchange, Inc. (''NSX®'' or ''Exchange'') is proposing to continue to make available, without charge, the Exchange's data feed, the NSX depth-of-book feed (''DOB feed''), to authorized recipients.

The text of the proposed rule change is available on the Exchange's Web site at *http://www.nsx.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to continue to make available, without charge, the Exchange's data feed, the NSX depth-of-book feed (''DOB feed''), to authorized recipients.[3] This rule change also describes the Exchange's practices for distributing the NSX DOB feed to authorized recipients.

The Exchange first established its DOB feed in November, 2006. The Exchange does not and has never charged authorized recipients for receipt of its DOB feed.[4] The NSX DOB feed

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] An authorized recipient of the DOB feed must execute required documentation with, and be approved by, the Exchange prior to receiving the service. Currently, the required documentation consists of the NSX Market Data Feed License Agreement, which is available on the Exchange Web site (*http://www.nsx.com/resources/content/2/4/documents/MarketDataFeed062009.pdf*).

[4] Although the Exchange does not charge authorized recipients for receipt of the NSX DOB feed, an ETP Holder recipient may incur third party costs associated with such feed, including pursuant to the Exchange's ability to pass through third party costs to ETP Holders pursuant to section III.B of the Fee Schedule.

provides the real-time quotation and execution information, including price, size, and buy or sell, for all displayed orders in the NSX book. The DOB feed does not disclose the source of any order or identify any transaction party. A more specific description of the NSX DOB feed, including the type of data, data elements and format, is contained in two technical specification documents available for review on the NSX Web site (*http://www.nsx.com/content/connect-to-nsx*). The NSX DOB feed is available on a uniform basis to all ETP Holders authorized to receive the feed, as well as to any other authorized recipients. Authorized recipients must, before receiving the DOB feed, execute required Exchange documentation and be approved for receipt of the feed. A recipient's continuing eligibility to receive the feed, and the permitted uses of the data by a recipient, among other things, is governed by the Market Data Feed License Agreement, available on the NSX Web site, that must be executed by each authorized DOB feed recipient.

Based on NSX system architecture, market data contained in the NSX DOB feed will not be distributed to authorized recipients prior to the equivalent data being transmitted to the securities information processor (''SIP'').[5] In addition, the Exchange monitors, in real time, its data transmissions to the SIP such that, in the event of delay or interruption, the Exchange has policies and procedures in place designed to delay transmission of the equivalent data to NSX DOB feed recipients.

By making clear on the Fee Schedule that the DOB feed is available free of charge, the Exchange believes that market transparency is enhanced and competition is promoted. Should the Exchange determine at a later date to charge fees associated with the DOB feed, or develop and offer to qualified recipients any other market data feed product, the Exchange will submit a proposed rule change to the Commission concerning those subjects.

The absence of an Exchange charge to recipients for receipt of the NSX DOB feed is reflected in Section III.C of the Fee Schedule under the header ''Depth of Book Feed'' and in corresponding Explanatory Endnote 13.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6(b) of the Securities and Exchange Act of 1934 (the ''Act''),[6] in general, and Section 6(b)(5) of the Act,[7] in particular, in that it is designed to promote just and equitable principles of trade, remove impediments to, and perfect the mechanism of, a free and open market and a national market system, and, in general, protect investors and the public interest. Moreover, the proposed rule change is not discriminatory in that all qualified ETP Holders, and other qualified recipients, are eligible to receive this feed. The Exchange also believes that the proposed change is consistent with Section 6(b)(5) of the Act,[8] which requires, among other things, that the Exchange's rules are not designed to unfairly discriminate between customers, issuers, brokers or dealers. Specially, the Exchange believes that the proposed changes to the Fee Schedule are equitable in that they apply uniformly to all data recipients.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate, it has become effective pursuant to 19(b)(3)(A) of the Act[9] and Rule 19b–4(f)(6)[10] thereunder.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NSX–2011–15 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NSX–2011–15. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NSX–

[5] As measured, based on point in time that the data passes through the NSX firewall.

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

[8] 15 U.S.C. 78f(b)(5).

[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

2011–15 and should be submitted on or before January 17, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2011–33052 Filed 12–23–11; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–66008; File No. SR–C2–2011–40]

Self-Regulatory Organizations; C2 Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to the Penny Pilot Program

December 20, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 15, 2011, C2 Options Exchange, Incorporated (the ''Exchange'' or ''C2'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its rules relating to the Penny Pilot Program. The text of the proposed rule change is available on the Exchange's Web site (*http://www.c2exchange.com/Legal/*), at the Exchange's Office of the Secretary, and at the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Penny Pilot Program is scheduled to expire on December 31, 2011. C2 proposes to extend the Pilot Program until June 30, 2012. C2 believes that extending the Pilot Program will allow for further analysis of the Pilot Program and a determination of how the Pilot Program should be structured in the future.

During this extension of the Penny Pilot Program, C2 proposes that it may replace any option class that is currently included in the Pilot Program and that has been delisted with the next most actively-traded, multiple-listed option class that is not yet participating in the Pilot Program (''replacement class''). Any replacement class would be determined based on national average daily volume in the preceding six months[3], and would be added on the second trading day following January 1, 2012. C2 will announce to its Permit Holders by circular any replacement classes in the Pilot Program.

C2 is specifically authorized to act jointly with the other options exchanges participating in the Penny Pilot Program in identifying any replacement class. C2 will submit to the Securities and Exchange Commission (the ''Commission'') reports that will analyze the impact of the Pilot Program on market quality and systems capacity for the periods October 1, 2011 through March 31, 2012 and April 1 through June 30, 2012. Each report will include, but not be limited to, the following: (1) Data and analysis of the number of quotations generated for options included in the report; (2) an assessment of the quotation spreads for the options included in the report; (3) an assessment of the impact of the Pilot Program on C2's automated systems; (4) data reflecting the size and depth of markets; and (5) any capacity problems or other problems that arose related to the operation of the Pilot Program and how the Exchange addressed them.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with Section 6 of the Act[4] and the rules and regulations thereunder applicable to a national securities exchange and, in particular, the requirements of Section 6(b) of the Act[5]. Specifically, the Exchange believes that the proposed rule change is consistent with the Section 6(b)(5) of the Act[6] requirements that the rules of an exchange be designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts, to remove impediments to and to perfect the mechanism for a free and open market and a national market system, and, in general, to protect investors and the public interest. In particular, the proposed rule change allows for an extension of the Penny Pilot Program for the benefit of market participants.

B. Self-Regulatory Organization's Statement on Burden on Competition

C2 does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[7] and Rule 19b–4(f)(6)(iii) thereunder.[8]

A proposed rule change filed under Rule 19b–4(f)(6)[9] normally does not become operative for 30 days after the

[11] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The month immediately preceding a replacement class's addition to the Pilot Program (*i.e.* December) would not be used for purposes of the six-month analysis. Thus, a replacement class to be added on the second trading following January 1, 2012 would be identified based on The Option Clearing Corporation's trading volume data from June 1, 2011 through November 30, 2011.

[4] 15 U.S.C. 78f.

[5] 15 U.S.C. 78f(b).

[6] 15 U.S.C. 78f(b)(5).

[7] 15 U.S.C. 78s(b)(3)(A).

[8] 17 CFR 240.19b–4(f)(6)(iii). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Commission notes that the Exchange has satisfied this requirement.

[9] 17 CFR 240.19b–4(f)(6).

date of filing. However, pursuant to Rule 19b–4(f)(6)(iii) [10] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing.

The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. Waiving the operative delay will allow the pilot program to continue on C2 uninterrupted, which will avoid the investor confusion that could result from an interruption in the pilot. For this reason, the Commission designates the proposed rule change as operative upon the date of this notice.[11]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File No. SR–C2–2011–40 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File No. SR–C2–2011–40. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR–C2–2011–40 and should be submitted on or before January 17, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2011–33053 Filed 12–23–11; 8:45 am]

BILLING CODE 8011–01–P

[10] 17 CFR 240.19b–4(f)(6)(iii).

[11] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[12] 17 CFR 200.30–3(a)(12).

SOCIAL SECURITY ADMINISTRATION

[Docket No. SSA–2011–0097]

Rate for Assessment on Direct Payment Fees to Representatives in 2012

AGENCY: Social Security Administration (SSA).

ACTION: Notice.

SUMMARY: We are announcing that the assessment percentage rate under Sections 206(d) and 1631(d)(2)(C) of the Social Security Act (Act), 42 U.S.C. 406(d) and 1383(d)(2)(C), is 6.3 percent for 2012.

FOR FURTHER INFORMATION CONTACT: Jeffrey C. Blair, Associate General Counsel for Program Law, Office of the General Counsel, Social Security Administration, 6401 Security Boulevard, Baltimore, MD 21235–6401. Phone: (410) 965–3157, email *Jeff.Blair@ssa.gov.*

SUPPLEMENTARY INFORMATION: Individuals claiming Social Security benefits or Supplemental Security Income payments may choose to hire representatives to assist them with their claims. If the claim is successful and the individual was represented either by an attorney or by a nonattorney representative who has met certain prerequisites, the Act provides that we may withhold up to 25 percent of the past-due benefits payable on the claim and use that money to pay the representative's approved fee directly to the representative.

When we pay the representative's fee directly to the representative, we must collect from that fee payment an assessment to recover the costs we incur in determining and paying representatives' fees. The Act provides that the assessment we collect will be the lesser of two amounts: a specified dollar limit; or the amount determined by multiplying the fee we are paying by the assessment percentage rate. (Sections 206(d), 206(e), and 1631(d)(2) of the Act, 42 U.S.C. 406(d), 406(e), and 1383(d)(2)).

The Act initially set the dollar limit at $75 in 2004 and provides that the limit will be adjusted annually based on changes in the cost-of-living. (Sections 206(d)(2)(A) and 1631(d)(2)(C)(ii)(I) of the Act, 42 U.S.C. 406(d)(2)(A) and 1383(d)(2)(C)(ii)(I)) The maximum dollar limit for the assessment currently is $86, as we announced in the **Federal Register** on October 25, 2011 (76 FR 66111).

The Act requires us each year to set the assessment percentage rate at the lesser of 6.3 percent or the percentage rate necessary to achieve full recovery of the costs we incur to determine and pay representatives' fees. (Sections 206(d)(2)(B)(ii) and 1631(d)(2)(C)(ii)(II) of the Act, 42 U.S.C. 406(d)(2)(B)(ii) and 1383(d)(2)(C)(ii)(II)) Based on the best available data, we have determined that the current rate of 6.3 percent will continue for 2012. We will continue to review our costs for these services on a yearly basis.

Dated: December 8, 2011.

Michael G. Gallagher,

Deputy Commissioner for Budget, Finance and Management.

[FR Doc. 2011–33099 Filed 12–23–11; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF STATE

[Public Notice: 7739]

Culturally Significant Objects Imported for Exhibition Determinations: ''Woman in Blue, Against Blue Water'' by Edvard Munch

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.;* 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, and Delegation of Authority No. 236–3 of August 28, 2000 (and, as appropriate, Delegation of Authority No. 257 of April 15, 2003), I hereby determine that the object ''Woman in Blue, Against Blue Water'' by Edvard Munch, imported from abroad for temporary exhibition within the United States, is of cultural significance. The object is imported pursuant to a loan agreement with the foreign owners or custodians. I also determine that the exhibition or display of the exhibit object at the Metropolitan Museum of Art, New York, N.Y., from on or about January 9, 2012, until on or about January 9, 2014, and at possible additional exhibitions or venues yet to be determined, is in the national interest. I have ordered that Public Notice of these Determinations be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, contact Ona M. Hahs, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: (202) 632–6473). The mailing address is U.S. Department of State, SA–5, L/PD, Fifth Floor (Suite 5H03), Washington, DC 20522–0505.

Dated: December 19, 2011.

J. Adam Ereli,

Principal Deputy Assistant Secretary, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 2011–33157 Filed 12–23–11; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice: 7740]

Culturally Significant Object Imported for Exhibition Determinations: ''Nordkapp''

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.;* 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, and Delegation of Authority No. 236–3 of August 28, 2000 (and, as appropriate, Delegation of Authority No. 257 of April 15, 2003), I hereby determine that the object to be included in the exhibition ''Nordkapp,'' imported from abroad for temporary exhibition within the United States, is of cultural significance. The object is imported pursuant to a loan agreement with the foreign owner or custodian. I also determine that the exhibition or display of the exhibit object at the Metropolitan Museum of Art, New York, New York, from on or about January 9, 2012, until on or about January 9, 2014, and at possible additional exhibitions or venues yet to be determined, is in the national interest. I have ordered that Public Notice of these Determinations be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a description of the exhibit object, contact Paul W. Manning, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: (202) 632–6469). The mailing address is U.S. Department of State, SA–5, L/PD, Fifth Floor (Suite 5H03), Washington, DC 20522–0505.

Dated: December 16, 2011.

J. Adam Ereli,

Principal Deputy Assistant Secretary, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 2011–33174 Filed 12–23–11; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice: 7741]

Imposition of Nonproliferation Measures Against Foreign Persons, Including a Ban on U.S. Government Procurement

AGENCY: Bureau of International Security and Nonproliferation, Department of State.

ACTION: Notice.

SUMMARY: A determination has been made that a number of foreign entities and one foreign person have engaged in activities that warrant the imposition of measures pursuant to Section 3 of the Iran, North Korea, and Syria Nonproliferation Act. The Act provides for penalties on entities and individuals for the transfer to or acquisition from Iran since January 1, 1999, the transfer to or acquisition from Syria since January 1, 2005, or the transfer to or acquisition from North Korea since January 1, 2006, of goods, services, or technology controlled under multilateral control lists (Missile Technology Control Regime, Australia Group, Chemical Weapons Convention, Nuclear Suppliers Group, Wassenaar Arrangement) or otherwise having the potential to make a material contribution to the development of weapons of mass destruction (WMD) or cruise or ballistic missile systems. The latter category includes (a) items of the same kind as those on multilateral lists but falling below the control list parameters, when it is determined that such items have the potential of making a material contribution to WMD or cruise or ballistic missile systems, (b) other items with the potential of making such a material contribution, when added through case-by-case decisions, and (c) items on U.S. national control lists for WMD/missile reasons that are not on multilateral lists.

DATES: *Effective Date:* December 20, 2011.

FOR FURTHER INFORMATION CONTACT: On general issues: Pamela K. Durham, Bureau of International Security and Nonproliferation, Department of State, Telephone (202) 647–4930. For U.S. Government procurement ban issues: Eric Moore, Office of the Procurement Executive, Department of State, Telephone: (703) 875–4079.

SUPPLEMENTARY INFORMATION: On December 1, 2011, the U.S. Government determined that the measures authorized in Section 3 of the Iran, North Korea, and Syria Nonproliferation Act (Pub. L. 109–353) shall apply to the following foreign entities and persons identified in the report submitted pursuant to Section 2(a) of the Act:

Belvneshpromservice (BVPS) (Belarus) and any successor, sub-unit, or subsidiary thereof;

Dalian Sunny Industries (China) [also known as: LIMMT] and any successor, sub-unit, or subsidiary thereof;

Karl Lee (China) [also known as: Li Fang Wei];

Zibo Chemet Equipment Company (China) and any successor, sub-unit, or subsidiary thereof;

Defense Industries Organization (Iran) and any successor, sub-unit, or subsidiary thereof;

SAD Import-Export Company (Iran) and any successor, sub-unit, or subsidiary thereof;

Green Pine Associated Companies (North Korea) and any successor, sub-unit, or subsidiary thereof;

Army Supply Bureau (Syria) and any successor, sub-unit, or subsidiary thereof.

Accordingly, pursuant to the provisions of the Act, the following measures are imposed on these entities:

1. No department or agency of the United States Government may procure, or enter into any contract for the procurement of any goods, technology, or services from these foreign persons, except to the extent that the Secretary of State otherwise may have determined;

2. No department or agency of the United States Government may provide any assistance to the foreign persons, and these persons shall not be eligible to participate in any assistance program of the United States Government, except to the extent that the Secretary of State otherwise may have determined;

3. No United States Government sales to the foreign persons of any item on the United States Munitions List are permitted, and all sales to these persons of any defense articles, defense services, or design and construction services under the Arms Export Control Act are terminated; and

4. No new individual licenses shall be granted for the transfer to these foreign persons of items the export of which is controlled under the Export Administration Act of 1979 of the Export Administration Regulations, and any existing such licenses are suspended.

These measures shall be implemented by the responsible departments and agencies of the United States Government and will remain in place for two years from the effective date, except to the extent that the Secretary of State may subsequently determine otherwise.

Dated: December 20, 2011.

Thomas M. Countryman,

Assistant Secretary of State for International Security and Nonproliferation.

[FR Doc. 2011–33143 Filed 12–23–11; 8:45 am]

BILLING CODE P

DEPARTMENT OF STATE

[Public Notice 6628]

The Secretary of State's International Council on Women's Business Leadership; Notice of Open Meeting

The Secretary of State's International Council on Women's Business Leadership (ICWBL) will meet from 9:15 a.m. to 10:15 a.m. on Tuesday, January 24, 2012, in the Harry S. Truman Building at the U.S. Department of State, 2201 C Street NW., Washington, DC. The meeting will be hosted by U.S. Secretary of State Hillary Rodham Clinton. The ICWBL serves the U.S. Government in a solely advisory capacity, and provides advice and assistance in the formulation of U.S. policy, positions, proposals and strategies for multilateral and bilateral negotiations, business outreach, and commercial diplomacy, particularly pertaining to the economic empowerment of women for global economic prosperity, where the State Department has the lead negotiating authority. The meeting will focus on Women and the Economy. Subcommittee discussions will be led by the Access to Markets Subcommittee, the Access to Finance Subcommittee, the Training and Capacity Building Subcommittee, and the Leadership Subcommittee.

This meeting is open to public participation, via live webcast on the Internet at *http://www.state.gov/e/eb/adcom/icwbl/*. The public is invited to submit written statements to the Secretary of State's International Council on Women's Business Leadership by C.O.B. January 17, 2012, by either of the following methods:

Send electronic statements to the Secretary of State's International Council on Women's Business Leadership at *SGWI_ICWBL@state.gov*; send paper statements via facsimile to (202) 632–9232, attention: Secretary of State's International Council on Women's Business Leadership (ICWBL).

All statements will be posted on the Secretary of State's ICWBL Web site without change, including any business or personal information provided such as names, addresses, email addresses, or telephone numbers. All statements received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. You should submit only information that you wish to make available publicly.

Meeting summaries of the Council's discussion will be available within 90 days on the ICWBL Web site *http://www.state.gov/e/eb/adcom/icwbl/*.

For additional information, contact Senior Coordinator Nancy Smith-Nissley, Office of Economic Policy Analysis and Public Diplomacy, Bureau of Economic and Business Affairs, at (202) 647–1682 or *Smith-NissleyN@state.gov*.

Dated: December 20, 2011.

Lorraine Hariton,

Special Representative, Office of Commercial and Business Affairs, U.S. Department of State.

[FR Doc. 2011–33176 Filed 12–23–11; 8:45 am]

BILLING CODE 4710–07–P

STATE DEPARTMENT

[Public Notice: 7718]

International Security Advisory Board (ISAB) Meeting Notice; Closed Meeting

In accordance with section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. 10(a)(2), the Department of State announces a meeting of the International Security Advisory Board (ISAB) to take place on February 8, 2012, at Lawrence Livermore National Laboratory, Livermore, California.

Pursuant to section 10(d) of the Federal Advisory Committee Act, 5 U.S.C. App. 10(d), and 5 U.S.C. 552b(c)(1), it has been determined that this Board meeting will be closed to the public in the interest of national defense and foreign policy because the Board will be reviewing and discussing matters properly classified in accordance with Executive Order 13526. The purpose of the ISAB is to provide the Department with a continuing source of independent advice on all aspects of arms control, disarmament, political-military affairs, international security and related aspects of public diplomacy. The agenda for this meeting will include classified discussions related to the Board's ongoing studies on current U.S. policy and issues regarding arms control, international security, nuclear proliferation, and diplomacy.

For more information, contact Richard W. Hartman II, Executive Director of the International Security Advisory Board, Department of State, Washington, DC 20520, telephone: (202) 736–4290.

Dated: December 14, 2011.

Richard W. Hartman II,

Executive Director, International Security Advisory Board, U.S. Department of State.

[FR Doc. 2011–33178 Filed 12–23–11; 8:45 am]

BILLING CODE 4710–24–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Determination of Trade Surplus in Certain Sugar and Syrup Goods and Sugar-Containing Products of Chile, Morocco, Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua, and Peru

AGENCY: Office of the United States Trade Representative.

ACTION: Notice.

SUMMARY: In accordance with relevant provisions of the Harmonized Tariff Schedule of the United States (HTS), the Office of the United States Trade

Representative (USTR) is providing notice of its determination of the trade surplus in certain sugar and syrup goods and sugar-containing products of Chile, Morocco, Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua, and Peru. As described below, the level of a country's trade surplus in these goods relates to the quantity of sugar and syrup goods and sugar-containing products for which the United States grants preferential tariff treatment under (i) the United States—Chile Free Trade Agreement (Chile FTA), in the case of Chile; (ii) the United States—Morocco Free Trade Agreement (Morocco FTA), in the case of Morocco; (iii) the Dominican Republic—Central America—United States Free Trade Agreement (CAFTA–DR), in the case of Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua, and (iv) the United States—Peru Trade Promotion Agreement (Peru TPA), in the case of Peru.

DATES: *Effective Date:* December 27, 2011.

ADDRESSES: Inquiries may be mailed or delivered to Ann Heilman-Dahl, Director of Agricultural Affairs, Office of Agricultural Affairs, Office of the United States Trade Representative, 600 17th Street NW., Washington, DC 20508.

FOR FURTHER INFORMATION CONTACT: Ann Heilman-Dahl, Office of Agricultural Affairs, telephone: (202) 395–6127 or facsimile: (202) 395–4579.

SUPPLEMENTARY INFORMATION:

Chile: Pursuant to section 201 of the United States—Chile Free Trade Agreement Implementation Act (Pub. L. 108–77; 19 U.S.C. 3805 note), Presidential Proclamation No. 7746 of December 30, 2003 (68 FR 75789) implemented the Chile FTA on behalf of the United States and modified the HTS to reflect the tariff treatment provided for in the Chile FTA.

U.S. Note 12(a) to subchapter XI of HTS chapter 99 provides that USTR is required to publish annually in the **Federal Register** a determination of the amount of Chile's trade surplus, by volume, with all sources for goods in Harmonized System (HS) subheadings 1701.11, 1701.12, 1701.91, 1701.99, 1702.20, 1702.30, 1702.40, 1702.60, 1702.90, 1806.10, 2101.12, 2101.20, and 2106.90, except that Chile's imports of U.S. goods classified under HS subheadings 1702.40 and 1702.60 that qualify for preferential tariff treatment under the Chile FTA are not included in the calculation of Chile's trade surplus.

U.S. Note 12(b) to subchapter XI of HTS chapter 99 provides duty-free treatment for certain sugar and syrup goods and sugar-containing products of Chile entered under subheading 9911.17.05 in an amount equal to the lesser of Chile's trade surplus or the specific quantity set out in that note for that calendar year.

U.S. Note 12(c) to subchapter XI of HTS chapter 99 provides preferential tariff treatment for certain sugar and syrup goods and sugar-containing products of Chile entered under subheading 9911.17.10 through 9911.17.85 in an amount equal to the amount by which Chile's trade surplus exceeds the specific quantity set out in that note for that calendar year.

During calendar year (CY) 2010, the most recent year for which data is available, Chile's imports of sugar and syrup goods and sugar-containing products described above exceeded its exports of those goods by 459,471 metric tons according to data published by the Ministro de Agricultura de Chile. Based on this data, USTR determines that Chile's trade surplus is negative. Therefore, in accordance with U.S. Note 12(b) and U.S. Note 12(c) to subchapter XI of HTS chapter 99, goods of Chile are not eligible to enter the United States duty-free under subheading 9911.17.05 or at preferential tariff rates under subheading 9911.17.10 through 9911.17.85 in CY 2012.

Morocco: Pursuant to section 201 of the United States—Morocco Free Trade Agreement Implementation Act (Pub. L. 108–302; 19 U.S.C. 3805 note), Presidential Proclamation No. 7971 of December 22, 2005 (70 FR 76651) implemented the Morocco FTA on behalf of the United States and modified the HTS to reflect the tariff treatment provided for in the Morocco FTA.

U.S. Note 12(a) to subchapter XII of HTS chapter 99 provides that USTR is required to publish annually in the **Federal Register** a determination of the amount of Morocco's trade surplus, by volume, with all sources for goods in HS subheadings 1701.11, 1701.12, 1701.91, 1701.99, 1702.40, and 1702.60, except that Morocco's imports of U.S. goods classified under HS subheadings 1702.40 and 1702.60 that qualify for preferential tariff treatment under the Morocco FTA are not included in the calculation of Morocco's trade surplus.

U.S. Note 12(b) to subchapter XII of HTS chapter 99 provides duty-free treatment for certain sugar and syrup goods and sugar-containing products of Morocco entered under subheading 9912.17.05 in an amount equal to the lesser of Morocco's trade surplus or the specific quantity set out in that note for that calendar year.

U.S. Note 12(c) to subchapter XII of HTS chapter 99 provides preferential tariff treatment for certain sugar and syrup goods and sugar-containing products of Morocco entered under subheading 9912.17.10 through 9912.17.85 in an amount equal to the amount by which Morocco's trade surplus exceeds the specific quantity set out in that note for that calendar year.

During CY 2010, the most recent year for which data is available, Morocco's imports of the sugar and syrup goods and sugar-containing products described above exceeded its exports of those goods by 784,897 metric tons according to data published by its customs authority, the Office des Changes. Based on this data, USTR determines that Morocco's trade surplus is negative. Therefore, in accordance with U.S. Note 12(b) and U.S. Note 12(c) to subchapter XII of HTS chapter 99, goods of Morocco are not eligible to enter the United States duty-free under subheading 9912.17.05 or at preferential tariff rates under subheading 9912.17.10 through 9912.17.85 in CY 2012.

CAFTA–DR: Pursuant to section 201 of the Dominican Republic—Central America—United States Free Trade Agreement Implementation Act (Pub. L. 109–53; 19 U.S.C. 4031), Presidential Proclamation No. 7987 of February 28, 2006 (71 FR 10827), Presidential Proclamation No. 7991 of March 24, 2006 (71 FR 16009), Presidential Proclamation No. 7996 of March 31, 2006 (71 FR 16971), Presidential Proclamation No. 8034 of June 30, 2006 (71 FR 38509), Presidential Proclamation No. 8111 of February 28, 2007 (72 FR 10025), Presidential Proclamation No. 8331 of December 23, 2008 (73 FR 79585), and Presidential Proclamation No. 8536 of June 12, 2010 (75 FR 34311) implemented the CAFTA–DR on behalf of the United States and modified the HTS to reflect the tariff treatment provided for in the CAFTA–DR.

U.S. Note 25(b)(i) to subchapter XXII of HTS chapter 98 provides that USTR is required to publish annually in the **Federal Register** a determination of the amount of each CAFTA–DR country's trade surplus, by volume, with all sources for goods in HS subheadings 1701.11, 1701.12, 1701.91, 1701.99, 1702.40, and 1702.60, except that each CAFTA–DR country's exports to the United States of goods classified under HS subheadings 1701.11, 1701.12, 1701.91, and 1701.99 and its imports of U.S. goods classified under HS subheadings 1702.40 and 1702.60 that qualify for preferential tariff treatment under the CAFTA–DR are not included in the calculation of that country's trade surplus.

U.S. Note 25(b)(ii) to subchapter XXII of HTS chapter 98 provides duty-free treatment for certain sugar and syrup goods and sugar-containing products of each CAFTA–DR country entered under subheading 9822.05.20 in an amount equal to the lesser of that country's trade surplus or the specific quantity set out in that note for that country and that calendar year.

During CY 2010, the most recent year for which data is available, Costa Rica's exports of the sugar and syrup goods and sugar-containing products described above exceeded its imports of those goods by 21,409 metric tons according to data published by the Servicio Nacional de Aduanas, Ministerio de Hacienda de Costa Rica. Based on this data, USTR determines that Costa Rica's trade surplus is 21,409 metric tons. The specific quantity set out in U.S. Note 25(b)(ii) to subchapter XXII of HTS chapter 98 for Costa Rica for CY 2012 is 12,320 metric tons. Therefore, in accordance with that note, the aggregate quantity of goods of Costa Rica that may be entered duty-free under subheading 9822.05.20 in CY 2012 is 12,320 metric tons (i.e., the amount that is the lesser of Costa Rica's trade surplus and the specific quantity set out in that note for Costa Rica for CY 2012).

During CY 2010, the most recent year for which data is available, the Dominican Republic's imports of the sugar and syrup goods and sugar-containing products described above exceeded its exports of those goods by 48,700 metric tons according to data published by the Instituto Azucarero Dominicano. Based on this data, USTR determines that the Dominican Republic's trade surplus is negative. Therefore, in accordance with U.S. Note 25(b)(ii) to subchapter XXII of HTS chapter 98, goods of the Dominican Republic are not eligible to enter the United States duty-free under subheading 9822.05.20 in CY 2012.

During CY 2010, the most recent year for which data is available, El Salvador's exports of the sugar and syrup goods and sugar-containing products described above exceeded its imports of those goods by 217,401 metric tons according to data published by the Banco Central de Reserva de El Salvador. Based on this data, USTR determines that El Salvador's trade surplus is 217,401 metric tons. The specific quantity set out in U.S. Note 25(b)(ii) to subchapter XXII of HTS chapter 98 for El Salvador for CY 2012 is 29,680 metric tons. Therefore, in accordance with that note, the aggregate quantity of goods of El Salvador that may be entered duty-free under subheading 9822.05.20 in CY 2012 is 29,680 metric tons (*i.e.,* the amount that is the lesser of El Salvador's trade surplus and the specific quantity set out in that note for El Salvador for CY 2012).

During CY 2010, the most recent year for which data is available, Guatemala's exports of the sugar and syrup goods and sugar-containing products described above exceeded its imports of those goods by 1,464,618 metric tons according to data published by the Asociación de Azucareros de Guatemala. Based on this data, USTR determines that Guatemala's trade surplus is 1,464,618 metric tons. The specific quantity set out in U.S. Note 25(b)(ii) to subchapter XXII of HTS chapter 98 for Guatemala for CY 2012 is 39,220 metric tons. Therefore, in accordance with that note, the aggregate quantity of goods of Guatemala that may be entered duty-free under subheading 9822.05.20 in CY 2012 is 39,220 metric tons (i.e., the amount that is the lesser of Guatemala's trade surplus and the specific quantity set out in that note for Guatemala for CY 2012).

During CY 2010, the most recent year for which data is available, Honduras' exports of the sugar and syrup goods and sugar-containing products described above exceeded its imports of those goods by 60,851 metric tons according to data published by the Banco Central de Honduras. Based on this data, USTR determines that Honduras' trade surplus is 60,851 metric tons. The specific quantity set out in U.S. Note 25(b)(ii) to subchapter XXII of HTS chapter 98 for Honduras for CY 2012 is 8,960 metric tons. Therefore, in accordance with that note, the aggregate quantity of goods of Honduras that may be entered duty-free under subheading 9822.05.20 in CY 2012 is 8,960 metric tons (*i.e.,* the amount that is the lesser of Honduras' trade surplus and the specific quantity set out in that note for Honduras for CY 2012).

During CY 2010, the most recent year for which data is available, Nicaragua's exports of the sugar and syrup goods and sugar-containing products described above exceeded its imports of those goods by 197,176 metric tons according to data published by the Centro de Trámites de las Exportaciones. Based on this data, USTR determines that Nicaragua's trade surplus is 197,176 metric tons. The specific quantity set out in U.S. Note 25(b)(ii) to subchapter XXII of HTS chapter 98 for Nicaragua for CY 2012 is 24,640 metric tons. Therefore, in accordance with that note, the aggregate quantity of goods of Nicaragua that may be entered duty-free under subheading 9822.05.20 in CY 2012 is 24,640 metric tons (*i.e.,* the amount that is the lesser of Nicaragua's trade surplus and the specific quantity set out in that note for Nicaragua for CY 2012).

Peru: Pursuant to section 201 of the United States—Peru Trade Promotion Agreement Implementation Act (Pub. L. 110–138; 19 U.S.C. 3805 note), Presidential Proclamation No. 8341 of January 16, 2009 (74 FR 4105) implemented the Peru TPA on behalf of the United States and modified the HTS to reflect the tariff treatment provided for in the Peru TPA.

U.S. Note 28(c) to subchapter XXII of HTS chapter 98 provides that USTR is required to publish annually in the **Federal Register** a determination of the amount of Peru's trade surplus, by volume, with all sources for goods in HS subheadings 1701.11, 1701.12, 1701.91, 1701.99, 1702.40, and 1702.60, except that Peru's imports of U.S. goods classified under HS subheadings 1702.40 and 1702.60 that are originating goods under the Peru TPA and Peru's exports to the United States of goods classified under HS subheadings 1701.11, 1701.12, 1701.91, and 1701.99 are not included in the calculation of Peru's trade surplus.

U.S. Note 28(d) to subchapter XXII of HTS chapter 98 provides duty-free treatment for certain sugar goods of Peru entered under subheading 9822.06.10 in an amount equal to the lesser of Peru's trade surplus or the specific quantity set out in that note for that calendar year.

During CY 2010, the most recent year for which data is available, Peru's imports of the sugar goods described above exceeded its exports of those goods by 162,469 metric tons according to data published by its customs authority, the Superintendencia Nacional de Administración Tributaria. Based on this data, USTR determines that Peru's trade surplus is negative. Therefore, in accordance with U.S. Note 28(d) to subchapter XXII of HTS chapter 98, goods of Peru are not eligible to enter the United States duty-free under subheading 9822.06.10 in CY 2012.

Islam A. Siddiqui,

Chief Agricultural Negotiator, Office of the U.S. Trade Representative.

[FR Doc. 2011–33139 Filed 12–23–11; 8:45 am]

BILLING CODE 3190–W2–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Agency Information Collection Activities: Requests for Comments; Clearance of Renewed Approval of Information Collection: Type Certification Procedures for Changed Products

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request the Office of Management and Budget (OMB) approval to renew an information collection. The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on October 26, 2011, vol. 76, no. 207, page 66347. 14 CFR part 21 may require applicants to demonstrate compliance with the latest regulations in effect on the date of application for amended Type Certificates (TC) or a Supplemental TCs for aeronautical products.

DATES: Written comments should be submitted by January 26, 2012.

FOR FURTHER INFORMATION CONTACT: Kathy DePaepe at (405) 954–9362, or by email at: *KathyA.DePaepe@faa.gov.*

SUPPLEMENTARY INFORMATION: *OMB Control Number:* 2120–0657.

Title: Type Certification Procedures for Changed Products.

Form Numbers: There are no FAA forms associated with this collection.

Type of Review: Renewal of an information collection.

Background: 14 CFR Part 21 requires that, with certain exceptions, all aviation product changes comply with the latest airworthiness standards when determining the certification basis for aeronautical products. This process is intended to increase safety by applying the latest regulations where practicable. A certification application request, in letter form, and a supporting data package is made to the appropriate Federal Aviation Administration (FAA) Aircraft Certification Office by an aircraft/product manufacturer/modifier.

Respondents: Approximately 2,558 manufacturers/modifiers.

Frequency: Information is collected on occasion.

Estimated Average Burden per Response: 7.35 hours.

Estimated Total Annual Burden: 18,815 hours.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the attention of the Desk Officer, Department of Transportation/FAA, and sent via electronic mail to *oira_submission@omb.eop.gov,* or faxed to (202) 395–6974, or mailed to the Office of Information and Regulatory Affairs, Office of Management and Budget, Docket Library, Room 10102, 725 17th Street NW., Washington, DC 20503.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including (a) whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

Issued in Washington, DC on December 19, 2011.

Albert R. Spence,

FAA Assistant Information Collection Clearance Officer, IT Enterprises Business Services Division, AES–200.

[FR Doc. 2011–33042 Filed 12–23–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Agency Information Collection Activities: Requests for Comments; Clearance of Renewed Approval of Information Collection: Training and Qualification Requirements for Check Airmen and Flight Instructors

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request the Office of Management and Budget (OMB) approval to renew an information collection. The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on October 26, 2011, vol. 76, no. 207, page 66349. The rule allows some experienced pilots who would otherwise qualify as flight instructors or check airmen, but who are not medically eligible to hold the requisite medical certificate, to perform flight instructor or check airmen functions in a simulator.

DATES: Written comments should be submitted by January 26, 2012.

FOR FURTHER INFORMATION CONTACT: Kathy DePaepe at (405) 954–9362, or by email at: *Kathy A. DePaepe @faa.gov.*

SUPPLEMENTARY INFORMATION:

OMB Control Number: 2120–0600 .

Title: Training and Qualification Requirements for Check Airmen and Flight Instructors.

Form Numbers: There are no FAA forms associated with this collection.

Type of Review: Renewal of an information collection.

Background: Federal Aviation Regulations (FAR) Parts 121.411(d), 121.412(d), 135.337(d), and 135.338(d) require the collection of this data. This collection is necessary to insure that instructors and check airmen have completed necessary training and checking required to perform instructor and check airmen functions.

Respondents: Approximately 3,000 check airmen and flight instructors.

Frequency: Information is collected on occasion.

Estimated Average Burden per Response: 15 seconds.

Estimated Total Annual Burden: 13 hours.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the attention of the Desk Officer, Department of Transportation/FAA, and sent via electronic mail to *oira_submission@omb.eop.gov,* or faxed to (202) 395–6974, or mailed to the Office of Information and Regulatory Affairs, Office of Management and Budget, Docket Library, Room 10102, 725 17th Street NW., Washington, DC 20503.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including (a) whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

Issued in Washington, DC on December 19, 2011.

Albert R. Spence,

FAA Assistant Information Collection Clearance Officer, IT Enterprises Business Services Division, AES–200.

[FR Doc. 2011–33054 Filed 12–23–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Agency Information Collection Activities: Requests for Comments; Clearance of Renewed Approval of Information Collection: General Aviation and Air Taxi Activity and Avionics Survey

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request the Office of Management and Budget (OMB) approval to renew an information collection. The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on October 26, 2011, vol. 76, no. 207, page 66346–66347. Respondents to this survey are owners of general aviation aircraft. This information is used by FAA, NTSB, and other government agencies, the aviation industry, and others for safety assessment, planning, forecasting, cost/benefit analysis, and to target areas for research.

DATES: Written comments should be submitted by January 26, 2012.

FOR FURTHER INFORMATION CONTACT: Kathy DePaepe at (405) 954–9362, or by email at: *Kathy A. DePaepe@faa.gov.*

SUPPLEMENTARY INFORMATION: *OMB Control Number:* 2120–0060.

Title: General Aviation and Air Taxi Activity and Avionics Survey.

Form Numbers: There are no FAA forms associated with this collection.

Type of Review: Renewal of an information collection.

Background: Title 49, United States Code, empowers the Secretary of Transportation to collect and disseminate information relative to civil aeronautics, to study the possibilities for development of air commerce and the aeronautical industries, and to make long-range plans for, and formulate policy with respect to, the orderly development and use of the navigable airspace, radar installations and all other aids for air navigation. Respondents to this survey are owners of general aviation aircraft. This information is used by FAA, NTSB, and other government agencies, the aviation industry, and others for safety assessment, planning, forecasting, cost/benefit analysis, and to target areas for research.

Respondents: Approximately 83,500 owners of general aviation aircraft.

Frequency: Information is collected annually.

Estimated Average Burden per Response: 20 minutes.

Estimated Total Annual Burden: 13,000 hours.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the attention of the Desk Officer, Department of Transportation/FAA, and sent via electronic mail to *oira_submission@omb.eop.gov,* or faxed to (202) 395–6974, or mailed to the Office of Information and Regulatory Affairs, Office of Management and Budget, Docket Library, Room 10102, 725 17th Street NW., Washington, DC 20503.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including (a) whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

Issued in Washington, DC on December 19, 2011.

Albert R. Spence,

FAA Assistant Information Collection Clearance Officer, IT Enterprises Business Services Division, AES–200.

[FR Doc. 2011–33043 Filed 12–23–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Aviation Rulemaking Advisory Committee—New Task

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of new task assignment for the Aviation Rulemaking Advisory Committee (ARAC).

SUMMARY: The FAA assigned the Aviation Rulemaking Advisory Committee (ARAC) a new task to develop a comprehensive program of voluntary accreditation for commercial air tour operators that are not required under parts 91 and 135 of Title 14 of the Code of Federal Regulations (14 CFR) to maintain their aircraft under a continuous airworthiness maintenance program (CAMP). This task addresses, in part, the ARAC recommendation developed by the Commercial Air Tours Maintenance (CATM) Working Group, which the FAA accepted on February 1, 2011. This notice informs the public of a new ARAC activity and solicits membership for the new Commercial Air Tour Voluntary Accreditation Program Working Group.

FOR FURTHER INFORMATION CONTACT: Katherine Haley, Office of Rulemaking, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone: (202) 493–5708, facsimile: (202) 267–5075; email: *Katherine.L.Haley@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

The FAA established ARAC to provide advice and recommendations to the FAA Administrator on the FAA's rulemaking activities. ARAC's objectives are to improve the development of the FAA's regulations by providing information, advice, and recommendations related to aviation issues.

On July 15, 2009, the FAA tasked ARAC (74 FR 34390) to provide advice and recommendations on a maintenance quality assurance system, a maintenance training program and a required inspection program for operators and air carriers that conduct air tours and who operate under parts 91 and 135 (aircraft type certificated for a passenger seating configuration, excluding any pilot seat, of 9 or fewer seats). That tasking was in response to two recommendations from the National Transportation Safety Board (NTSB) (A–08–32 and A–08–33) and an FAA recommendation on air tour accidents. The CATM Working Group formed and met between November 2009 and December 2010 to address the ARAC tasking. On December 16, 2010, the CATM working group presented the findings and recommendations to the ARAC Executive Committee. One of the recommendations was to develop an Advisory Circular (AC) to create a voluntary accreditation program

modeled after the AC 00–56A, Voluntary Industry Distributor Accreditation Program. The FAA accepted the recommendations on February 1, 2011.

This tasking is the FAA's response to one of the CATM recommendations. The FAA is tasking ARAC to make recommendations on a program for voluntary accreditation in the form of an AC. The objective of the accreditation program is to raise the level of safety of commercial air tour operators not required by regulation to maintain their aircraft under a continuous airworthiness maintenance program.

In December 2011, the ARAC Executive Committee met and discussed the solicited ideas and proposed actions for the tasking. This notice advises the public that the FAA has assigned, and the Executive Committee has accepted, a task to develop a recommendation report on a voluntary accreditation program in the form of an AC.

The Task

The FAA has tasked the ARAC working group to provide advice and recommendations on a program for voluntary accreditation in the form of an AC. The objective of the accreditation program is to raise the level of safety of commercial air tour operators not required by regulation to maintain their aircraft under a CAMP.

The working group is expected to develop a report containing recommendations on the tasking elements listed below. This report should document both majority and minority positions on the findings and the rationale for each position. Any disagreements should be documented, including the rationale for each position and the reasons for the disagreement. In developing its recommendations, the working group shall:

1. Familiarize itself with AC 00–56A to use as a model for developing the subject AC.
2. Establish quality system elements for a maintenance accreditation program.
3. Determine acceptable quality system standards.
4. Establish accreditation organization responsibilities.
5. Establish audit procedures.
6. Establish accreditation procedures.
7. Draft an advisory circular that addresses the elements of 1–6 above.

Schedule: The recommendations must be forwarded to the ARAC Executive Committee for review and approval no later than December 2012.

ARAC Acceptance of Task

The ARAC Executive Committee has accepted the task and assigned it to the Commercial Air Tour Voluntary Accreditation Program Working Group. The working group serves as staff to ARAC and assists in the analysis of the assigned task. ARAC must review and approve the working group's recommendations. If ARAC accepts the working group's recommendations, it will send them to the FAA.

Working Group Activity

The Commercial Air Tour Voluntary Accreditation Program Working Group must comply with the procedures adopted by ARAC. As part of the procedures, the working group must:

1. Recommend a work plan for completion of the task, including the rationale supporting such a plan, for consideration at the next ARAC Executive Committee meeting held following publication of this notice.
2. Provide a status report at each meeting of the ARAC Executive Committee.
3. Draft the recommendation report and required analyses and/or any other related materials or documents.
4. Present the final recommendations to the ARAC Executive Committee for review and approval.

Participation in the Working Group

The Commercial Air Tour Voluntary Accreditation Program Working Group will be comprised of air tour industry organizations and technical experts having an interest in the assigned task. A working group member need not be a representative or a member of the committee. The FAA would like a wide range of members to ensure all aspects of rulemaking are considered in development of the recommendations.

If you wish to become a member of the Commercial Air Tour Voluntary Accreditation Program Working Group, write the person listed under the caption **FOR FURTHER INFORMATION CONTACT** expressing that desire. Describe your interest in the task and state the expertise you would bring to the working group. We must receive all requests by January 26, 2012. The ARAC Executive Committee and the FAA will review the requests and advise you whether or not your request is approved.

If you are chosen for membership on the working group, you must actively participate in the working group by attending all meetings, and providing written comments when requested to do so. You must devote the resources necessary to support the working group in meeting any assigned deadlines. You must keep your management chain and those you may represent advised of working group activities and decisions to ensure the proposed technical solutions do not conflict with your sponsoring organization's position when the subject is presented to ARAC for approval. Once the working group has begun deliberations, members will not be added or substituted without the approval of the FAA and the working group chair.

The Secretary of Transportation determined the formation and use of ARAC is necessary and in the public interest in connection with the performance of duties imposed on the FAA by law.

ARAC meetings are open to the public. However, ARAC Commercial Air Tour Voluntary Accreditation Program Working Group meetings are not open to the public, except to the extent individuals with an interest and expertise are selected to participate. The FAA will make no public announcement of working group meetings.

Issued in Washington, DC, on December 19, 2011.

Pamela Hamilton-Powell,

Executive Director, Aviation Rulemaking Advisory Committee.

[FR Doc. 2011–33097 Filed 12–23–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Summary Notice No. PE–2011–54]

Petition for Exemption; Summary of Petition Received

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of petition for exemption received.

SUMMARY: This notice contains a summary of a petition seeking relief from specified requirements of title 14 CFR. The purpose of this notice is to improve the public's awareness of, and participation in, this aspect of FAA's regulatory activities. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of the petition or its final disposition.

DATES: Comments on this petition must identify the petition docket number and must be received on or before January 17, 2012.

ADDRESSES: You may send comments identified by Docket Number FAA–2011–1044 using any of the following methods:

- *Government-wide rulemaking web site:* Go to *http://www.regulations.gov*

and follow the instructions for sending your comments electronically.

• *Mail:* Send comments to the Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590.

• *Fax:* Fax comments to the Docket Management Facility at (202) 493–2251.

• *Hand Delivery:* Bring comments to the Docket Management Facility in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Privacy: We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. Using the search function of our docket web site, anyone can find and read the comments received into any of our dockets, including the name of the individual sending the comment (or signing the comment for an association, business, labor union, *etc.*). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78).

Docket: To read background documents or comments received, go to *http://www.regulations.gov* at any time or to the Docket Management Facility in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: David Staples, (202) 267–4058, Keira Jones, (202) 267–4025, or Tyneka L. Thomas, (202) 267–7626, Office of Rulemaking, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591.

This notice is published pursuant to 14 CFR 11.85.

Issued in Washington, DC on December 20, 2011.

Pamela Hamilton-Powell,

Director, Office of Rulemaking.

Petition For Exemption

Docket No.: FAA–2011–1044.

Petitioner: Sundance Helicopters, Inc.

Section of 14 CFR Affected: 14 CFR 93.323.

Description of Relief Sought: Sundance Helicopters, Inc. seeks relief from the requirement to file VFR flight plans prior to conducting operations in the vicinity of Grand Canyon National Park, AZ.

[FR Doc. 2011–33100 Filed 12–23–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Notice of Final Federal Agency Actions on Proposed Light Rail Project in Washington

AGENCY: Federal Highway Administration (FHWA), Department of Transportation (DOT).

ACTION: Notice of limitation on claims for judicial review of actions by FHWA and other Federal agencies.

SUMMARY: This notice announces actions taken by FHWA and other Federal agencies that are final within the meaning of 23 U.S.C. 139(l)(1). The actions relate to the East Link Light Rail Transit Project in King County Washington. These actions grant licenses, permits, and approvals for the project.

DATES: By this notice, FHWA is advising the public of final agency actions subject to 23 U.S.C. 139(l). A claim seeking judicial review of the Federal agency actions on the listed highway project will be barred unless the claim is filed on or before June 24, 2012. If the Federal law that authorizes judicial review of a claim provides a time period of less than 180 days for filing such claim, then that shorter time period still applies.

FOR FURTHER INFORMATION CONTACT: Pete Jilek, Urban Area Engineer, Federal Highway Administration, 711 S. Capitol Way #501, Olympia, Washington, 98501; telephone: (360) 753–9550; and email: *pete.jilek@dot.gov*. The FHWA Washington Division Urban Area Engineer's regular office hours are between 6 a.m. and 3:30 p.m. (Pacific Time). You may also contact the following FTA officials: Nancy-Ellen Zusman, Assistant Chief Counsel, Office of Chief Counsel, (312) 353–2577, or Terence Plaskon, Environmental Protection Specialist, Office of Human and Natural Environment, (202) 366–0442. FTA Headquarters is located at 1200 New Jersey Avenue SE., Washington, DC 20590. Office hours are from 9 a.m. to 5:30 p.m., EST, Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION: Notice is hereby given that FHWA and other Federal agencies have taken final agency actions by issuing licenses, permits, and approvals for the following project in the State of Washington: East Link Light Rail Transit Project, King County, WA. *Federal Lead Agency:* Federal Transit Administration (FTA). *Project sponsor:* Central Puget Sound Regional Transit Authority (Sound Transit). *Project description:* The project extends the current light rail system an additional 18 miles from Downtown Seattle to Mercer Island and Bellevue along Interstate 90 (I–90), and then through Bellevue to Overlake and Redmond in the Puget Sound region of Washington State. The light rail extension will cross Lake Washington in the center lanes of Interstate 90 (I–90). Project elements will affect portions of I–90 in Seattle, Mercer Island and Bellevue, Washington and portions of I–405 in Bellevue, Washington. The project includes 12 stations, four park-and-ride lots, and supporting facilities. The project also includes storage tracks and facilities located just north of the Hospital Station to allow for overnight storage of vehicles and daily startup operations. The actions by the Federal agencies, and the laws under which such actions were taken, are described in the Final Environmental Impact Statement (FEIS) for the project, issued in July 2011, and in the FHWA Record of Decision (ROD) issued on November 17, 2011. The FEIS and ROD are available by contacting FHWA at the address above or can be downloaded from the project Web site at *http://projects.soundtransit.org*.

This notice applies to all Federal agency decisions on the project as of the issuance date of this notice and all laws under which such actions were taken. This notice does not, however, alter or extend the limitation period of 180 days for challenges to final agency actions subject to previous notices published in the **Federal Register**, including notice given by the Federal Transit Administration on December 16, 2011 (76 FR 78332).

This notice applies to all Federal agency decisions, actions, approvals, licenses and permits on the project as of the issuance date of this notice, including but not limited to those arising under the following laws, as amended:

1. *General:* National Environmental Policy Act [42 U.S.C. 4321–4347]; Federal-Aid Highway Act [23 U.S.C. 109].

2. *Air:* Clean Air Act, as amended [42 U.S.C. 7401–7671(q)].

3. *Land:* Section 4(f) of the Department of Transportation Act of 1966 [49 U.S.C. 303]; Landscaping and Scenic Enhancement (Wildflowers) [23 U.S.C. 319].

4. *Wildlife:* Endangered Species Act [16 U.S.C. 1531–1544]; Anadromous Fish Conservation Act [16 U.S.C. 757(a)–757(f)]; Fish and Wildlife Coordination Act [16 U.S.C. 661–667(e)]; Magnuson-Stevenson Fishery Conservation and Management Act of 1976, as amended [16 U.S.C. 1801 *et seq.*].

5. *Historic and Cultural Resources:* Section 106 of the National Historic Preservation Act of 1966, as amended [16 U.S.C. 470f]; Archaeological Resources Protection Act of 1977 [16 U.S.C. 470aa–470mm]; Archaeological and Historic Preservation Act [16 U.S.C. 469–469c–2]; Native American Grave Protection and Repatriation Act [25 U.S.C. 3001–3013].

6. *Social and Economic:* Civil Rights Act of 1964 [42 U.S.C. 2000(d)–2000(d)(1)); American Indian Religious Freedom Act [42 U.S.C. 1996); Farmland Protection Policy Act [7 U.S.C. 4201–4209]; the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended [42 U.S.C. 61].

7. *Wetlands and Water Resources:* Clean Water Act, 33 U.S.C. 1251–1377 [Section 404, Section 401, Section 319]; Coastal Zone Management Act [16 U.S.C. 1451–1465]; Land and Water Conservation Fund [16 U.S.C. 460l–4–460l–11]; Safe Drinking Water Act [42 U.S.C. 300f et seq.]; Rivers and Harbors Act of 1899 [33 U.S.C. 401–406]; TEA–21 Wetlands Mitigation [23 U.S.C. 103(b)(6)(m), 133(b)(11)]; Flood Disaster Protection Act [42 U.S.C. 4001–4129].

8. *Hazardous Materials:* Comprehensive Environmental Response, Compensation, and Liability Act [42 U.S.C. 9601–9675]; Superfund Amendments and Reauthorization Act of 1986 [PL 99–499]; Resource Conservation and Recovery Act [42 U.S.C. 6901–6992(k)].

9. *Executive Orders:* E.O. 11990 Protection of Wetlands; E.O. 11988 Floodplain Management; E.O. 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations; E.O. 11593 Protection and Enhancement of Cultural Resources; E.O. 13007 Indian Sacred Sites; E.O. 13287 Preserve America; E.O. 13175 Consultation and Coordination with Indian Tribal Governments; E.O. 11514 Protection and Enhancement of Environmental Quality; E.O. 13112 Invasive Species. (Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

Authority: 23 U.S.C. 139(l)(1).

Daniel M. Mathis,

Division Administrator, Olympia, Washington.

[FR Doc. 2011–33079 Filed 12–23–11; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket Number FRA–2011–0094]

Petition for Waiver of Compliance

In accordance with part 211 of title 49 of the Code of Federal Regulations (CFR), this document provides public notice that by a document dated October 28, 2011, the Maryland Transit Administration (MTA) has petitioned the Federal Railroad Administration (FRA) for a waiver of compliance from certain provisions of the Federal railroad safety regulations contained at 49 CFR Section 213.329, *Curves, elevation and speed limitations;* Section 213.333, *Automated vehicle inspection systems;* and Section 213.345, *Vehicle qualification testing.* FRA assigned the petition Docket Number FRA–2011–0094.

MTA seeks a permanent waiver of compliance from the provisions of 49 CFR Sections 213.329, 213.333, and 213.345 as part of its recent purchase of 26 new model MP36PH–3C locomotives. These locomotives are intended for operation by MTA's Maryland Area Regional Commuter (MARC) train service on the National Railroad Passenger Corporation's (Amtrak) Northeast Corridor (NEC) at 100 mph and 4 inches cant deficiency. In MTA's previous waiver request, dated January 22, 2009, MTA sought relief from 49 CFR Section 213.345(b), which references 49 CFR Section 213.333. The waiver would allow MTA to test the MP36 locomotives with accelerometers, instead of instrumented wheelsets. MTA also indicated that it would use computer simulations to evaluate the wheel/rail forces for speeds and track geometry of the MARC route over the NEC.

In December 2010, during route testing in Maryland, the MP36PH–3C sustained carbody yaw oscillations that exceeded the carbody lateral acceleration limits described in FRA's Notice of Proposed Rulemaking (NPRM), as found in Docket Number FRA–2009–0036. In February 2011, MTA rescinded that waiver petition until a solution to the carbody yaw issue could be developed and implemented.

In its current waiver petition, MTA indicated that it has developed and implemented a solution to the sustained carbody yaw issue by modifying the MP36PH–3C locomotive truck, as detailed in Attachment 2 to the waiver petition. It also indicated that computer simulations using a valid computer model demonstrated that the modified MP36PH–3C locomotive complies with the wheel/rail forces and the truck and carbody acceleration limits contained in the NPRM for 49 CFR section 213.333.

A copy of the petition, as well as any written communications concerning the petition, is available for review online at *http://www.regulations.gov* and in person at the U.S. Department of Transportation's (DOT) Docket Operations Facility, 1200 New Jersey Ave. SE., W12–140, Washington, DC 20590. The Docket Operations Facility is open from 9 a.m. to 5 p.m., Monday through Friday, except Federal Holidays.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number and may be submitted by any of the following methods:

- *Web site: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* (202) 493–2251.
- *Mail:* Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE., W12–140, Washington, DC 20590.
- *Hand Delivery:* 1200 New Jersey Avenue SE., Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Communications received by February 10, 2012 will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable.

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, *etc.*). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78), or online at *http://www.dot.gov/privacy.html.*

Issued in Washington, DC on December 20, 2011.

Robert C. Lauby,

Deputy Associate Administrator for Regulatory and Legislative Operations.

[FR Doc. 2011–33047 Filed 12–23–11; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket Number FRA–2011–0093]

Petition for Waiver of Compliance

In accordance with part 211 of title 49 of the Code of Federal Regulations (CFR), this document provides the public notice that by a document dated November 22, 2011, Peninsula Terminal Company (PT) has petitioned the Federal Railroad Administration (FRA) for a waiver of compliance from certain provisions of the Federal hours of service laws contained at 49 U.S.C. 21103(a)(4). FRA assigned the petition Docket Number FRA–2011–0093.

In their petition, PT seeks relief from 49 U.S.C. 21103(a)(4), which in part requires a train employee to receive 48 hours off duty after initiating an on-duty period for 6 consecutive days. Specifically, PT seeks a waiver to allow a train employee to initiate an on-duty period for 6 consecutive days followed by 24 hours off duty. In support of their request, PT submitted documents demonstrating employee support and a description of employee work schedules.

A copy of the petition, as well as any written communications concerning the petition, is available for review online at *http://www.regulations.gov* and in person at the U.S. Department of Transportation's (DOT) Docket Operations Facility, 1200 New Jersey Ave. SE., W12–140, Washington, DC 20590. The Docket Operations Facility is open from 9 a.m. to 5 p.m., Monday through Friday, except Federal Holidays.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number and may be submitted by any of the following methods:

- *Web site: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* (202) 493–2251.
- *Mail:* Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE., W12–140, Washington, DC 20590.
- *Hand Delivery:* 1200 New Jersey Avenue SE., Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Communications received by February 10, 2012 will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable.

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78) or online at *http://www.dot.gov/privacy.html.*

Issued in Washington, DC on December 20, 2011.

Robert C. Lauby,

Deputy Associate Administrator for Regulatory and Legislative Operations.

[FR Doc. 2011–33048 Filed 12–23–11; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

[Docket No. PHMSA–2011–0342]

Pipeline Safety: Information Collection Activities

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, PHMSA invites comments on an information collection under Office of Management and Budget (OMB) Control No. 2137–0584, ''Gas Pipeline Safety Program Certification and Hazardous Liquid Pipeline Safety Program Certification.'' PHMSA will request approval from OMB for a renewal of the current information collection with no revisions.

DATES: Interested persons are invited to submit comments on or before February 27, 2012.

ADDRESSES: Comments may be submitted in the following ways:

E–Gov Web Site: http://www.regulations.gov. This site allows the public to enter comments on any **Federal Register** notice issued by any agency.

Fax: 1–(202) 493–2251.

Mail: Docket Management Facility; U.S. Department of Transportation (DOT), 1200 New Jersey Avenue SE., West Building, Room W12–140, Washington, DC 20590–0001.

Hand Delivery: Room W12–140 on the ground level of DOT, West Building, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Instructions: Identify the docket number, PHMSA–2011–0342, at the beginning of your comments. Note that all comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. You should know that anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). Therefore, you may want to review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477) or visit *http://www.regulations.gov* before submitting any such comments.

Docket: For access to the docket or to read background documents or comments, go to *http://www.regulations.gov* at any time or to Room W12–140 on the ground level of DOT, West Building, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. If you wish to receive confirmation of receipt of your written comments, please include a self-addressed, stamped postcard with the following statement: ''Comments on PHMSA–2011–0342.'' The Docket Clerk will date stamp the postcard prior to returning it to you via the U.S. mail. Please note that due to delays in the delivery of U.S. mail to Federal offices in Washington, DC, we recommend that persons consider an alternative method (Internet, fax, or professional delivery service) of submitting comments to the docket and ensuring their timely receipt at DOT.

FOR FURTHER INFORMATION CONTACT: Angela Dow by telephone at (202) 366–1246, by fax at (202) 366–4566, or by mail at DOT, PHMSA, 1200 New Jersey Avenue SE., PHP–30, Washington, DC 20590–0001.

SUPPLEMENTARY INFORMATION: Section 1320.8(d), Title 5, Code of Federal Regulations, requires PHMSA to provide interested members of the public and affected agencies an opportunity to comment on information collection and recordkeeping requests. This notice identifies an information collection request that PHMSA will be submitting to OMB for renewal. The following information is provided for that information collection: (1) Title of the information collection; (2) OMB control number; (3) Current expiration date; (4) Type of request; (5) Abstract of the information collection activity; (6) Description of affected public; (7) Estimate of total annual reporting and recordkeeping burden; and (8) Frequency of collection. PHMSA will request a three-year term of approval for the information collection activity. PHMSA requests comments on the following information collection:

Title: Gas Pipeline Safety Program Certification and Hazardous Liquid Pipeline Safety Program Certification.

OMB Control Number: 2137–0584.

Current Expiration Date: 6/30/2012.

Abstract: A state must submit an annual certification to assume responsibility for regulating intrastate pipelines, and certain records must be maintained to demonstrate that the state is ensuring satisfactory compliance with the pipeline safety regulations. PHMSA uses that information to evaluate a state's eligibility for Federal grants.

Affected Public: State and local governments.

Annual Reporting and Recordkeeping Burden:

Total Annual Responses: 67.

Total Annual Burden Hours: 3,820.

Frequency of Collection: Annually.

Comments are invited on:

(a) The need for the proposed collection of information for the proper performance of the functions of the agency, including whether the information will have practical utility;

(b) The accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(d) Ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques.

Issued in Washington, DC on December 16, 2011.

John A. Gale,

Director, Office of Standards and Rulemaking.

[FR Doc. 2011–33163 Filed 12–23–11; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

Agency Information Collection Activities: Proposed Collection; Comment Request; Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery

AGENCY: Office of Hazardous Materials Safety, Pipeline and Hazardous Materials Safety Administration, Department of Transportation.

ACTION: 30-Day Notice and request for comments.

SUMMARY: As part of a Federal Government-wide effort to streamline the process to seek feedback from the public on service delivery, the Pipeline Hazardous Materials Safety Administration will submit a Generic Information Collection Request (Generic ICR): ''Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery'' to the Office of Management and Budget (OMB) for approval under the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*).

DATES: Comments must be submitted January 26, 2012.

ADDRESSES: Submit comments regarding the burden estimate, including suggestions for reducing the burden by mail: to the Office of Management and Budget (OMB), Attention: Desk Officer for PHMSA, 725 17th Street NW., Washington, DC 20503; by email at *ServiceDelivery Comments@omb.eop.gov;* or by fax at (202) 395–7245. Comments are invited on: whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; the accuracy of the Department's estimate of the burden of the proposed information collection; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology. A comment to OMB is most effective if OMB receives it within 30 days of publication.

FOR FURTHER INFORMATION CONTACT: Steven Andrews or T. Glenn Foster, U.S. Department of Transportation, Standards and Rulemaking Division (PHH–10), Pipeline and Hazardous Materials Safety Administration, 1200 New Jersey Avenue SE., East Building, 2nd Floor, Washington, DC 20590–0001, Telephone (202) 366–8553.

SUPPLEMENTARY INFORMATION:

Title: Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery Abstract. The information collection activity will garner qualitative customer and stakeholder feedback in an efficient, timely manner, in accordance with the Administration's commitment to improving service delivery. Such feedback will provide useful insights on perceptions and opinions that yield quantitative results that can be generalized to the population of study. This feedback will provide insights into customer or stakeholder perceptions, experiences and expectations, provide an early warning of issues with service, or focus attention on areas where communication, training or changes in operations might improve delivery of products or services. These collections will allow for ongoing, collaborative and actionable communications between the Agency and its customers and stakeholders. It will also allow feedback to contribute directly to the improvement of program management.

Feedback collected under this generic clearance will provide useful information, but it will not yield data that can be generalized to the overall population. This type of generic clearance for qualitative information will not be used for quantitative information collections that are designed to yield reliably actionable results, such as monitoring trends over time or documenting program performance. Such data uses require more rigorous designs that address: the target population to which generalizations will be made; the sampling frame; the sample design (including stratification and clustering); the precision requirements or power calculations that justify the proposed sample size; the expected response rate; methods for assessing potential non-response bias; the protocols for data collection; and any testing procedures that were or will be undertaken prior to fielding the study. Depending on the degree of influence the results are likely to have, such collections may still be

eligible for submission for other generic mechanisms that are designed to yield quantitative results.

The Agency did not receive comments in response to the 60-day notice published in the **Federal Register** on December 22, 2010 [75 FR 80542].

The Pipeline and Hazardous Materials Safety Administration's projected average annual estimate for burden is provided as follows:

Current Actions: PHMSA Feedback.

Type of Review: New Collection.

Affected Public: Individuals and Households, Businesses and Organizations, State, Local or Tribal Government.

Respondents: 2,670.

Annual responses: 2,670.

Frequency of Response: On occasion.

Burden hours: 2,670.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid Office of Management and Budget Control Number.

Delmer F. Billings,

Acting Director, Standards and Rulemaking Division.

[FR Doc. 2011–33162 Filed 12–23–11; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

[Docket ID PHMSA–RSPA–2004–19854]

Notice of Public Webinar on Implementation of Distribution Integrity Management Programs

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: Notice of Public Webinar.

SUMMARY: Distribution pipeline operators were required to have prepared and implemented distribution integrity management plans (DIMP) by August 2, 2011. Federal and state regulators have begun inspecting those plans and their implementation. This webinar will be the first opportunity for the regulators to share their findings broadly with the regulated community. The webinar will also include discussion of analyses of the initial submissions of data concerning mechanical fitting failures in distribution pipelines.

DATES: The webinar will be held on January 25, 2012, from 11 a.m. to 12:30 p.m. EST. Refer to the DIMP Web site for additional information: *http://primis.phmsa.dot.gov/dimp/index.htm.*

ADDRESSES: *Comments:* Members of the public may also submit written comments, either before, during, or after the webinar. Comments should reference Docket ID PHMSA–RSPA–2004–19854. Comments and questions can be submitted during the webinar through LiveMeeting. Instructions describing how to submit questions will be given at the beginning of the webinar. Comments may be submitted before or after the webinar in the following ways:

- *DIMP Web site: http://primis.phmsa.dot.gov/dimp/comment.htm.* This site allows the public to enter questions and comments about DIMP before or after the webinar. Instructions for submitting comments are provided on that Web site.
- *E–Gov Web Site: http://www.regulations.gov.* This site allows the public to enter comments on any **Federal Register** notice issued by any agency. Follow the instructions for submitting comments.
- *Fax:* 1-(202) 493–2251.
- *Mail:* Docket Management System, U.S. Department of Transportation (DOT), 1200 New Jersey Avenue SE., Room W12–140, Washington, DC 20590.
- *Hand Delivery:* DOT, Docket Management System, Room W12–140, on the ground floor of the West Building, 1200 New Jersey Avenue SE., Washington, DC between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Instructions: Identify the Docket ID at the beginning of your comments. If you submit your comments by mail, submit two copies. If you wish to receive confirmation that PHMSA has received your comments, include a self-addressed stamped postcard. Internet users may submit comments at *http://www.regulations.gov.* Note: Comments will be posted without changes or edits to *http://www.regulations.gov* including any personal information provided. Please see the Privacy Act statement immediately following for additional information.

Privacy Act Statement: Anyone may search the electronic form of all comments received for any of our dockets. You may review DOT's complete Privacy Act Statement in the **Federal Register** published April 11, 2000 (65 FR 19477).

Information on Services for Individuals with Disabilities: For information on facilities or services for individuals with disabilities, or to request special assistance during the webinar, please contact Chris McLaren at (281) 216–4455 by January 6, 2012.

Copies of the presentations will be available on the DIMP Web site and in the docket PHMSA–2004–19854 at *http://www.regulations.gov*, within 30 days following the webinar.

FOR FURTHER INFORMATION CONTACT: Chris McLaren by e-mail at *Chris.Mclaren@dot.gov* or by phone at (281) 216–4455.

SUPPLEMENTARY INFORMATION:

Purpose: The DIMP regulation was published December 4, 2009, (74 FR 63906) and became effective on August 2, 2011. This regulation represents a new approach to assuring the safety and integrity of distribution pipelines. Previously, regulations presented highly-prescriptive requirements for which it was relatively easy to understand what needed to be done to comply. DIMP is much less prescriptive. It requires pipeline operators to analyze their pipeline systems, identify threats and risks that may be unique to their systems, and take appropriate actions to address those threats and risks. Distribution pipeline operators previously have not been required to comply with such a performance-based rule.

A DIMP Implementation Team (Team) was created as a collaboration of state and Federal regulators to support improvements in the integrity of the Nation's gas distribution pipeline systems through development of inspection methods and guidance for the evaluation of an Operator's DIMP. The Team recognized the challenges posed by the individual characteristics of each state's oversight program and operating conditions as well as the evolutionary process that distribution system operators would go through in building an integrity management culture from a prescriptive, compliance based culture. Due to the high-level, risk-based, performance-oriented nature of the regulations contained in 49 CFR 192.1001–192.1015, the Team recognized that operators could benefit from guidance in implementing their programs. The team sponsored two webinars to provide operators with information and to direct operators to resource material. These webinars were conducted on May 10 and June 8, 2011. This was prior to the August 2, 2011, effective date of the rule by which time operators were required to have developed and implemented their DIMP plans.

The August 2, 2011, deadline has now passed. Distribution pipeline operators must have implemented their DIMP plans. Initial inspections of these plans have begun. The material presented at this webinar will summarize this inspection experience, including the types of concerns that have been identified and where the initial

inspection experience indicates that operators should devote additional attention to assure compliance.

States are implementing the DIMP rule under their individual state statutory authority in accordance with the applicable certification under 49 U.S.C. 60105 or agreement under section 60106. State inspectors will participate in this webinar, but not all states will be represented. Since regulatory structures differ among states, operators should contact the state authority regulating their distribution pipeline system for more information.

The DIMP rule also required distribution pipeline operators to report failures of mechanical fittings that result in hazardous leaks. Such failures have been the cause of a number of serious accidents on distribution pipelines. Collection of this data is intended to facilitate better understanding of the causes of fitting failures and actions that can/should be taken to prevent future failures. Operators have the option of submitting reports as failures occur or of submitting all reports for a calendar year by March 15 of the following year. The new reporting requirement became effective on April 4, 2011. Operators have submitted many reports to PHMSA. These reports will be analyzed before the webinar and PHMSA will discuss the results of these analyses. Operators should note that lessons from mechanical fitting failure reporting will be preliminary at this time. They will be based on a limited set of data. The data set is likely to increase significantly as additional reports are received on or before March 15, 2012. Even then, though, only one year of data will be available, which may not be sufficient to identify trends. Nevertheless, the initial analyses will provide some information that will be shared with stakeholders, and operators will be given a chance to comment on the mechanical fitting failure reporting process.

Preliminary Webinar Agenda

January 25, 2012, DIMP Implementation Webinar Agenda

- Welcome, Introductions, and Overview.
- Initial DIMP Inspection Findings.
- Results of Initial Analyses of Mechanical Fitting Failure Reports.
- Question & Answer Session.
- Session Concludes.

Registration: Members of the public may attend this free webinar. To help ensure that adequate space is provided, all attendees are required to register for the webinar at *http://opsweb.phmsa.dot.gov/webinars.* Upon registration, LiveMeeting information will be distributed. Due to the limited capacity, we encourage and request that parties at the same location share a LiveMeeting link. The Webinars will use the audio feature of LiveMeeting and not a standard phone line for the voice portion of the Webinars.

Issued in Washington, DC on December 20, 2011.

Jeffrey D. Wiese,

Associate Administrator for Pipeline Safety.

[FR Doc. 2011–33165 Filed 12–23–11; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF THE TREASURY

Alcohol and Tobacco Tax and Trade Bureau

Proposed Information Collections; Comment Request

AGENCY: Alcohol and Tobacco Tax and Trade Bureau; Treasury.

ACTION: Notice and request for comments.

SUMMARY: As part of our continuing effort to reduce paperwork and respondent burden, and as required by the Paperwork Reduction Act of 1995, we invite comments on the proposed or continuing information collections listed below in this notice.

DATES: We must receive your written comments on or before February 27, 2012.

ADDRESSES: You may send comments to Mary A. Wood, Alcohol and Tobacco Tax and Trade Bureau, at any of these addresses:

- P.O. Box 14412, Washington, DC 20044–4412;
- 202–453–2686 (facsimile); or
- *formcomments@ttb.gov* (email).

Please send separate comments for each specific information collection listed below. You must reference the information collection's title, form or recordkeeping requirement number, and OMB number (if any) in your comment. If you submit your comment via facsimile, send no more than five 8.5 x 11 inch pages in order to ensure electronic access to our equipment.

FOR FURTHER INFORMATION CONTACT: To obtain additional information, copies of the information collection and its instructions, or copies of any comments received, contact Mary A. Wood, Alcohol and Tobacco Tax and Trade Bureau, P.O. Box 14412, Washington, DC 20044–4412; or telephone 202–453–1039, ext. 165.

SUPPLEMENTARY INFORMATION:

Request for Comments

The Department of the Treasury and its Alcohol and Tobacco Tax and Trade Bureau (TTB), as part of their continuing effort to reduce paperwork and respondent burden, invite the general public and other Federal agencies to comment on the proposed or continuing information collections listed below in this notice, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Comments submitted in response to this notice will be included or summarized in our request for Office of Management and Budget (OMB) approval of the relevant information collection. All comments are part of the public record and subject to disclosure. Please not do include any confidential or inappropriate material in your comments.

We invite comments on: (a) Whether this information collection is necessary for the proper performance of the agency's functions, including whether the information has practical utility; (b) the accuracy of the agency's estimate of the information collection's burden; (c) ways to enhance the quality, utility, and clarity of the information collected; (d) ways to minimize the information collection's burden on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide the requested information.

Information Collections Open for Comment

Currently, we are seeking comments on the following forms and recordkeeping requirements:

Title: Personnel Questionnaire—Alcohol and Tobacco Products.

OMB Control Number: 1513–0002.

TTB Form Number: 5000.9.

Abstract: The information listed on TTB F 5000.9, Personnel Questionnaire—Alcohol and Tobacco Products, enables TTB to determine whether or not an applicant for an alcohol or tobacco permit meets the minimum qualifications. The form identifies the individual, residence, business background, financial sources for the business, and criminal record. If the applicant is found not to be qualified, the permit may be denied.

Current Actions: We are submitting this information collection for extension purposes only. The information collection, estimated number of respondents, and estimated total annual burden hours remain unchanged.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit.

Estimated Number of Respondents: 5,000.

Estimated Total Annual Burden Hours: 10,000.

Title: Change of Bond (Consent of Surety).

OMB Control Number: 1513–0013.

TTB Form Number: 5000.18.

Abstract: A Change of Bond (Consent of Surety) is executed by both the bonding company and a proprietor and acts as a binding legal agreement between the two parties to extend the terms of a bond. A bond is necessary to cover specific liabilities on the revenue produced from untaxpaid commodities. The Change of Bond (Consent of Surety) is filed with TTB and a copy is retained by TTB as long as it remains current and in force.

Current Actions: We are submitting this information collection as a revision. A change in the supporting statement reflects a change to a regulatory section number contained in the final rule that revised 27 CFR Part 19, Distilled Spirits Plants (see T.D. TTB–92, February 16, 2011, 76 FR 9080). The information collection, estimated number of respondents, and estimated total annual burden hours remain unchanged.

Type of Review: Revision of a currently approved collection.

Affected Public: Business or other for-profit.

Estimated Number of Respondents: 2,000.

Estimated Total Annual Burden Hours: 2,000.

Title: Application for and Certification/Exemption of Label/Bottle Approval.

OMB Number: 1513–0020.

TTB Form Number: 5100.31.

Abstract: The Federal Alcohol Administration Act (the FAA Act, 27 U.S.C. 201 *et seq.*) requires the alcoholic beverage labels to provide the consumer with adequate information regarding a product's identity and prohibits the use of misleading information on such labels. The FAA Act also authorized the Secretary of the Treasury Department to issue regulations to carry out its provisions. To ensure compliance with the FAA Act and the related regulations, industry members complete TTB F 5100.31 as an application to label their products.

Current Actions: TTB F 5100.31, Application for and Certification/Exemption of Label/Bottle Approval, was revised in part to accommodate the Alcohol and Tobacco Tax and Trade Bureau's ongoing efforts to streamline the Certificate of Label Approval application and review process. Minor changes were made to the application portion of the form, including elimination of the requirement to show wording appearing on caps and seals and other materials firmly affixed to the container. Minor changes were also made to the second and third pages of the form including changes to the instructions for completing the form and the conditions of approval. The circumstances under which approved labels may be modified without submission of a new application for certificate of label approval were also updated to include additional circumstances. Finally, the supporting statement and form reflect the new section numbers used in the final rule that revised 27 CFR Part 19, Distilled Spirits Plants (see T.D. TTB–92, February 16, 2011, 76 FR 9080).

Type of Review: Revision of a currently approved collection.

Affected Public: Business or other for-profit.

Estimated Number of Respondents: 7,738.

Estimated Total Annual Burden Hours: 67,566.

Title: Claim for Drawback of Tax on Tobacco Products, Cigarette Papers, and Cigarette Tubes.

OMB Number: 1513–0026.

TTB Form Number: 5620.7.

Abstract: TTB F 5620.7 documents that cigars, cigarettes, and cigarette papers and tubes were shipped to a foreign country, Puerto Rico, the Virgin Islands, or a possession of the United States and that the tax has been paid on these tobacco articles. TTB F 5620.7 is the claim form that a person who paid the tax on the articles uses to file for a drawback or refund for the tax that was paid.

Current Actions: We are submitting this information collection as a revision. We are consolidating two collections (1513–0026 and 1513–0102) into one (1513–0026). Both collections contain some of the same regulatory sections. In addition to the duplicate sections, we are adding sections 44.228, 44.229, and 44.230 to 1513–0026 to ensure that all related 27 CFR regulatory sections are covered. Afterwards, 1513–0102 will be discontinued.

Type of Review: Revision of a currently approved collection.

Affected Public: Business or other for-profit.

Estimated Number of Respondents: 288.

Estimated Total Annual Burden Hours: 144.

Title: Taxable Articles without Payment of Tax.

OMB Control Number: 1513–0027.

TTB Form Number: 5200.14.

Abstract: The tobacco manufacturer or export warehouse proprietor is liable for the tax on tobacco products until execution of the certification by Customs or an authorized receiving officer on TTB F 5200.14, which indicates verification of export or bonded transfer. TTB needs this information to protect the revenue. If this TTB form is not properly completed, TTB will assess the tax on the manufacturer of tobacco products or cigarette papers and tubes or on the proprietor of the export warehouse or customs manufacturing warehouse for products not exported or properly disposed of.

Current Actions: We are submitting this information collection for extension purposes only. The information collection, estimated number of respondents, and estimated total annual burden hours remain unchanged.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit and Federal Government.

Estimated Number of Respondents: 272.

Estimated Total Annual Burden Hours: 59,840.

Title: Drawback on Distilled Spirits Exported.

OMB Control Number: 1513–0042.

TTB Form Number: 5110.30.

Abstract: The information collected on TTB F 5110.30 provides a uniform format for determining that taxes have already been paid. The form details specific operations and accounts for taxable commodities. Tax liability is established to prevent jeopardy to the revenue derived from distilled spirits. TTB examines and verifies entries so as to identify unusual activities, errors, or omissions.

Current Actions: We are submitting this information collection for extension purposes only. The information collection, estimated number of respondents, and estimated total annual burden hours remain unchanged.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit.

Estimated Number of Respondents: 100.

Estimated Total Annual Burden Hours: 10,000.

Title: Application and Permit under 26 U.S.C. 5181—Alcohol Fuel Producer.

OMB Control Number: 1513–0051.

TTB Form Number: 5110.74.

Abstract: This form is used by persons who wish to produce and receive spirits for the production of alcohol fuels as a business or for their own use and for State and local registration where required. The form describes the person(s) applying for the permit, location of the proposed operation, type of material used for production, and amount of spirits to be produced.

Current Actions: We are submitting this information collection as a revision. A change in the supporting statement reflects a change to a regulatory section number contained in the final rule that revised 27 CFR Part 19, Distilled Spirits Plants (see T.D. TTB–92, February 16, 2011, 76 FR 9080). The information collection, estimated number of respondents, and estimated total annual burden hours remain unchanged.

Type of Review: Revision of a currently approved collection.

Affected Public: Business or other for-profit.

Estimated Number of Respondents: 219.

Estimated Total Annual Burden Hours: 394.

Title: Excise Tax Return—Alcohol and Tobacco (Puerto Rico).

OMB Number: 1513–0090.

TTB Form Number: 5000.25.

Abstract: Businesses in Puerto Rico report their Federal excise tax liability on distilled spirits, wine, beer, tobacco products, and cigarette papers and tubes on TTB F 5000.25. TTB needs this form to identify the taxpayer and to determine the amount and type of taxes due and paid.

Current Actions: We are submitting this information collection for extension purposes only. The information collection, estimated number of respondents, and estimated total annual burden hours remain unchanged.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit.

Estimated Number of Respondents: 24.

Estimated Total Annual Burden Hours: 356.

Title: COLAs Online Access Request.

OMB Number: 1513–0111.

TTB Form Number: 5013.2.

Abstract: The information on this form will be used by TTB to authenticate end users on the COLAs Online system who electronically file Certificates of Label Approval (COLAs). The system will authenticate end users by comparing user-submitted information to records in multiple databases.

Current Actions: We are submitting this information collection for extension purposes only. The information collection, estimated number of respondents, and estimated total annual burden hours remain unchanged.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit.

Estimated Number of Respondents: 1,366.

Estimated Total Annual Burden Hours: 410.

Title: Special (occupational) Tax Registration and Return.

OMB Control Number: 1513–0112.

TTB Form Numbers: 5630.5a, 5630.5d, and 5630.5t.

Abstract: On August 10, 2005, the President signed into law the ''Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users,'' Public Law 109–59. Section 11125 of that act permanently repealed, effective July 1, 2008, the special (occupational) tax (SOT) on all taxpayers except for Tobacco Product Manufacturers (TPM), Cigarette Papers and Tubes Manufacturers (CPTM), and Tobacco Products Export Warehouse Proprietors (TPEWP). As a result, three forms were created to cover all phases of SOT collections. TTB F 5630.5 was amended to create TTB F 5630.5t, which is used only for collection of taxes from TPM, CPTM, and TPEWP; TTB F 5630.5a is a tax return/registration for the period on and before July 1, 2008; and TTB F 5630.5d is used to register Alcohol Dealers on and after July 1, 2008.

Current Actions: We are submitting this information collection for extension purposes only. The information collection, estimated number of respondents, and estimated total annual burden hours remain unchanged.

Type of Review: Extension of a currently approved collection.

Affected Public: Business and other for-profit, Individuals or households, Not-for-profit institutions.

Estimated Number of Respondents: 35,000.

Estimated Total Annual Burden Hours: 14,583.

Title: Formulas for Fermented Products.

OMB Control Number: 1513–0118.

TTB Reporting Requirement Number: 5052/1.

Abstract: The collection is used, along with other supporting documents, to establish that the standards for production are followed for a given type and style of beer. Also, TTB examines the formula information to determine if the product may be produced at a brewery and if it is to be taxpaid at the rate applicable to beer and sake.

Current Actions: We are submitting this information collection for extension purposes only. The information collection, estimated number of respondents, and estimated total annual burden hours remain unchanged.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit.

Estimated Number of Respondents: 100.

Estimated Total Annual Burden Hours: 500.

Dated: December 20, 2011.

Gerald Isenberg,

Director, Regulations and Rulings Division.

[FR Doc. 2011–33077 Filed 12–23–11; 8:45 am]

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FEDERAL REGISTER

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Part II

Bureau of Consumer Financial Protection

12 CFR Part 1005

Electronic Fund Transfers (Regulation E); Interim Final Rule

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1005

[Docket No. CFPB–2011–0021]

RIN 3170–AA06

Electronic Fund Transfers (Regulation E)

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Interim final rule with request for public comment.

SUMMARY: Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) transferred rulemaking authority for a number of consumer financial protection laws from seven Federal agencies to the Bureau of Consumer Financial Protection (Bureau) as of July 21, 2011. The Bureau is in the process of republishing the regulations implementing those laws with technical and conforming changes to reflect the transfer of authority and certain other changes made by the Dodd-Frank Act. In light of the transfer of the Board of Governors of the Federal Reserve System's (Board's) rulemaking authority for the Electronic Fund Transfer Act (EFTA) to the Bureau, the Bureau is publishing for public comment an interim final rule establishing a new Regulation E (Electronic Fund Transfers). This interim final rule does not impose any new substantive obligations on persons subject to the existing Regulation E, previously published by the Board.

DATES: This interim final rule is effective December 30, 2011. Comments must be received on or before February 27, 2012.

ADDRESSES: You may submit comments, identified by *Docket No. CFPB–2011–0021* or *RIN 3170–AA06,* by any of the following methods:

- *Electronic: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Monica Jackson, Office of the Executive Secretary, Bureau of Consumer Financial Protection, 1500 Pennsylvania Avenue NW., (Attn: 1801 L Street), Washington, DC 20220.
- *Hand Delivery/Courier in Lieu of Mail:* Monica Jackson, Office of the Executive Secretary, Bureau of Consumer Financial Protection, 1700 G Street NW., Washington, DC 20006.

All submissions must include the agency name and docket number or Regulatory Information Number (RIN) for this rulemaking. In general, all comments received will be posted without change to *http://www.regulations.gov.* In addition, comments will be available for public inspection and copying at 1700 G Street NW., Washington, DC 20006, on official business days between the hours of 10 a.m. and 5 p.m. Eastern Time. You can make an appointment to inspect the documents by telephoning (202) 435–7275.

All comments, including attachments and other supporting materials, will become part of the public record and subject to public disclosure. Sensitive personal information, such as account numbers or social security numbers, should not be included. Comments will not be edited to remove any identifying or contact information.

FOR FURTHER INFORMATION CONTACT: Gregory Evans or Jane Gao, Office of Regulations, at (202) 435–7700.

SUPPLEMENTARY INFORMATION:

I. Background

The Electronic Fund Transfer Act (15 U.S.C. 1693 *et seq.*) (EFTA), enacted in 1978, provides a basic framework establishing the rights, liabilities, and responsibilities of participants in electronic fund transfer (EFT) systems. Historically, the EFTA was implemented in Regulation E of the Board of Governors of the Federal Reserve System (Board), 12 CFR Part 205. The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) [1] amended a number of consumer financial protection laws, including the EFTA. In addition to various substantive amendments, the Dodd-Frank Act generally transferred the Board's rulemaking authority for the EFTA to the Bureau of Consumer Financial Protection (Bureau), effective July 21, 2011.[2] *See* sections 1061 and 1084 of the Dodd-Frank Act. Pursuant to the Dodd-Frank Act and EFTA, as amended, the Bureau is publishing for public comment an interim final rule establishing a new Regulation E (Electronic Fund Transfers), 12 CFR Part 1005, implementing the EFTA.

[1] Public Law 111–203,124 Stat. 1376 (2010).

[2] The Dodd-Frank Act section 1029, generally excludes from this transfer of authority, subject to certain exceptions, any rulemaking authority over a motor vehicle dealer that is predominantly engaged in the sale and servicing of motor vehicles, the leasing and servicing of motor vehicles, or both. *See also* Dodd-Frank Act, sections 1002(12)(C), 1084(3) (Board retains rulemaking authority with respect to section 920 of EFTA, dealing with debit card interchange fees, network arrangements, and routing restrictions);12 CFR Part 235.

II. Summary of the Interim Final Rule

A. General

The interim final rule substantially duplicates the Board's Regulation E as the Bureau's new Regulation E, 12 CFR Part 1005, making only certain non-substantive, technical, formatting, and stylistic changes. To minimize any potential confusion, the Bureau is preserving the numbering of the Board's Regulation E, other than the new part number. While this interim final rule generally incorporates the Board's existing regulatory text, appendices (including model forms and clauses), and supplements, the rule has been edited as necessary to reflect nomenclature and other technical amendments required by the Dodd-Frank Act. Notably, this interim final rule does not impose any new substantive obligations on regulated entities.

B. Specific Changes

The Bureau has made certain nomenclature and other non-substantive changes consistently throughout Regulation E. References to the Board and its administrative structure have been replaced with references to the Bureau. Conforming edits have been made to internal cross-references, as well as addresses or other contact information. Conforming edits have also been made to reflect the scope of the Bureau's authority pursuant to the EFTA, as amended by the Dodd-Frank Act. Historical references that are no longer applicable, and references to effective dates that have passed, have been removed as appropriate. In addition, certain changes have been made to the text of the Board's Regulation E to conform to current codification standards of the Code of Federal Regulations. For example, previously undesignated paragraphs in the regulation and the official commentary have been enumerated.

The Bureau is eliminating three provisions of Regulation E that are no longer applicable and renumbering one section that is affected by this deletion. The deleted provisions include the following:

- Section 1005.3(b)(2)(iii), which expired December 31, 2009. What would have been § 1005.3(b)(2)(iv) was renumbered 1005.3(b)(2)(iii).
- Section 1005.3(b)(3)(iii), which expired December 31, 2007.
- Section 1005.16(d), which provided a technical exemption for certain automated teller machines through December 31, 2004. What would have been § 1005.16(e) was renumbered 1005.16(d).

The Bureau is also eliminating Appendix B, entitled ''Federal Enforcement Agencies,'' because it was designed to be informational only and is unnecessary for the implementation of the EFTA, as amended.

Moreover, the Bureau is revising Form A–9, Model Consent Form for Overdraft Services, in Appendix A to the Bureau's new Regulation E. The revised Form A–9 is, however, identical to the Board's version in substance. The only revision was to modernize the spelling of ''website'' (in place of ''Web site'') to parallel a stylistic change the Bureau is making in the corresponding regulatory text of §§ 1005.18 and 1005.20. This change does not necessitate any revision to standard forms that institutions may use in reliance on Model Form A–9 because the term, ''website,'' appears in the model form within brackets, indicating that the institution is to replace the placeholder with its own website address. Thus, neither ''website'' nor ''website'' appears in overdraft services consent forms actually delivered to consumers.

Finally, the Bureau is updating references to the EFTA by correcting statutory citations to the EFTA in cases where the numbering of the Act was altered by section 1084 of the Dodd-Frank Act. These updated references occur in the following provisions of Regulation E:

- Section 1005.3(c)(5)
- Section 1005.3(c)(7)
- Section 1005.12(c)(2)
- Section 1005.13(b)(2)
- Section 1005.20(h)(2)
- Appendix C—Official Interpretations

III. Legal Authority

A. Rulemaking Authority

The Bureau is issuing this interim final rule pursuant to its authority under the EFTA and the Dodd-Frank Act. Effective July 21, 2011, section 1061 of the Dodd-Frank Act transferred to the Bureau the ''consumer financial protection functions'' previously vested in certain other Federal agencies. The term ''consumer financial protection function'' is defined to include ''all authority to prescribe rules or issue orders or guidelines pursuant to any Federal consumer financial law, including performing appropriate functions to promulgate and review such rules, orders, and guidelines.'' [3] The EFTA is a Federal consumer financial law, except with respect to section 920 of the EFTA, dealing with debit card interchange fees, network arrangements, and routing restrictions.[4] Accordingly, effective July 21, 2011, the authority of the Board to issue regulations pursuant to the EFTA transferred to the Bureau.[5]

EFTA section 904(a) authorizes the Bureau to prescribe regulations necessary to carry out the purposes of the title. The express purposes of the EFTA, as amended by the Dodd-Frank Act, are to establish ''the rights, liabilities, and responsibilities of participants in electronic fund and remittance transfer systems'' and to provide ''individual consumer rights.'' EFTA section 902(b), 15 U.S.C. 1693. EFTA section 904(c), as amended by the Dodd-Frank Act, further provides that regulations prescribed by the Bureau may contain any classifications, differentiations, or other provisions, and may provide for such adjustments or exceptions for any class of electronic fund transfers or remittance transfers that the Bureau deems necessary or proper to effectuate the purposes of the title, to prevent circumvention or evasion, or to facilitate compliance.[6]

B. Authority To Issue an Interim Final Rule Without Prior Notice and Comment

The Administrative Procedure Act (APA) [7] generally requires public notice and an opportunity to comment before promulgation of regulations.[8] The APA provides exceptions to notice-and-comment procedures, however, where an agency for good cause finds that such procedures are impracticable, unnecessary, or contrary to the public interest or when a rulemaking relates to agency organization, procedure, and practice.[9] The Bureau finds that there is good cause to conclude that providing notice and opportunity for comment would be unnecessary and contrary to the public interest under these circumstances. In addition, substantially all the changes made by this interim final rule, which were necessitated by the Dodd-Frank Act's transfer of EFTA authority from the Board to the Bureau, relate to agency organization, procedure, and practice and are thus exempt from the APA's notice-and-comment requirements.

The Bureau's good cause findings are based on the following considerations. As an initial matter, the Board's existing regulation was a result of notice-and-comment rulemaking to the extent required. Moreover, the interim final rule published today does not impose any new, substantive obligations on regulated entities. Rather, the interim final rule makes only non-substantive, technical changes to the existing text of the regulation, such as renumbering, changing internal cross-references, replacing appropriate nomenclature to reflect the transfer of authority to the Bureau, and changing the address for filing applications and notices. Given the technical nature of these changes, and the fact that the interim final rule does not impose any additional substantive requirements on covered entities, an opportunity for prior public comment is unnecessary. In addition, recodifying the Board's regulation to reflect the transfer of authority to the Bureau will help facilitate compliance with the EFTA and its implementing regulation, and the new regulation will help reduce uncertainty regarding the applicable regulatory framework. Using notice-and-comment procedures would delay this process and thus be contrary to the public interest.

The APA generally requires that rules be published not less than 30 days before their effective dates. *See* 5 U.S.C. 553(d). As with the notice and comment requirement, however, the APA allows an exception when ''otherwise provided by the agency for good cause found and published with the rule.'' 5 U.S.C. 553(d)(3). The Bureau finds that there is good cause for providing less than 30 days notice here. A delayed effective date would harm consumers and regulated entities by needlessly perpetuating discrepancies between the amended statutory text and the implementing regulation, thereby hindering compliance and prolonging uncertainty regarding the applicable regulatory framework.[10]

[3] Public Law 111–203, section 1061(a)(1). Effective on the designated transfer date, the Bureau is also granted ''all powers and duties'' vested in each of the Federal agencies, relating to the consumer financial protection functions, on the day before the designated transfer date. Until this and other interim final rules take effect, existing regulations for which rulemaking authority transferred to the Bureau continue to govern persons covered by this rule. *See* 76 FR 43569 (July 21, 2011).

[4] Public Law 111–203, section 1002(14) (defining ''Federal consumer financial law'' to include the ''enumerated consumer laws''); *id.* Section 1002(12) (defining ''enumerated consumer laws'' to include the EFTA, except with respect to section 920 of the EFTA).

[5] Section 1066 of the Dodd-Frank Act grants the Secretary of the Treasury interim authority to perform certain functions of the Bureau. Pursuant to that authority, Treasury is publishing this interim final rule on behalf of the Bureau.

[6] 15 U.S.C. 1693b.

[7] 5 U.S.C. 551 *et seq.*

[8] 5 U.S.C. 553(b), (c).

[9] 5 U.S.C. 553(b)(3)(A), (B).

[10] This interim final rule is one of 14 companion rulemakings that together restate and recodify the implementing regulations under 14 existing consumer financial laws (part III.C, below, lists the 14 laws involved). In the interest of proper coordination of this overall regulatory framework, which includes numerous cross-references among some of the regulations, the Bureau is establishing the same effective date of December 30, 2011 for those rules published on or before that date and

Continued

In addition, delaying the effective date of the interim final rule for 30 days would provide no practical benefit to regulated entities in this context and in fact could operate to their detriment. As discussed above, the interim final rule published today does not impose any new, substantive obligations on regulated entities. Instead, the rule makes only non-substantive, technical changes to the existing text of the regulation. Thus, regulated entities that are already in compliance with the existing rules will not need to modify business practices as a result of this rule.

C. Section 1022(b)(2) of the Dodd-Frank Act

In developing the interim final rule, the Bureau has conducted an analysis of potential benefits, costs, and impacts.[11] The Bureau believes that the interim final rule will benefit consumers and covered persons by updating and recodifying Regulation E to reflect the transfer of authority to the Bureau and certain other changes mandated by the Dodd-Frank Act. This will help facilitate compliance with the EFTA and its implementing regulation and help reduce any uncertainty regarding the applicable regulatory framework. The interim final rule will not impose any new substantive obligations on consumers or covered persons and it is not expected to have any impact on consumers' access to consumer financial products and services.

Although not required by the interim final rule, covered entities may incur some costs in updating compliance manuals and related materials to reflect the new numbering and other technical changes reflected in the new Regulation E. The Bureau has worked to reduce any such burden by preserving the existing numbering to the extent possible and believes that such costs will likely be minimal. These changes could be handled in the short term by providing a short, standalone summary alerting users to the changes and in the long term could be combined with other updates at the covered person's convenience. The Bureau intends to continue investigating the possible costs to affected entities of updating manuals and related materials to reflect these changes and solicits comments on this and other issues discussed in this section.

The interim final rule will have no unique impact on depository institutions or credit unions with $10 billion or less in assets as described in section 1026(a) of the Dodd-Frank Act. Also, the interim final rule will have no unique impact on rural consumers.

In undertaking the process of recodifying Regulation E, as well as regulations implementing thirteen other existing consumer financial laws,[12] the Bureau consulted the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the National Credit Union Administration, the Board of Governors of the Federal Reserve System, the Federal Trade Commission, and the Department of Housing and Urban Development, including with respect to consistency with any prudential, market, or systemic objectives that may be administered by such agencies.[13] The Bureau also has consulted with the Office of Management and Budget for technical assistance. The Bureau expects to have further consultations with the appropriate Federal agencies during the comment period.

IV. Request for Comment

Although notice and comment rulemaking procedures are not required, the Bureau invites comments on this notice. Commenters are specifically encouraged to identify any technical issues raised by the rule. The Bureau is also seeking comment in response to a notice published at 76 FR 75825 (Dec. 5, 2011) concerning its efforts to identify priorities for streamlining regulations that it has inherited from other Federal agencies to address provisions that are outdated, unduly burdensome, or unnecessary.

V. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, requires each agency to consider the potential impact of its regulations on small entities, including small businesses, small governmental units, and small not-for-profit organizations.[14] The RFA generally requires an agency to conduct an initial regulatory flexibility analysis (IRFA) and a final regulatory flexibility analysis (FRFA) of any rule subject to notice-and-comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.[15] The Bureau also is subject to certain additional procedures under the RFA involving the convening of a panel to consult with small business representatives prior to proposing a rule for which an IRFA is required.[16]

The IRFA and FRFA requirements described above apply only where a notice of proposed rulemaking is required,[17] and the panel requirement applies only when a rulemaking requires an IRFA.[18] As discussed above in part III, a notice of proposed rulemaking is not required for this rulemaking.

In addition, as discussed above, this interim final rule has only a minor impact on entities subject to Regulation E. The rule imposes no new, substantive obligations on covered entities. Accordingly, the undersigned certifies that this interim final rule will not have a significant economic impact on a substantial number of small entities.

VI. Paperwork Reduction Act

The Bureau may not conduct or sponsor, and a respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. This rule contains information collection

making those published thereafter (if any) effective immediately.

[11] Section 1022(b)(2)(A) of the Dodd-Frank Act addresses the consideration of the potential benefits and costs of regulation to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services; the impact on depository institutions and credit unions with $10 billion or less in total assets as described in section 1026 of the Dodd-Frank Act; and the impact on consumers in rural areas. Section 1022(b)(2)(B) requires that the Bureau ''consult with the appropriate prudential regulators or other Federal agencies prior to proposing a rule and during the comment process regarding consistency with prudential, market, or systemic objectives administered by such agencies.'' The manner and extent to which these provisions apply to interim final rules and to benefits, costs, and impacts that are compelled by statutory changes rather than discretionary Bureau action is unclear. Nevertheless, to inform this rulemaking more fully, the Bureau performed the described analyses and consultations.

[12] The fourteen laws implemented by this and its companion rulemakings are: the Consumer Leasing Act, the Electronic Fund Transfer Act (except with respect to section 920 of that Act), the Equal Credit Opportunity Act, the Fair Credit Reporting Act (except with respect to sections 615(e) and 628 of that act), the Fair Debt Collection Practices Act, Subsections (b) through (f) of section 43 of the Federal Deposit Insurance Act, sections 502 through 509 of the Gramm-Leach-Bliley Act (except for section 505 as it applies to section 501(b)), the Home Mortgage Disclosure Act, the Real Estate Settlement Procedures Act, the S.A.F.E. Mortgage Licensing Act, the Truth in Lending Act, the Truth in Savings Act, section 626 of the Omnibus Appropriations Act, 2009, and the Interstate Land Sales Full Disclosure Act.

[13] In light of the technical but voluminous nature of this recodification project, the Bureau focused the consultation process on a representative sample of the recodified regulations, while making information on the other regulations available. The Bureau expects to conduct differently its future consultations regarding substantive rulemakings.

[14] 5 U.S.C. 601 *et seq.*

[15] 5 U.S.C. 603, 604.

[16] 5 U.S.C. 609.

[17] 5 U.S.C. 603(a), 604(a); 5 U.S.C. 553(b)(B).

[18] 5 U.S.C. 609(b).

requirements under the Paperwork Reduction Act (PRA), which have been previously approved by OMB under the following OMB control number issued to the Board, and the PRA burden for which is unchanged by this rule: OMB Control No(s). 7100–0200. There are no new information collection requirements in this interim final rule. The Bureau's OMB control number for this information collection is: 3170–0014.

List of Subjects in 12 CFR Part 1005

Banks, Banking, Consumer protection, Credit unions, Electronic fund transfers, National banks, Reporting and recordkeeping requirements, Savings Associations.

Authority and Issuance

For the reasons set forth above, the Bureau of Consumer Financial Protection adds part 1005 to Chapter X in Title 12 of the Code of Federal Regulations to read as follows:

PART 1005—ELECTRONIC FUND TRANSFERS (REGULATION E)

Sec.

1005.1 Authority and purpose.
1005.2 Definitions.
1005.3 Coverage.
1005.4 General disclosure requirements; jointly offered services.
1005.5 Issuance of access devices.
1005.6 Liability of consumer for unauthorized transfers.
1005.7 Initial disclosures.
1005.8 Change in terms notice; error resolution notice.
1005.9 Receipts at electronic terminals; periodic statements.
1005.10 Preauthorized transfers.
1005.11 Procedures for resolving errors.
1005.12 Relation to other laws.
1005.13 Administrative enforcement; record retention.
1005.14 Electronic fund transfer service provider not holding consumer's account.
1005.15 Electronic fund transfer of government benefits.
1005.16 Disclosures at automated teller machines.
1005.17 Requirements for overdraft services.
1005.18 Requirements for financial institutions offering payroll card accounts.
1005.20 Requirements for gift cards and gift certificates.
Appendix A to Part 1005—Model Disclosure Clauses and Forms
Appendix B to Part 1005—[Reserved]
Appendix C to Part 1005—Issuance of Official Interpretations
Supplement I to Part 1005—Official Interpretations

Authority: 12 U.S.C. 5512, 5581; 15 U.S.C. 1693b.

§ 1005.1 Authority and purpose.

(a) *Authority.* The regulation in this part, known as Regulation E, is issued by the Bureau of Consumer Financial Protection (Bureau) pursuant to the Electronic Fund Transfer Act (15 U.S.C. 1693 *et seq.*). The information-collection requirements have been approved by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.* and have been assigned OMB No. 3170–0014.

(b) *Purpose.* This part carries out the purposes of the Electronic Fund Transfer Act, which establishes the basic rights, liabilities, and responsibilities of consumers who use electronic fund transfer services and of financial institutions that offer these services. The primary objective of the Act and this part is the protection of individual consumers engaging in electronic fund transfers.

§ 1005.2 Definitions.

For purposes of this part, the following definitions apply:

(a)(1) ''Access device'' means a card, code, or other means of access to a consumer's account, or any combination thereof, that may be used by the consumer to initiate electronic fund transfers.

(2) An access device becomes an ''accepted access device'' when the consumer:

(i) Requests and receives, or signs, or uses (or authorizes another to use) the access device to transfer money between accounts or to obtain money, property, or services;

(ii) Requests validation of an access device issued on an unsolicited basis; or

(iii) Receives an access device in renewal of, or in substitution for, an accepted access device from either the financial institution that initially issued the device or a successor.

(b)(1) ''Account'' means a demand deposit (checking), savings, or other consumer asset account (other than an occasional or incidental credit balance in a credit plan) held directly or indirectly by a financial institution and established primarily for personal, family, or household purposes.

(2) The term includes a ''payroll card account'' which is an account that is directly or indirectly established through an employer and to which electronic fund transfers of the consumer's wages, salary, or other employee compensation (such as commissions), are made on a recurring basis, whether the account is operated or managed by the employer, a third-party payroll processor, a depository institution or any other person. For rules governing payroll card accounts, *see* § 1005.18.

(3) The term does not include an account held by a financial institution under a bona fide trust agreement.

(c) ''Act'' means the Electronic Fund Transfer Act (Title IX of the Consumer Credit Protection Act, 15 U.S.C. 1693 *et seq.*).

(d) ''Business day'' means any day on which the offices of the consumer's financial institution are open to the public for carrying on substantially all business functions.

(e) ''Consumer'' means a natural person.

(f) ''Credit'' means the right granted by a financial institution to a consumer to defer payment of debt, incur debt and defer its payment, or purchase property or services and defer payment therefor.

(g) ''Electronic fund transfer'' is defined in § 1005.3.

(h) ''Electronic terminal'' means an electronic device, other than a telephone operated by a consumer, through which a consumer may initiate an electronic fund transfer. The term includes, but is not limited to, point-of-sale terminals, automated teller machines (ATMs), and cash dispensing machines.

(i) ''Financial institution'' means a bank, savings association, credit union, or any other person that directly or indirectly holds an account belonging to a consumer, or that issues an access device and agrees with a consumer to provide electronic fund transfer services, other than a person excluded from coverage of this part by section 1029 of the Consumer Financial Protection Act of 2010, Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376.

(j) ''Person'' means a natural person or an organization, including a corporation, government agency, estate, trust, partnership, proprietorship, cooperative, or association.

(k) ''Preauthorized electronic fund transfer'' means an electronic fund transfer authorized in advance to recur at substantially regular intervals.

(l) ''State'' means any state, territory, or possession of the United States; the District of Columbia; the Commonwealth of Puerto Rico; or any political subdivision of the thereof in this paragraph (l).

(m) ''Unauthorized electronic fund transfer'' means an electronic fund transfer from a consumer's account initiated by a person other than the consumer without actual authority to initiate the transfer and from which the consumer receives no benefit. The term does not include an electronic fund transfer initiated:

(1) By a person who was furnished the access device to the consumer's account by the consumer, unless the consumer has notified the financial institution that transfers by that person are no longer authorized;

(2) With fraudulent intent by the consumer or any person acting in concert with the consumer; or

(3) By the financial institution or its employee.

§ 1005.3 Coverage.

(a) *General.* This part applies to any electronic fund transfer that authorizes a financial institution to debit or credit a consumer's account. Generally, this part applies to financial institutions. For purposes of §§ 1005.3(b)(2) and (3), 1005.10(b), (d), and (e), 1005.13, and 1005.20 this part applies to any person, other than a person excluded from coverage of this part by section 1029 of the Consumer Financial Protection Act of 2010, Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376.

(b) *Electronic fund transfer.* (1) *Definition.* The term ''electronic fund transfer'' means any transfer of funds that is initiated through an electronic terminal, telephone, computer, or magnetic tape for the purpose of ordering, instructing, or authorizing a financial institution to debit or credit a consumer's account. The term includes, but is not limited to:

(i) Point-of-sale transfers;

(ii) Automated teller machine transfers;

(iii) Direct deposits or withdrawals of funds;

(iv) Transfers initiated by telephone; and

(v) Transfers resulting from debit card transactions, whether or not initiated through an electronic terminal.

(2) *Electronic fund transfer using information from a check.* (i) This part applies where a check, draft, or similar paper instrument is used as a source of information to initiate a one-time electronic fund transfer from a consumer's account. The consumer must authorize the transfer.

(ii) The person initiating an electronic fund transfer using the consumer's check as a source of information for the transfer must provide a notice that the transaction will or may be processed as an electronic fund transfer, and obtain a consumer's authorization for each transfer. A consumer authorizes a one-time electronic fund transfer (in providing a check to a merchant or other payee for the MICR encoding, that is, the routing number of the financial institution, the consumer's account number and the serial number) when the consumer receives notice and goes forward with the underlying transaction. For point-of-sale transfers, the notice must be posted in a prominent and conspicuous location, and a copy thereof, or a substantially similar notice, must be provided to the consumer at the time of the transaction.

(iii) A person may provide notices that are substantially similar to those set forth in Appendix A–6 to comply with the requirements of this paragraph (b)(2).

(3) *Collection of returned item fees via electronic fund transfer.*(i) *General.* The person initiating an electronic fund transfer to collect a fee for the return of an electronic fund transfer or a check that is unpaid, including due to insufficient or uncollected funds in the consumer's account, must obtain the consumer's authorization for each transfer. A consumer authorizes a one-time electronic fund transfer from his or her account to pay the fee for the returned item or transfer if the person collecting the fee provides notice to the consumer stating that the person may electronically collect the fee, and the consumer goes forward with the underlying transaction. The notice must state that the fee will be collected by means of an electronic fund transfer from the consumer's account if the payment is returned unpaid and must disclose the dollar amount of the fee. If the fee may vary due to the amount of the transaction or due to other factors, then, except as otherwise provided in paragraph (b)(3)(ii) of this section, the person collecting the fee may disclose, in place of the dollar amount of the fee, an explanation of how the fee will be determined.

(ii) *Point-of-sale transactions.* If a fee for an electronic fund transfer or check returned unpaid may be collected electronically in connection with a point-of-sale transaction, the person initiating an electronic fund transfer to collect the fee must post the notice described in paragraph (b)(3)(i) of this section in a prominent and conspicuous location. The person also must either provide the consumer with a copy of the posted notice (or a substantially similar notice) at the time of the transaction, or mail the copy (or a substantially similar notice) to the consumer's address as soon as reasonably practicable after the person initiates the electronic fund transfer to collect the fee. If the amount of the fee may vary due to the amount of the transaction or due to other factors, the posted notice may explain how the fee will be determined, but the notice provided to the consumer must state the dollar amount of the fee if the amount can be calculated at the time the notice is provided or mailed to the consumer.

(c) *Exclusions from coverage.* The term ''electronic fund transfer'' does not include:

(1) *Checks.* Any transfer of funds originated by check, draft, or similar paper instrument; or any payment made by check, draft, or similar paper instrument at an electronic terminal.

(2) *Check guarantee or authorization.* Any transfer of funds that guarantees payment or authorizes acceptance of a check, draft, or similar paper instrument but that does not directly result in a debit or credit to a consumer's account.

(3) *Wire or other similar transfers.* Any transfer of funds through Fedwire or through a similar wire transfer system that is used primarily for transfers between financial institutions or between businesses.

(4) *Securities and commodities transfers.* Any transfer of funds the primary purpose of which is the purchase or sale of a security or commodity, if the security or commodity is:

(i) Regulated by the Securities and Exchange Commission or the Commodity Futures Trading Commission;

(ii) Purchased or sold through a broker-dealer regulated by the Securities and Exchange Commission or through a futures commission merchant regulated by the Commodity Futures Trading Commission; or

(iii) Held in book-entry form by a Federal Reserve Bank or Federal agency.

(5) *Automatic transfers by account-holding institution.* Any transfer of funds under an agreement between a consumer and a financial institution which provides that the institution will initiate individual transfers without a specific request from the consumer:

(i) Between a consumer's accounts within the financial institution;

(ii) From a consumer's account to an account of a member of the consumer's family held in the same financial institution; or

(iii) Between a consumer's account and an account of the financial institution, except that these transfers remain subject to § 1005.10(e) regarding compulsory use and sections 916 and 917 of the Act regarding civil and criminal liability.

(6) *Telephone-initiated transfers.* Any transfer of funds that:

(i) Is initiated by a telephone communication between a consumer and a financial institution making the transfer; and

(ii) Does not take place under a telephone bill-payment or other written

plan in which periodic or recurring transfers are contemplated.

(7) *Small institutions.* Any preauthorized transfer to or from an account if the assets of the account-holding financial institution were $100 million or less on the preceding December 31. If assets of the account-holding institution subsequently exceed $100 million, the institution's exemption for preauthorized transfers terminates one year from the end of the calendar year in which the assets exceed $100 million. Preauthorized transfers exempt under this paragraph (c)(7) remain subject to § 1005.10(e) regarding compulsory use and sections 916 and 917 of the Act regarding civil and criminal liability.

§ 1005.4 General disclosure requirements; jointly offered services.

(a)(1) *Form of disclosures.* Disclosures required under this part shall be clear and readily understandable, in writing, and in a form the consumer may keep, except as otherwise provided in this part. The disclosures required by this part may be provided to the consumer in electronic form, subject to compliance with the consumer-consent and other applicable provisions of the Electronic Signatures in Global and National Commerce Act (E-Sign Act) (15 U.S.C. 7001 *et seq.*). A financial institution may use commonly accepted or readily understandable abbreviations in complying with the disclosure requirements of this part.

(2) *Foreign language disclosures.* Disclosures required under this part may be made in a language other than English, provided that the disclosures are made available in English upon the consumer's request.

(b) *Additional information; disclosures required by other laws.* A financial institution may include additional information and may combine disclosures required by other laws (such as the Truth in Lending Act (15 U.S.C. 1601 *et seq.*) or the Truth in Savings Act (12 U.S.C. 4301 *et seq.*) with the disclosures required by this part.

(c) *Multiple accounts and account holders.*(1) *Multiple accounts.* A financial institution may combine the required disclosures into a single statement for a consumer who holds more than one account at the institution.

(2) *Multiple account holders.* For joint accounts held by two or more consumers, a financial institution need provide only one set of the required disclosures and may provide them to any of the account holders.

(d) *Services offered jointly.* Financial institutions that provide electronic fund transfer services jointly may contract among themselves to comply with the requirements that this part imposes on any or all of them. An institution need make only the disclosures required by §§ 1005.7 and 1005.8 that are within its knowledge and within the purview of its relationship with the consumer for whom it holds an account.

§ 1005.5 Issuance of access devices.

(a) *Solicited issuance.* Except as provided in paragraph (b) of this section, a financial institution may issue an access device to a consumer only:

(1) In response to an oral or written request for the device; or

(2) As a renewal of, or in substitution for, an accepted access device whether issued by the institution or a successor.

(b) *Unsolicited issuance.* A financial institution may distribute an access device to a consumer on an unsolicited basis if the access device is:

(1) Not validated, meaning that the institution has not yet performed all the procedures that would enable a consumer to initiate an electronic fund transfer using the access device;

(2) Accompanied by a clear explanation that the access device is not validated and how the consumer may dispose of it if validation is not desired;

(3) Accompanied by the disclosures required by § 1005.7, of the consumer's rights and liabilities that will apply if the access device is validated; and

(4) Validated only in response to the consumer's oral or written request for validation, after the institution has verified the consumer's identity by a reasonable means.

§ 1005.6 Liability of consumer for unauthorized transfers.

(a) *Conditions for liability.* A consumer may be held liable, within the limitations described in paragraph (b) of this section, for an unauthorized electronic fund transfer involving the consumer's account only if the financial institution has provided the disclosures required by § 1005.7(b)(1), (2), and (3). If the unauthorized transfer involved an access device, it must be an accepted access device and the financial institution must have provided a means to identify the consumer to whom it was issued.

(b) *Limitations on amount of liability.* A consumer's liability for an unauthorized electronic fund transfer or a series of related unauthorized transfers shall be determined as follows:

(1) *Timely notice given.* If the consumer notifies the financial institution within two business days after learning of the loss or theft of the access device, the consumer's liability shall not exceed the lesser of $50 or the amount of unauthorized transfers that occur before notice to the financial institution.

(2) *Timely notice not given.* If the consumer fails to notify the financial institution within two business days after learning of the loss or theft of the access device, the consumer's liability shall not exceed the lesser of $500 or the sum of:

(i) $50 or the amount of unauthorized transfers that occur within the two business days, whichever is less; and

(ii) The amount of unauthorized transfers that occur after the close of two business days and before notice to the institution, provided the institution establishes that these transfers would not have occurred had the consumer notified the institution within that two-day period.

(3) *Periodic statement; timely notice not given.* A consumer must report an unauthorized electronic fund transfer that appears on a periodic statement within 60 days of the financial institution's transmittal of the statement to avoid liability for subsequent transfers. If the consumer fails to do so, the consumer's liability shall not exceed the amount of the unauthorized transfers that occur after the close of the 60 days and before notice to the institution, and that the institution establishes would not have occurred had the consumer notified the institution within the 60-day period. When an access device is involved in the unauthorized transfer, the consumer may be liable for other amounts set forth in paragraphs (b)(1) or (b)(2) of this section, as applicable.

(4) *Extension of time limits.* If the consumer's delay in notifying the financial institution was due to extenuating circumstances, the institution shall extend the times specified above to a reasonable period.

(5) *Notice to financial institution.* (i) Notice to a financial institution is given when a consumer takes steps reasonably necessary to provide the institution with the pertinent information, whether or not a particular employee or agent of the institution actually receives the information.

(ii) The consumer may notify the institution in person, by telephone, or in writing.

(iii) Written notice is considered given at the time the consumer mails the notice or delivers it for transmission to the institution by any other usual means. Notice may be considered constructively given when the institution becomes aware of

circumstances leading to the reasonable belief that an unauthorized transfer to or from the consumer's account has been or may be made.

(6) *Liability under state law or agreement.* If state law or an agreement between the consumer and the financial institution imposes less liability than is provided by this section, the consumer's liability shall not exceed the amount imposed under the state law or agreement.

§ 1005.7 Initial disclosures.

(a) *Timing of disclosures.* A financial institution shall make the disclosures required by this section at the time a consumer contracts for an electronic fund transfer service or before the first electronic fund transfer is made involving the consumer's account.

(b) *Content of disclosures.* A financial institution shall provide the following disclosures, as applicable:

(1) *Liability of consumer.* A summary of the consumer's liability, under § 1005.6 or under state or other applicable law or agreement, for unauthorized electronic fund transfers.

(2) *Telephone number and address.* The telephone number and address of the person or office to be notified when the consumer believes that an unauthorized electronic fund transfer has been or may be made.

(3) *Business days.* The financial institution's business days.

(4) *Types of transfers; limitations.* The type of electronic fund transfers that the consumer may make and any limitations on the frequency and dollar amount of transfers. Details of the limitations need not be disclosed if confidentiality is essential to maintain the security of the electronic fund transfer system.

(5) *Fees.* Any fees imposed by the financial institution for electronic fund transfers or for the right to make transfers.

(6) *Documentation.* A summary of the consumer's right to receipts and periodic statements, as provided in § 1005.9 of this part, and notices regarding preauthorized transfers as provided in § 1005.10(a) and (d).

(7) *Stop payment.* A summary of the consumer's right to stop payment of a preauthorized electronic fund transfer and the procedure for placing a stop-payment order, as provided in § 1005.10(c).

(8) *Liability of institution.* A summary of the financial institution's liability to the consumer under section 910 of the Act for failure to make or to stop certain transfers.

(9) *Confidentiality.* The circumstances under which, in the ordinary course of business, the financial institution may provide information concerning the consumer's account to third parties.

(10) *Error resolution.* A notice that is substantially similar to Model Form A–3 as set out in Appendix A of this part concerning error resolution.

(11) *ATM fees.* A notice that a fee may be imposed by an automated teller machine operator as defined in § 1005.16(a)(1), when the consumer initiates an electronic fund transfer or makes a balance inquiry, and by any network used to complete the transaction.

(c) *Addition of electronic fund transfer services.* If an electronic fund transfer service is added to a consumer's account and is subject to terms and conditions different from those described in the initial disclosures, disclosures for the new service are required.

§ 1005.8 Change in terms notice; error resolution notice.

(a) *Change in terms notice.* (1) *Prior notice required.* A financial institution shall mail or deliver a written notice to the consumer, at least 21 days before the effective date, of any change in a term or condition required to be disclosed under § 1005.7(b) of this part if the change would result in:

(i) Increased fees for the consumer;

(ii) Increased liability for the consumer;

(iii) Fewer types of available electronic fund transfers; or

(iv) Stricter limitations on the frequency or dollar amount of transfers.

(2) *Prior notice exception.* A financial institution need not give prior notice if an immediate change in terms or conditions is necessary to maintain or restore the security of an account or an electronic fund transfer system. If the institution makes such a change permanent and disclosure would not jeopardize the security of the account or system, the institution shall notify the consumer in writing on or with the next regularly scheduled periodic statement or within 30 days of making the change permanent.

(b) *Error resolution notice.* For accounts to or from which electronic fund transfers can be made, a financial institution shall mail or deliver to the consumer, at least once each calendar year, an error resolution notice substantially similar to the model form set forth in Appendix A of this part (Model Form A–3). Alternatively, an institution may include an abbreviated notice substantially similar to the model form error resolution notice set forth in Appendix A of this part (Model Form A–3), on or with each periodic statement required by § 1005.9(b).

§ 1005.9 Receipts at electronic terminals; periodic statements.

(a) *Receipts at electronic terminals—General.* Except as provided in paragraph (e) of this section, a financial institution shall make a receipt available to a consumer at the time the consumer initiates an electronic fund transfer at an electronic terminal. The receipt shall set forth the following information, as applicable:

(1) *Amount.* The amount of the transfer. A transaction fee may be included in this amount, provided the amount of the fee is disclosed on the receipt and displayed on or at the terminal.

(2) *Date.* The date the consumer initiates the transfer.

(3) *Type.* The type of transfer and the type of the consumer's account(s) to or from which funds are transferred. The type of account may be omitted if the access device used is able to access only one account at that terminal.

(4) *Identification.* A number or code that identifies the consumer's account or accounts, or the access device used to initiate the transfer. The number or code need not exceed four digits or letters to comply with the requirements of this paragraph (a)(4).

(5) *Terminal location.* The location of the terminal where the transfer is initiated, or an identification such as a code or terminal number. Except in limited circumstances where all terminals are located in the same city or state, if the location is disclosed, it shall include the city and state or foreign country and one of the following:

(i) The street address; or

(ii) A generally accepted name for the specific location; or

(iii) The name of the owner or operator of the terminal if other than the account-holding institution.

(6) *Third party transfer.* The name of any third party to or from whom funds are transferred.

(b) *Periodic statements.* For an account to or from which electronic fund transfers can be made, a financial institution shall send a periodic statement for each monthly cycle in which an electronic fund transfer has occurred; and shall send a periodic statement at least quarterly if no transfer has occurred. The statement shall set forth the following information, as applicable:

(1) *Transaction information.* For each electronic fund transfer occurring during the cycle:

(i) The amount of the transfer;

(ii) The date the transfer was credited or debited to the consumer's account;

(iii) The type of transfer and type of account to or from which funds were transferred;

(iv) For a transfer initiated by the consumer at an electronic terminal (except for a deposit of cash or a check, draft, or similar paper instrument), the terminal location described in paragraph (a)(5) of this section; and

(v) The name of any third party to or from whom funds were transferred.

(2) *Account number.* The number of the account.

(3) *Fees.* The amount of any fees assessed against the account during the statement period for electronic fund transfers, the right to make transfers, or account maintenance.

(4) *Account balances.* The balance in the account at the beginning and at the close of the statement period.

(5) *Address and telephone number for inquiries.* The address and telephone number to be used for inquiries or notice of errors, preceded by ''Direct inquiries to'' or similar language. The address and telephone number provided on an error resolution notice under § 1005.8(b) given on or with the statement satisfies this requirement.

(6) *Telephone number for preauthorized transfers.* A telephone number the consumer may call to ascertain whether preauthorized transfers to the consumer's account have occurred, if the financial institution uses the telephone-notice option under § 1005.10(a)(1)(iii).

(c) *Exceptions to the periodic statement requirement for certain accounts.* (1) *Preauthorized transfers to accounts.* For accounts that may be accessed only by preauthorized transfers to the account the following rules apply:

(i) *Passbook accounts.* For passbook accounts, the financial institution need not provide a periodic statement if the institution updates the passbook upon presentation or enters on a separate document the amount and date of each electronic fund transfer since the passbook was last presented.

(ii) *Other accounts.* For accounts other than passbook accounts, the financial institution must send a periodic statement at least quarterly.

(2) *Intra-institutional transfers.* For an electronic fund transfer initiated by the consumer between two accounts of the consumer in the same institution, documenting the transfer on a periodic statement for one of the two accounts satisfies the periodic statement requirement.

(3) *Relationship between paragraphs (c)(1) and (2) of this section.* An account that is accessed by preauthorized transfers to the account described in paragraph (c)(1) of this section and by intra-institutional transfers described in paragraph (c)(2) of this section, but by no other type of electronic fund transfers, qualifies for the exceptions provided by paragraph (c)(1) of this section.

(d) *Documentation for foreign-initiated transfers.* The failure by a financial institution to provide a terminal receipt for an electronic fund transfer or to document the transfer on a periodic statement does not violate this part if:

(1) The transfer is not initiated within a state; and

(2) The financial institution treats an inquiry for clarification or documentation as a notice of error in accordance with § 1005.11.

(e) *Exception for receipts in small-value transfers.* A financial institution is not subject to the requirement to make available a receipt under paragraph (a) of this section if the amount of the transfer is $15 or less.

§ 1005.10 Preauthorized transfers.

(a) *Preauthorized transfers to consumer's account.* (1) *Notice by financial institution.* When a person initiates preauthorized electronic fund transfers to a consumer's account at least once every 60 days, the account-holding financial institution shall provide notice to the consumer by:

(i) *Positive notice.* Providing oral or written notice of the transfer within two business days after the transfer occurs; or

(ii) *Negative notice.* Providing oral or written notice, within two business days after the date on which the transfer was scheduled to occur, that the transfer did not occur; or

(iii) *Readily-available telephone line.* Providing a readily available telephone line that the consumer may call to determine whether the transfer occurred and disclosing the telephone number on the initial disclosure of account terms and on each periodic statement.

(2) *Notice by payor.* A financial institution need not provide notice of a transfer if the payor gives the consumer positive notice that the transfer has been initiated.

(3) *Crediting.* A financial institution that receives a preauthorized transfer of the type described in paragraph (a)(1) of this section shall credit the amount of the transfer as of the date the funds for the transfer are received.

(b) *Written authorization for preauthorized transfers from consumer's account.* Preauthorized electronic fund transfers from a consumer's account may be authorized only by a writing signed or similarly authenticated by the consumer. The person that obtains the authorization shall provide a copy to the consumer.

(c) *Consumer's right to stop payment.* (1) *Notice.* A consumer may stop payment of a preauthorized electronic fund transfer from the consumer's account by notifying the financial institution orally or in writing at least three business days before the scheduled date of the transfer.

(2) *Written confirmation.* The financial institution may require the consumer to give written confirmation of a stop-payment order within 14 days of an oral notification. An institution that requires written confirmation shall inform the consumer of the requirement and provide the address where confirmation must be sent when the consumer gives the oral notification. An oral stop-payment order ceases to be binding after 14 days if the consumer fails to provide the required written confirmation.

(d) *Notice of transfers varying in amount.* (1) *Notice.* When a preauthorized electronic fund transfer from the consumer's account will vary in amount from the previous transfer under the same authorization or from the preauthorized amount, the designated payee or the financial institution shall send the consumer written notice of the amount and date of the transfer at least 10 days before the scheduled date of transfer.

(2) *Range.* The designated payee or the institution shall inform the consumer of the right to receive notice of all varying transfers, but may give the consumer the option of receiving notice only when a transfer falls outside a specified range of amounts or only when a transfer differs from the most recent transfer by more than an agreed-upon amount.

(e) *Compulsory use.* (1) *Credit.* No financial institution or other person may condition an extension of credit to a consumer on the consumer's repayment by preauthorized electronic fund transfers, except for credit extended under an overdraft credit plan or extended to maintain a specified minimum balance in the consumer's account.

(2) *Employment or government benefit.* No financial institution or other person may require a consumer to establish an account for receipt of electronic fund transfers with a particular institution as a condition of employment or receipt of a government benefit.

§ 1005.11 Procedures for resolving errors.

(a) *Definition of error.* (1) *Types of transfers or inquiries covered.* The term ''error'' means:

(i) An unauthorized electronic fund transfer;

(ii) An incorrect electronic fund transfer to or from the consumer's account;

(iii) The omission of an electronic fund transfer from a periodic statement;

(iv) A computational or bookkeeping error made by the financial institution relating to an electronic fund transfer;

(v) The consumer's receipt of an incorrect amount of money from an electronic terminal;

(vi) An electronic fund transfer not identified in accordance with § 1005.9 or § 1005.10(a); or

(vii) The consumer's request for documentation required by § 1005.9 or § 1005.10(a) or for additional information or clarification concerning an electronic fund transfer, including a request the consumer makes to determine whether an error exists under paragraphs (a)(1)(i) through (vi) of this section.

(2) *Types of inquiries not covered.* The term ''error'' does not include:

(i) A routine inquiry about the consumer's account balance;

(ii) A request for information for tax or other recordkeeping purposes; or

(iii) A request for duplicate copies of documentation.

(b) *Notice of error from consumer.* (1) *Timing; contents.* A financial institution shall comply with the requirements of this section with respect to any oral or written notice of error from the consumer that:

(i) Is received by the institution no later than 60 days after the institution sends the periodic statement or provides the passbook documentation, required by § 1005.9, on which the alleged error is first reflected;

(ii) Enables the institution to identify the consumer's name and account number; and

(iii) Indicates why the consumer believes an error exists and includes to the extent possible the type, date, and amount of the error, except for requests described in paragraph (a)(1)(vii) of this section.

(2) *Written confirmation.* A financial institution may require the consumer to give written confirmation of an error within 10 business days of an oral notice. An institution that requires written confirmation shall inform the consumer of the requirement and provide the address where confirmation must be sent when the consumer gives the oral notification.

(3) *Request for documentation or clarifications.* When a notice of error is based on documentation or clarification that the consumer requested under paragraph (a)(1)(vii) of this section, the consumer's notice of error is timely if received by the financial institution no later than 60 days after the institution sends the information requested.

(c) *Time limits and extent of investigation.* (1) *Ten-day period.* A financial institution shall investigate promptly and, except as otherwise provided in this paragraph (c), shall determine whether an error occurred within 10 business days of receiving a notice of error. The institution shall report the results to the consumer within three business days after completing its investigation. The institution shall correct the error within one business day after determining that an error occurred.

(2) *Forty-five day period.* If the financial institution is unable to complete its investigation within 10 business days, the institution may take up to 45 days from receipt of a notice of error to investigate and determine whether an error occurred, provided the institution does the following:

(i) Provisionally credits the consumer's account in the amount of the alleged error (including interest where applicable) within 10 business days of receiving the error notice. If the financial institution has a reasonable basis for believing that an unauthorized electronic fund transfer has occurred and the institution has satisfied the requirements of § 1005.6(a), the institution may withhold a maximum of $50 from the amount credited. An institution need not provisionally credit the consumer's account if:

(A) The institution requires but does not receive written confirmation within 10 business days of an oral notice of error; or

(B) The alleged error involves an account that is subject to Regulation T of the Board of Governors of the Federal Reserve System (Securities Credit by Brokers and Dealers, 12 CFR part 220);

(ii) Informs the consumer, within two business days after the provisional crediting, of the amount and date of the provisional crediting and gives the consumer full use of the funds during the investigation;

(iii) Corrects the error, if any, within one business day after determining that an error occurred; and

(iv) Reports the results to the consumer within three business days after completing its investigation (including, if applicable, notice that a provisional credit has been made final).

(3) *Extension of time periods.* The time periods in paragraphs (c)(1) and (c)(2) of this section are extended as follows:

(i) The applicable time is 20 business days in place of 10 business days under paragraphs (c)(1) and (2) of this section if the notice of error involves an electronic fund transfer to or from the account within 30 days after the first deposit to the account was made.

(ii) The applicable time is 90 days in place of 45 days under paragraph (c)(2) of this section, for completing an investigation, if a notice of error involves an electronic fund transfer that:

(A) Was not initiated within a state;

(B) Resulted from a point-of-sale debit card transaction; or

(C) Occurred within 30 days after the first deposit to the account was made.

(4) *Investigation.* With the exception of transfers covered by § 1005.14 of this part, a financial institution's review of its own records regarding an alleged error satisfies the requirements of this section if:

(i) The alleged error concerns a transfer to or from a third party; and

(ii) There is no agreement between the institution and the third party for the type of electronic fund transfer involved.

(d) *Procedures if financial institution determines no error or different error occurred.* In addition to following the procedures specified in paragraph (c) of this section, the financial institution shall follow the procedures set forth in this paragraph (d) if it determines that no error occurred or that an error occurred in a manner or amount different from that described by the consumer:

(1) *Written explanation.* The institution's report of the results of its investigation shall include a written explanation of the institution's findings and shall note the consumer's right to request the documents that the institution relied on in making its determination. Upon request, the institution shall promptly provide copies of the documents.

(2) *Debiting provisional credit.* Upon debiting a provisionally credited amount, the financial institution shall:

(i) Notify the consumer of the date and amount of the debiting;

(ii) Notify the consumer that the institution will honor checks, drafts, or similar instruments payable to third parties and preauthorized transfers from the consumer's account (without charge to the consumer as a result of an overdraft) for five business days after the notification. The institution shall honor items as specified in the notice, but need honor only items that it would have paid if the provisionally credited funds had not been debited.

(e) *Reassertion of error.* A financial institution that has fully complied with the error resolution requirements has no further responsibilities under this

section should the consumer later reassert the same error, except in the case of an error asserted by the consumer following receipt of information provided under paragraph (a)(1)(vii) of this section.

§ 1005.12 Relation to other laws.

(a) *Relation to Truth in Lending.* (1) The Electronic Fund Transfer Act and this part govern:

(i) The addition to an accepted credit card, as defined in Regulation Z (12 CFR 1026.12, comment 12–2), of the capability to initiate electronic fund transfers;

(ii) The issuance of an access device that permits credit extensions (under a preexisting agreement between a consumer and a financial institution) only when the consumer's account is overdrawn or to maintain a specified minimum balance in the consumer's account, or under an overdraft service, as defined in § 1005.17(a) of this part;

(iii) The addition of an overdraft service, as defined in § 1005.17(a), to an accepted access device; and

(iv) A consumer's liability for an unauthorized electronic fund transfer and the investigation of errors involving an extension of credit that occurs under an agreement between the consumer and a financial institution to extend credit when the consumer's account is overdrawn or to maintain a specified minimum balance in the consumer's account, or under an overdraft service, as defined in § 1005.17(a).

(2) The Truth in Lending Act and Regulation Z (12 CFR part 1026), which prohibit the unsolicited issuance of credit cards, govern:

(i) The addition of a credit feature to an accepted access device; and

(ii) Except as provided in paragraph (a)(1)(ii) of this section, the issuance of a credit card that is also an access device.

(b) *Preemption of inconsistent state laws.* (1) *Inconsistent requirements.* The Bureau shall determine, upon its own motion or upon the request of a state, financial institution, or other interested party, whether the Act and this part preempt state law relating to electronic fund transfers, or dormancy, inactivity, or service fees, or expiration dates in the case of gift certificates, store gift cards, or general-use prepaid cards.

(2) *Standards for determination.* State law is inconsistent with the requirements of the Act and this part if state law:

(i) Requires or permits a practice or act prohibited by the Federal law;

(ii) Provides for consumer liability for unauthorized electronic fund transfers that exceeds the limits imposed by the Federal law;

(iii) Allows longer time periods than the Federal law for investigating and correcting alleged errors, or does not require the financial institution to credit the consumer's account during an error investigation in accordance with § 1005.11(c)(2)(i) of this part; or

(iv) Requires initial disclosures, periodic statements, or receipts that are different in content from those required by the Federal law except to the extent that the disclosures relate to consumer rights granted by the state law and not by the Federal law.

(c) *State exemptions* (1) *General rule.* Any state may apply for an exemption from the requirements of the Act or this part for any class of electronic fund transfers within the state. The Bureau shall grant an exemption if it determines that:

(i) Under state law the class of electronic fund transfers is subject to requirements substantially similar to those imposed by the Federal law; and

(ii) There is adequate provision for state enforcement.

(2) *Exception.* To assure that the Federal and state courts continue to have concurrent jurisdiction, and to aid in implementing the Act:

(i) No exemption shall extend to the civil liability provisions of section 916 of the Act; and

(ii) When the Bureau grants an exemption, the state law requirements shall constitute the requirements of the Federal law for purposes of section 916 of the Act, except for state law requirements not imposed by the Federal law.

§ 1005.13 Administrative enforcement; record retention.

(a) *Enforcement by Federal agencies.* Compliance with this part is enforced in accordance with section 918 of the Act.

(b) *Record retention.* (1) Any person subject to the Act and this part shall retain evidence of compliance with the requirements imposed by the Act and this part for a period of not less than two years from the date disclosures are required to be made or action is required to be taken.

(2) Any person subject to the Act and this part having actual notice that it is the subject of an investigation or an enforcement proceeding by its enforcement agency, or having been served with notice of an action filed under sections 910, 916, or 917(a) of the Act, shall retain the records that pertain to the investigation, action, or proceeding until final disposition of the matter unless an earlier time is allowed by court or agency order.

§ 1005.14 Electronic fund transfer service provider not holding consumer's account.

(a) *Provider of electronic fund transfer service.* A person that provides an electronic fund transfer service to a consumer but that does not hold the consumer's account is subject to all requirements of this part if the person:

(1) Issues a debit card (or other access device) that the consumer can use to access the consumer's account held by a financial institution; and

(2) Has no agreement with the account-holding institution regarding such access.

(b) *Compliance by service provider.* In addition to the requirements generally applicable under this part, the service provider shall comply with the following special rules:

(1) *Disclosures and documentation.* The service provider shall give the disclosures and documentation required by §§ 1005.7, 1005.8, and 1005.9 of this part that are within the purview of its relationship with the consumer. The service provider need not furnish the periodic statement required by § 1005.9(b) if the following conditions are met:

(i) The debit card (or other access device) issued to the consumer bears the service provider's name and an address or telephone number for making inquiries or giving notice of error;

(ii) The consumer receives a notice concerning use of the debit card that is substantially similar to the notice contained in Appendix A of this part;

(iii) The consumer receives, on or with the receipts required by § 1005.9(a), the address and telephone number to be used for an inquiry, to give notice of an error, or to report the loss or theft of the debit card;

(iv) The service provider transmits to the account-holding institution the information specified in § 1005.9(b)(1), in the format prescribed by the automated clearinghouse (ACH) system used to clear the fund transfers;

(v) The service provider extends the time period for notice of loss or theft of a debit card, set forth in § 1005.6(b)(1) and (2), from two business days to four business days after the consumer learns of the loss or theft; and extends the time periods for reporting unauthorized transfers or errors, set forth in §§ 1005.6(b)(3) and 1005.11(b)(1)(i), from 60 days to 90 days following the transmittal of a periodic statement by the account-holding institution.

(2) *Error resolution.* (i) The service provider shall extend by a reasonable time the period in which notice of an error must be received, specified in § 1005.11(b)(1)(i), if a delay resulted from an initial attempt by the consumer

to notify the account-holding institution.

(ii) The service provider shall disclose to the consumer the date on which it initiates a transfer to effect a provisional credit in accordance with § 1005.11(c)(2)(ii).

(iii) If the service provider determines an error occurred, it shall transfer funds to or from the consumer's account, in the appropriate amount and within the applicable time period, in accordance with § 1005.11(c)(2)(i).

(iv) If funds were provisionally credited and the service provider determines no error occurred, it may reverse the credit. The service provider shall notify the account-holding institution of the period during which the account-holding institution must honor debits to the account in accordance with § 1005.11(d)(2)(ii). If an overdraft results, the service provider shall promptly reimburse the account-holding institution in the amount of the overdraft.

(c) *Compliance by account-holding institution.* The account-holding institution need not comply with the requirements of the Act and this part with respect to electronic fund transfers initiated through the service provider except as follows:

(1) *Documentation.* The account-holding institution shall provide a periodic statement that describes each electronic fund transfer initiated by the consumer with the access device issued by the service provider. The account-holding institution has no liability for the failure to comply with this requirement if the service provider did not provide the necessary information; and

(2) *Error resolution.* Upon request, the account-holding institution shall provide information or copies of documents needed by the service provider to investigate errors or to furnish copies of documents to the consumer. The account-holding institution shall also honor debits to the account in accordance with § 1005.11(d)(2)(ii).

§ 1005.15 Electronic fund transfer of government benefits.

(a) *Government agency subject to regulation.* (1) A government agency is deemed to be a financial institution for purposes of the Act and this part if directly or indirectly it issues an access device to a consumer for use in initiating an electronic fund transfer of government benefits from an account, other than needs-tested benefits in a program established under state or local law or administered by a state or local agency. The agency shall comply with all applicable requirements of the Act and this part, except as provided in this section.

(2) For purposes of this section, the term ''account'' means an account established by a government agency for distributing government benefits to a consumer electronically, such as through automated teller machines or point-of-sale terminals, but does not include an account for distributing needs-tested benefits in a program established under state or local law or administered by a state or local agency.

(b) *Issuance of access devices.* For purposes of this section, a consumer is deemed to request an access device when the consumer applies for government benefits that the agency disburses or will disburse by means of an electronic fund transfer. The agency shall verify the identity of the consumer receiving the device by reasonable means before the device is activated.

(c) *Alternative to periodic statement.* A government agency need not furnish the periodic statement required by § 1005.9(b) if the agency makes available to the consumer:

(1) The consumer's account balance, through a readily available telephone line and at a terminal (such as by providing balance information at a balance-inquiry terminal or providing it, routinely or upon request, on a terminal receipt at the time of an electronic fund transfer); and

(2) A written history of the consumer's account transactions that is provided promptly in response to an oral or written request and that covers at least 60 days preceding the date of a request by the consumer.

(d) *Modified requirements.* A government agency that does not furnish periodic statements, in accordance with paragraph (c) of this section, shall comply with the following special rules:

(1) *Initial disclosures.* The agency shall modify the disclosures under § 1005.7(b) by disclosing:

(i) *Account balance.* The means by which the consumer may obtain information concerning the account balance, including a telephone number. The agency provides a notice substantially similar to the notice contained in paragraph A–5 in appendix A of this part.

(ii) *Written account history.* A summary of the consumer's right to receive a written account history upon request, in place of the periodic statement required by § 1005.7(b)(6), and the telephone number to call to request an account history. This disclosure may be made by providing a notice substantially similar to the notice contained in paragraph A–5 in appendix A of this part.

(iii) *Error resolution.* A notice concerning error resolution that is substantially similar to the notice contained in paragraph A–5 in appendix A of this part, in place of the notice required by § 1005.7(b)(10).

(2) *Annual error resolution notice.* The agency shall provide an annual notice concerning error resolution that is substantially similar to the notice contained in paragraph A–5 in appendix A, in place of the notice required by § 1005.8(b).

(3) *Limitations on liability.* For purposes of § 1005.6(b)(3), regarding a 60-day period for reporting any unauthorized transfer that appears on a periodic statement, the 60-day period shall begin with transmittal of a written account history or other account information provided to the consumer under paragraph (c) of this section.

(4) *Error resolution.* The agency shall comply with the requirements of § 1005.11 of this part in response to an oral or written notice of an error from the consumer that is received no later than 60 days after the consumer obtains the written account history or other account information, under paragraph (c) of this section, in which the error is first reflected.

§ 1005.16 Disclosures at automated teller machines.

(a) *Definition.* ''Automated teller machine operator'' means any person that operates an automated teller machine at which a consumer initiates an electronic fund transfer or a balance inquiry and that does not hold the account to or from which the transfer is made, or about which an inquiry is made.

(b) *General.* An automated teller machine operator that imposes a fee on a consumer for initiating an electronic fund transfer or a balance inquiry shall:

(1) Provide notice that a fee will be imposed for providing electronic fund transfer services or a balance inquiry; and

(2) Disclose the amount of the fee.

(c) *Notice requirement.* To meet the requirements of paragraph (b) of this section, an automated teller machine operator must comply with the following:

(1) *On the machine.* Post in a prominent and conspicuous location on or at the automated teller machine a notice that:

(i) A fee will be imposed for providing electronic fund transfer services or for a balance inquiry; or

(ii) A fee may be imposed for providing electronic fund transfer

services or for a balance inquiry, but the notice in this paragraph (c)(1)(ii) may be substituted for the notice in paragraph (c)(1)(i) of this section only if there are circumstances under which a fee will not be imposed for such services; and

(2) *Screen or paper notice.* Provide the notice required by paragraphs (b)(1) and (2) of this section either by showing it on the screen of the automated teller machine or by providing it on paper, before the consumer is committed to paying a fee.

(d) *Imposition of fee.* An automated teller machine operator may impose a fee on a consumer for initiating an electronic fund transfer or a balance inquiry only if

(1) The consumer is provided the notices required under paragraph (c) of this section, and

(2) The consumer elects to continue the transaction or inquiry after receiving such notices.

§ 1005.17 Requirements for overdraft services.

(a) *Definition.* For purposes of this section, the term ''overdraft service'' means a service under which a financial institution assesses a fee or charge on a consumer's account held by the institution for paying a transaction (including a check or other item) when the consumer has insufficient or unavailable funds in the account. The term ''overdraft service'' does not include any payment of overdrafts pursuant to:

(1) A line of credit subject to Regulation Z (12 CFR part 1026), including transfers from a credit card account, home equity line of credit, or overdraft line of credit;

(2) A service that transfers funds from another account held individually or jointly by a consumer, such as a savings account; or

(3) A line of credit or other transaction exempt from Regulation Z (12 CFR part 1026) pursuant to 12 CFR 1026.3(d).

(b) *Opt-in requirement.* (1) *General.* Except as provided under paragraph (c) of this section, a financial institution holding a consumer's account shall not assess a fee or charge on a consumer's account for paying an ATM or one-time debit card transaction pursuant to the institution's overdraft service, unless the institution:

(i) Provides the consumer with a notice in writing, or if the consumer agrees, electronically, segregated from all other information, describing the institution's overdraft service;

(ii) Provides a reasonable opportunity for the consumer to affirmatively consent, or opt in, to the service for ATM and one-time debit card transactions;

(iii) Obtains the consumer's affirmative consent, or opt-in, to the institution's payment of ATM or one-time debit card transactions; and

(iv) Provides the consumer with confirmation of the consumer's consent in writing, or if the consumer agrees, electronically, which includes a statement informing the consumer of the right to revoke such consent.

(2) *Conditioning payment of other overdrafts on consumer's affirmative consent.* A financial institution shall not:

(i) Condition the payment of any overdrafts for checks, ACH transactions, and other types of transactions on the consumer affirmatively consenting to the institution's payment of ATM and one-time debit card transactions pursuant to the institution's overdraft service; or

(ii) Decline to pay checks, ACH transactions, and other types of transactions that overdraw the consumer's account because the consumer has not affirmatively consented to the institution's overdraft service for ATM and one-time debit card transactions.

(3) *Same account terms, conditions, and features.* A financial institution shall provide to consumers who do not affirmatively consent to the institution's overdraft service for ATM and one-time debit card transactions the same account terms, conditions, and features that it provides to consumers who affirmatively consent, except for the overdraft service for ATM and one-time debit card transactions.

(c) *Timing.* (1) *Existing account holders.* For accounts opened prior to July 1, 2010, the financial institution must not assess any fees or charges on a consumer's account on or after August 15, 2010, for paying an ATM or one-time debit card transaction pursuant to the overdraft service, unless the institution has complied with § 1005.17(b)(1) and obtained the consumer's affirmative consent.

(2) *New account holders.* For accounts opened on or after July 1, 2010, the financial institution must comply with § 1005.17(b)(1) and obtain the consumer's affirmative consent before the institution assesses any fee or charge on the consumer's account for paying an ATM or one-time debit card transaction pursuant to the institution's overdraft service.

(d) *Content and format.* The notice required by paragraph (b)(1)(i) of this section shall be substantially similar to Model Form A–9 set forth in Appendix A of this part, include all applicable items in this paragraph, and may not contain any information not specified in or otherwise permitted by this paragraph.

(1) *Overdraft service.* A brief description of the financial institution's overdraft service and the types of transactions for which a fee or charge for paying an overdraft may be imposed, including ATM and one-time debit card transactions.

(2) *Fees imposed.* The dollar amount of any fees or charges assessed by the financial institution for paying an ATM or one-time debit card transaction pursuant to the institution's overdraft service, including any daily or other overdraft fees. If the amount of the fee is determined on the basis of the number of times the consumer has overdrawn the account, the amount of the overdraft, or other factors, the institution must disclose the maximum fee that may be imposed.

(3) *Limits on fees charged.* The maximum number of overdraft fees or charges that may be assessed per day, or, if applicable, that there is no limit.

(4) *Disclosure of opt-in right.* An explanation of the consumer's right to affirmatively consent to the financial institution's payment of overdrafts for ATM and one-time debit card transactions pursuant to the institution's overdraft service, including the methods by which the consumer may consent to the service; and

(5) *Alternative plans for covering overdrafts.* If the institution offers a line of credit subject to Regulation Z (12 CFR part 1026) or a service that transfers funds from another account of the consumer held at the institution to cover overdrafts, the institution must state that fact. An institution may, but is not required to, list additional alternatives for the payment of overdrafts.

(6) *Permitted modifications and additional content.* If applicable, the institution may modify the content required by § 1005.17(d) to indicate that the consumer has the right to opt into, or opt out of, the payment of overdrafts under the institution's overdraft service for other types of transactions, such as checks, ACH transactions, or automatic bill payments; to provide a means for the consumer to exercise this choice; and to disclose the associated returned item fee and that additional merchant fees may apply. The institution may also disclose the consumer's right to revoke consent. For notices provided to consumers who have opened accounts prior to July 1, 2010, the financial institution may describe the institution's overdraft service with respect to ATM and one-time debit card

transactions with a statement such as ''After August 15, 2010, we will not authorize and pay overdrafts for the following types of transactions unless you ask us to (see below).''

(e) *Joint relationships.* If two or more consumers jointly hold an account, the financial institution shall treat the affirmative consent of any of the joint consumers as affirmative consent for that account. Similarly, the financial institution shall treat a revocation of affirmative consent by any of the joint consumers as revocation of consent for that account.

(f) *Continuing right to opt in or to revoke the opt-in.* A consumer may affirmatively consent to the financial institution's overdraft service at any time in the manner described in the notice required by paragraph (b)(1)(i) of this section. A consumer may also revoke consent at any time in the manner made available to the consumer for providing consent. A financial institution must implement a consumer's revocation of consent as soon as reasonably practicable.

(g) *Duration and revocation of opt-in.* A consumer's affirmative consent to the institution's overdraft service is effective until revoked by the consumer, or unless the financial institution terminates the service.

§ 1005.18 Requirements for financial institutions offering payroll card accounts.

(a) *Coverage.* A financial institution shall comply with all applicable requirements of the Act and this part with respect to payroll card accounts except as provided in this section.

(b) *Alternative to periodic statements.* (1) A financial institution need not furnish periodic statements required by § 1005.9(b) if the institution makes available to the consumer:

(i) The consumer's account balance, through a readily available telephone line;

(ii) An electronic history of the consumer's account transactions, such as through a Web site, that covers at least 60 days preceding the date the consumer electronically accesses the account; and

(iii) A written history of the consumer's account transactions that is provided promptly in response to an oral or written request and that covers at least 60 days preceding the date the financial institution receives the consumer's request.

(2) The history of account transactions provided under paragraphs (b)(1)(ii) and (iii) of this section must include the information set forth in § 1005.9(b).

(c) *Modified requirements.* A financial institution that provides information under paragraph (b) of this section, shall comply with the following:

(1) *Initial disclosures.* The financial institution shall modify the disclosures under § 1005.7(b) by disclosing:

(i) *Account information.* A telephone number that the consumer may call to obtain the account balance, the means by which the consumer can obtain an electronic account history, such as the address of a Web site, and a summary of the consumer's right to receive a written account history upon request (in place of the summary of the right to receive a periodic statement required by § 1005.7(b)(6)), including a telephone number to call to request a history. The disclosure required by this paragraph (c)(1)(i) may be made by providing a notice substantially similar to the notice contained in paragraph A–7(a) in appendix A of this part.

(ii) *Error resolution.* A notice concerning error resolution that is substantially similar to the notice contained in paragraph A–7(b) in appendix A of this part, in place of the notice required by § 1005.7(b)(10).

(2) *Annual error resolution notice.* The financial institution shall provide an annual notice concerning error resolution that is substantially similar to the notice contained in paragraph A–7(b) in appendix A of this part, in place of the notice required by § 1005.8(b). Alternatively, a financial institution may include on or with each electronic and written history provided in accordance with § 1005.18(b)(1), a notice substantially similar to the abbreviated notice for periodic statements contained in paragraph A–3(b) in appendix A of this part, modified as necessary to reflect the error resolution provisions set forth in this section.

(3) *Limitations on liability.* (i) For purposes of § 1005.6(b)(3), the 60-day period for reporting any unauthorized transfer shall begin on the earlier of:

(A) The date the consumer electronically accesses the consumer's account under paragraph (b)(1)(ii) of this section, provided that the electronic history made available to the consumer reflects the transfer; or

(B) The date the financial institution sends a written history of the consumer's account transactions requested by the consumer under paragraph (b)(1)(iii) of this section in which the unauthorized transfer is first reflected.

(ii) A financial institution may comply with paragraph (c)(3)(i) of this section by limiting the consumer's liability for an unauthorized transfer as provided under § 1005.6(b)(3) for any transfer reported by the consumer within 120 days after the transfer was credited or debited to the consumer's account.

(4) *Error resolution.* (i) The financial institution shall comply with the requirements of § 1005.11 in response to an oral or written notice of an error from the consumer that is received by the earlier of:

(A) Sixty days after the date the consumer electronically accesses the consumer's account under paragraph (b)(1)(ii) of this section, provided that the electronic history made available to the consumer reflects the alleged error; or

(B) Sixty days after the date the financial institution sends a written history of the consumer's account transactions requested by the consumer under paragraph (b)(1)(iii) of this section in which the alleged error is first reflected.

(ii) In lieu of following the procedures in paragraph (c)(4)(i) of this section, a financial institution complies with the requirements for resolving errors in § 1005.11 if it investigates any oral or written notice of an error from the consumer that is received by the institution within 120 days after the transfer allegedly in error was credited or debited to the consumer's account.

§ 1005.20 Requirements for gift cards and gift certificates.

(a) *Definitions.* For purposes of this section, except as excluded under paragraph (b), the following definitions apply:

(1) ''Gift certificate'' means a card, code, or other device that is:

(i) Issued on a prepaid basis primarily for personal, family, or household purposes to a consumer in a specified amount that may not be increased or reloaded in exchange for payment; and

(ii) Redeemable upon presentation at a single merchant or an affiliated group of merchants for goods or services.

(2) ''Store gift card'' means a card, code, or other device that is:

(i) Issued on a prepaid basis primarily for personal, family, or household purposes to a consumer in a specified amount, whether or not that amount may be increased or reloaded, in exchange for payment; and

(ii) Redeemable upon presentation at a single merchant or an affiliated group of merchants for goods or services.

(3) ''General-use prepaid card'' means a card, code, or other device that is:

(i) Issued on a prepaid basis primarily for personal, family, or household purposes to a consumer in a specified amount, whether or not that amount may be increased or reloaded, in exchange for payment; and

(ii) Redeemable upon presentation at multiple, unaffiliated merchants for goods or services, or usable at automated teller machines.

(4) ''Loyalty, award, or promotional gift card'' means a card, code, or other device that:

(i) Is issued on a prepaid basis primarily for personal, family, or household purposes to a consumer in connection with a loyalty, award, or promotional program;

(ii) Is redeemable upon presentation at one or more merchants for goods or services, or usable at automated teller machines; and

(iii) Sets forth the following disclosures, as applicable:

(A) A statement indicating that the card, code, or other device is issued for loyalty, award, or promotional purposes, which must be included on the front of the card, code, or other device;

(B) The expiration date for the underlying funds, which must be included on the front of the card, code, or other device;

(C) The amount of any fees that may be imposed in connection with the card, code, or other device, and the conditions under which they may be imposed, which must be provided on or with the card, code, or other device; and

(D) A toll-free telephone number and, if one is maintained, a Web site, that a consumer may use to obtain fee information, which must be included on the card, code, or other device.

(5) *Dormancy or inactivity fee.* The terms ''dormancy fee'' and ''inactivity fee'' mean a fee for non-use of or inactivity on a gift certificate, store gift card, or general-use prepaid card.

(6) *Service fee.* The term ''service fee'' means a periodic fee for holding or use of a gift certificate, store gift card, or general-use prepaid card. A periodic fee includes any fee that may be imposed on a gift certificate, store gift card, or general-use prepaid card from time to time for holding or using the certificate or card.

(7) *Activity.* The term ''activity'' means any action that results in an increase or decrease of the funds underlying a certificate or card, other than the imposition of a fee, or an adjustment due to an error or a reversal of a prior transaction.

(b) *Exclusions.* The terms ''gift certificate,'' ''store gift card,'' and ''general-use prepaid card'', as defined in paragraph (a) of this section, do not include any card, code, or other device that is:

(1) Useable solely for telephone services;

(2) Reloadable and not marketed or labeled as a gift card or gift certificate. For purposes of this paragraph (b)(2), the term ''reloadable'' includes a temporary non-reloadable card issued solely in connection with a reloadable card, code, or other device;

(3) A loyalty, award, or promotional gift card;

(4) Not marketed to the general public;

(5) Issued in paper form only; or

(6) Redeemable solely for admission to events or venues at a particular location or group of affiliated locations, or to obtain goods or services in conjunction with admission to such events or venues, either at the event or venue or at specific locations affiliated with and in geographic proximity to the event or venue.

(c) *Form of disclosures* (1) *Clear and conspicuous.* Disclosures made under this section must be clear and conspicuous. The disclosures may contain commonly accepted or readily understandable abbreviations or symbols.

(2) *Format.* Disclosures made under this section generally must be provided to the consumer in written or electronic form. Except for the disclosures in paragraphs (c)(3) and (h)(2) of this section, written and electronic disclosures made under this section must be in a retainable form. Only disclosures provided under paragraphs (c)(3) and (h)(2) may be given orally.

(3) *Disclosures prior to purchase.* Before a gift certificate, store gift card, or general-use prepaid card is purchased, a person that issues or sells such certificate or card must disclose to the consumer the information required by paragraphs (d)(2), (e)(3), and (f)(1) of this section. The fees and terms and conditions of expiration that are required to be disclosed prior to purchase may not be changed after purchase.

(4) *Disclosures on the certificate or card.* Disclosures required by paragraphs (a)(4)(iii), (d)(2), (e)(3), and (f)(2) of this section must be made on the certificate or card, or in the case of a loyalty, award, or promotional gift card, on the card, code, or other device. A disclosure made in an accompanying terms and conditions document, on packaging surrounding a certificate or card, or on a sticker or other label affixed to the certificate or card does not constitute a disclosure on the certificate or card. For an electronic certificate or card, disclosures must be provided electronically on the certificate or card provided to the consumer. An issuer that provides a code or confirmation to a consumer orally must provide to the consumer a written or electronic copy of the code or confirmation promptly, and the applicable disclosures must be provided on the written copy of the code or confirmation.

(d) *Prohibition on imposition of fees or charges.* No person may impose a dormancy, inactivity, or service fee with respect to a gift certificate, store gift card, or general-use prepaid card, unless:

(1) There has been no activity with respect to the certificate or card, in the one-year period ending on the date on which the fee is imposed;

(2) The following are stated, as applicable, clearly and conspicuously on the gift certificate, store gift card, or general-use prepaid card:

(i) The amount of any dormancy, inactivity, or service fee that may be charged;

(ii) How often such fee may be assessed; and

(iii) That such fee may be assessed for inactivity; and

(3) Not more than one dormancy, inactivity, or service fee is imposed in any given calendar month.

(e) *Prohibition on sale of gift certificates or cards with expiration dates.* No person may sell or issue a gift certificate, store gift card, or general-use prepaid card with an expiration date, unless:

(1) The person has established policies and procedures to provide consumers with a reasonable opportunity to purchase a certificate or card with at least five years remaining until the certificate or card expiration date;

(2) The expiration date for the underlying funds is at least the later of:

(i) Five years after the date the gift certificate was initially issued, or the date on which funds were last loaded to a store gift card or general-use prepaid card; or

(ii) The certificate or card expiration date, if any;

(3) The following disclosures are provided on the certificate or card, as applicable:

(i) The expiration date for the underlying funds or, if the underlying funds do not expire, that fact;

(ii) A toll-free telephone number and, if one is maintained, a Web site that a consumer may use to obtain a replacement certificate or card after the certificate or card expires if the underlying funds may be available; and

(iii) Except where a non-reloadable certificate or card bears an expiration date that is at least seven years from the date of manufacture, a statement, disclosed with equal prominence and in close proximity to the certificate or card expiration date, that:

(A) The certificate or card expires, but the underlying funds either do not expire or expire later than the certificate or card, and;

(B) The consumer may contact the issuer for a replacement card; and

(4) No fee or charge is imposed on the cardholder for replacing the gift certificate, store gift card, or general-use prepaid card or for providing the certificate or card holder with the remaining balance in some other manner prior to the funds expiration date, unless such certificate or card has been lost or stolen.

(f) *Additional disclosure requirements for gift certificates or cards.* The following disclosures must be provided in connection with a gift certificate, store gift card, or general-use prepaid card, as applicable:

(1) *Fee disclosures.* For each type of fee that may be imposed in connection with the certificate or card (other than a dormancy, inactivity, or service fee subject to the disclosure requirements under paragraph (d)(2) of this section), the following information must be provided on or with the certificate or card:

(i) The type of fee;

(ii) The amount of the fee (or an explanation of how the fee will be determined); and

(iii) The conditions under which the fee may be imposed.

(2) *Telephone number for fee information.* A toll-free telephone number and, if one is maintained, a Web site, that a consumer may use to obtain information about fees described in paragraphs (d)(2) and (f)(1) of this section must be disclosed on the certificate or card.

(g) *Compliance dates.* (1) *Effective date for gift certificates, store gift cards, and general-use prepaid cards.* Except as provided in paragraph (h) of this section, the requirements of this section apply to any gift certificate, store gift card, or general-use prepaid card sold to a consumer on or after August 22, 2010, or provided to a consumer as a replacement for such certificate or card.

(2) *Effective date for loyalty, award, or promotional gift cards.* The requirements in paragraph (a)(4)(iii) of this section apply to any card, code, or other device provided to a consumer in connection with a loyalty, award, or promotional program if the period of eligibility for such program began on or after August 22, 2010.

(h) *Temporary exemption.* (1) *Delayed mandatory compliance date.* For any gift certificate, store gift card, or general-use prepaid card produced prior to April 1, 2010, the mandatory compliance date of the requirements of paragraphs (c)(3), (d)(2), (e)(1), (e)(3), and (f) of this section is January 31, 2011, provided that an issuer of such certificate or card:

(i) Complies with all other provisions of this section;

(ii) Does not impose an expiration date with respect to the funds underlying such certificate or card;

(iii) At the consumer's request, replaces such certificate or card if it has funds remaining at no cost to the consumer; and

(iv) Satisfies the requirements of paragraph (h)(2) of this section.

(2) *Additional disclosures.* Issuers relying on the delayed effective date in § 1005.20(h)(1) must disclose through in-store signage, messages during customer service calls, Web sites, and general advertising, that:

(i) The underlying funds of such certificate or card do not expire;

(ii) Consumers holding such certificate or card have a right to a free replacement certificate or card, which must be accompanied by the packaging and materials typically associated with such certificate or card; and

(iii) Any dormancy, inactivity, or service fee for such certificate or card that might otherwise be charged will not be charged if such fees do not comply with section 916 of the Act.

(3) *Expiration of additional disclosure requirements.* The disclosures in paragraph (h)(2) of this section:

(i) Are not required to be provided on or after January 31, 2011, with respect to in-store signage and general advertising.

(ii) Are not required to be provided on or after January 31, 2013, with respect to messages during customer service calls and Web sites.

Appendix A to Part 1005—Model Disclosure Clauses and Forms

A–1—Model Clauses for Unsolicited Issuance (§ 1005.5(b)(2))
A–2—Model Clauses for Initial Disclosures (§ 1005.7(b))
A–3—Model Forms for Error Resolution Notice (§§ 1005.7(b)(10) and 1005.8(b))
A–4—Model Form for Service-Providing Institutions (§ 1005.14(b)(1)(ii))
A–5—Model Forms for Government Agencies (§ 1005.15(d)(1) and (2))
A–6—Model Clauses for Authorizing One-Time Electronic Fund Transfers Using Information From a Check (§ 1005.3(b)(2))
A–7—Model Clauses for Financial Institutions Offering Payroll Card Accounts (§ 1005.18(c))
A–8—Model Clause for Electronic Collection of Returned Item Fees (§ 1005.3(b)(3))
A–9—Model Consent Form for Overdraft Services (§ 1005.17)

A–1—Model Clauses for Unsolicited Issuance (§ 1005.5(b)(2))

(a) *Accounts using cards.* You cannot use the enclosed card to transfer money into or out of your account until we have validated it. If you do not want to use the card, please (destroy it at once by cutting it in half).

[Financial institution may add validation instructions here.]

(b) *Accounts using codes.* You cannot use the enclosed code to transfer money into or out of your account until we have validated it. If you do not want to use the code, please (destroy this notice at once).

[Financial institution may add validation instructions here.]

A–2—Model Clauses for Initial Disclosures (§ 1005.7(b))

(a) *Consumer Liability (§ 1005.7(b)(1)).*

(Tell us AT ONCE if you believe your [card] [code] has been lost or stolen, or if you believe that an electronic fund transfer has been made without your permission using information from your check. Telephoning is the best way of keeping your possible losses down. You could lose all the money in your account (plus your maximum overdraft line of credit). If you tell us within 2 business days after you learn of the loss or theft of your [card] [code], you can lose no more than $50 if someone used your [card][code] without your permission.)

If you do NOT tell us within 2 business days after you learn of the loss or theft of your [card] [code], and we can prove we could have stopped someone from using your [card] [code] without your permission if you had told us, you could lose as much as $500.

Also, if your statement shows transfers that you did not make, including those made by card, code or other means, tell us at once. If you do not tell us within 60 days after the statement was mailed to you, you may not get back any money you lost after the 60 days if we can prove that we could have stopped someone from taking the money if you had told us in time. If a good reason (such as a long trip or a hospital stay) kept you from telling us, we will extend the time periods.

(b) *Contact in event of unauthorized transfer (§ 1005.7(b)(2)).* If you believe your [card] [code] has been lost or stolen, call: [Telephone number] or write: [Name of person or office to be notified] [Address].

You should also call the number or write to the address listed above if you believe a transfer has been made using the information from your check without your permission.

(c) *Business days (§ 1005.7(b)(3)).* For purposes of these disclosures, our business days are (Monday through Friday) (Monday through Saturday) (any day including Saturdays and Sundays). Holidays are (not) included.

(d) *Transfer types and limitations (§ 1005.7(b)(4))* (1) *Account access.* You may use your [card][code] to:

(i) Withdraw cash from your [checking] [or] [savings] account.

(ii) Make deposits to your [checking] [or] [savings] account.

(iii) Transfer funds between your checking and savings accounts whenever you request.

(iv) Pay for purchases at places that have agreed to accept the [card] [code].

(v) Pay bills directly [by telephone] from your [checking] [or] [savings] account in the amounts and on the days you request.

Some of these services may not be available at all terminals.

(2) *Electronic check conversion.* You may authorize a merchant or other payee to make a one-time electronic payment from your checking account using information from your check to:

(i) Pay for purchases.

(ii) Pay bills.

(3) *Limitations on frequency of transfers.*(i) You may make only [insert number, *e.g.,* 3] cash withdrawals from our terminals each [insert time period, *e.g.,* week].

(ii) You can use your telephone bill-payment service to pay [insert number] bills each [insert time period] [telephone call].

(iii) You can use our point-of-sale transfer service for [insert number] transactions each [insert time period].

(iv) For security reasons, there are limits on the number of transfers you can make using our [terminals] [telephone bill-payment service] [point-of-sale transfer service].

(4) *Limitations on dollar amounts of transfers* (i) You may withdraw up to [insert dollar amount] from our terminals each [insert time period] time you use the [card] [code].

(ii) You may buy up to [insert dollar amount] worth of goods or services each [insert time period] time you use the [card] [code] in our point-of-sale transfer service.

(e) *Fees (§ 1005.7(b)(5))* (1) *Per transfer charge.* We will charge you [insert dollar amount] for each transfer you make using our [automated teller machines] [telephone bill-payment service] [point-of-sale transfer service].

(2) *Fixed charge.* We will charge you [insert dollar amount] each [insert time period] for our [automated teller machine service] [telephone bill-payment service] [point-of-sale transfer service].

(3) *Average or minimum balance charge.* We will only charge you for using our [automated teller machines] [telephone bill-payment service] [point-of-sale transfer service] if the [average] [minimum] balance in your [checking account] [savings account] [accounts] falls below [insert dollar amount]. If it does, we will charge you [insert dollar amount] each [transfer] [insert time period].

(f) *Confidentiality (§ 1005.7(b)(9)).* We will disclose information to third parties about your account or the transfers you make:

(i) Where it is necessary for completing transfers, or

(ii) In order to verify the existence and condition of your account for a third party, such as a credit bureau or merchant, or

(iii) In order to comply with government agency or court orders, or

(iv) If you give us your written permission.

(g) *Documentation (§ 1005.7(b)(6))* (1) *Terminal transfers.* You can get a receipt at the time you make any transfer to or from your account using one of our [automated teller machines] [or] [point-of-sale terminals].

(2) *Preauthorized credits.* If you have arranged to have direct deposits made to your account at least once every 60 days from the same person or company, (we will let you know if the deposit is [not] made.) [the person or company making the deposit will tell you every time they send us the money] [you can call us at (insert telephone number) to find out whether or not the deposit has been made].

(3) *Periodic statements.* You will get a [monthly] [quarterly] account statement (unless there are no transfers in a particular month. In any case you will get the statement at least quarterly).

(4) *Passbook account where the only possible electronic fund transfers are preauthorized credits.* If you bring your passbook to us, we will record any electronic deposits that were made to your account since the last time you brought in your passbook.

(h) *Preauthorized payments (§ 1005.7(b)(6), (7) and (8); § 1005.10(d))* (1) *Right to stop payment and procedure for doing so.* If you have told us in advance to make regular payments out of your account, you can stop any of these payments. Here's how:

Call us at [insert telephone number], or write us at [insert address], in time for us to receive your request 3 business days or more before the payment is scheduled to be made. If you call, we may also require you to put your request in writing and get it to us within 14 days after you call. (We will charge you [insert amount] for each stop-payment order you give.)

(2) *Notice of varying amounts.* If these regular payments may vary in amount, [we] [the person you are going to pay] will tell you, 10 days before each payment, when it will be made and how much it will be. (You may choose instead to get this notice only when the payment would differ by more than a certain amount from the previous payment, or when the amount would fall outside certain limits that you set.)

(3) *Liability for failure to stop payment of preauthorized transfer.* If you order us to stop one of these payments 3 business days or more before the transfer is scheduled, and we do not do so, we will be liable for your losses or damages.

(i) *Financial institution's liability (§ 1005.7(b)(8)).* If we do not complete a transfer to or from your account on time or in the correct amount according to our agreement with you, we will be liable for your losses or damages. However, there are some exceptions. We will not be liable, for instance:

(1) If, through no fault of ours, you do not have enough money in your account to make the transfer.

(2) If the transfer would go over the credit limit on your overdraft line.

(3) If the automated teller machine where you are making the transfer does not have enough cash.

(4) If the [terminal] [system] was not working properly and you knew about the breakdown when you started the transfer.

(5) If circumstances beyond our control (such as fire or flood) prevent the transfer, despite reasonable precautions that we have taken.

(6) There may be other exceptions stated in our agreement with you.

(j) *ATM fees (§ 1005.7(b)(11)).* When you use an ATM not owned by us, you may be charged a fee by the ATM operator [or any network used] (and you may be charged a fee for a balance inquiry even if you do not complete a fund transfer).

A–3—Model Forms for Error Resolution Notice (§§ 1005.7(b)(10) and 1005.8(b))

(a) *Initial and annual error resolution notice (§§ 1005.7(b)(10) and 1005.8(b)).*

In Case of Errors or Questions About Your Electronic Transfers Telephone us at [insert telephone number] Write us at [insert address] [or email us at [insert email address]] as soon as you can, if you think your statement or receipt is wrong or if you need more information about a transfer listed on the statement or receipt. We must hear from you no later than 60 days after we sent the FIRST statement on which the problem or error appeared.

(1) Tell us your name and account number (if any).

(2) Describe the error or the transfer you are unsure about, and explain as clearly as you can why you believe it is an error or why you need more information.

(3) Tell us the dollar amount of the suspected error.

If you tell us orally, we may require that you send us your complaint or question in writing within 10 business days.

We will determine whether an error occurred within 10 business days after we hear from you and will correct any error promptly. If we need more time, however, we may take up to 45 days to investigate your complaint or question. If we decide to do this, we will credit your account within 10 business days for the amount you think is in error, so that you will have the use of the money during the time it takes us to complete our investigation. If we ask you to put your complaint or question in writing and we do not receive it within 10 business days, we may not credit your account.

For errors involving new accounts, point-of-sale, or foreign-initiated transactions, we may take up to 90 days to investigate your complaint or question. For new accounts, we may take up to 20 business days to credit your account for the amount you think is in error.

We will tell you the results within three business days after completing our investigation. If we decide that there was no error, we will send you a written explanation. You may ask for copies of the documents that we used in our investigation.

(b) *Error resolution notice on periodic statements (§ 1005.8(b)).*

In Case of Errors or Questions About Your Electronic Transfers Telephone us at [insert telephone number] or Write us at [insert address] as soon as you can, if you think your statement or receipt is wrong or if you need more information about a transfer on the statement or receipt. We must hear from you no later than 60 days after we sent you the FIRST statement on which the error or problem appeared.

(1) Tell us your name and account number (if any).

(2) Describe the error or the transfer you are unsure about, and explain as clearly as you can why you believe it is an error or why you need more information.

(3) Tell us the dollar amount of the suspected error.

We will investigate your complaint and will correct any error promptly. If we take more than 10 business days to do this, we will credit your account for the amount you think is in error, so that you will have the use of the money during the time it takes us to complete our investigation.

A–4—Model Form for Service-Providing Institutions (§ 1005.14(b)(1)(ii))

ALL QUESTIONS ABOUT TRANSACTIONS MADE WITH YOUR (NAME OF CARD) CARD MUST BE DIRECTED TO US (NAME OF SERVICE PROVIDER), AND NOT TO THE BANK OR OTHER FINANCIAL INSTITUTION WHERE YOU HAVE YOUR ACCOUNT. We are responsible for the [name of service] service and for resolving any errors in transactions made with your [name of card] card.

We will not send you a periodic statement listing transactions that you make using your [name of card] card. The transactions will appear only on the statement issued by your bank or other financial institution. SAVE THE RECEIPTS YOU ARE GIVEN WHEN YOU USE YOUR [NAME OF CARD] CARD, AND CHECK THEM AGAINST THE ACCOUNT STATEMENT YOU RECEIVE FROM YOUR BANK OR OTHER FINANCIAL INSTITUTION. If you have any questions about one of these transactions, call or write us at [telephone number and address] [the telephone number and address indicated below].

IF YOUR [NAME OF CARD] CARD IS LOST OR STOLEN, NOTIFY US AT ONCE by calling or writing to us at [telephone number and address].

A–5—Model Forms for Government Agencies (§ 1005.15(d)(1) and (2))

(a) *Disclosure by government agencies of information about obtaining account balances and account histories (§ 1005.15(d)(1)(i) and (ii)).*

You may obtain information about the amount of benefits you have remaining by calling [telephone number]. That information is also available [on the receipt you get when you make a transfer with your card at (an ATM)(a POS terminal)][when you make a balance inquiry at an ATM][when you make a balance inquiry at specified locations].

You also have the right to receive a written summary of transactions for the 60 days preceding your request by calling [telephone number]. [Optional: Or you may request the summary by contacting your caseworker.]

(b) *Disclosure of error resolution procedures for government agencies that do not provide periodic statements (§ 1005.15(d)(1)(iii) and (d)(2)).*

In Case of Errors or Questions About Your Electronic Transfers Telephone us at [telephone number] Write us at [insert address] [or email us at [insert email address]] as soon as you can, if you think an error has occurred in your [EBT][agency's name for program] account. We must hear from you no later than 60 days after you learn of the error. You will need to tell us:

- Your name and [case] [file] number.
- Why you believe there is an error, and the dollar amount involved.
- Approximately when the error took place.

If you tell us orally, we may require that you send us your complaint or question in writing within 10 business days.

We will determine whether an error occurred within 10 business days after we hear from you and will correct any error promptly. If we need more time, however, we may take up to 45 days to investigate your complaint or question. If we decide to do this, we will credit your account within 10 business days for the amount you think is in error, so that you will have the use of the money during the time it takes us to complete our investigation. If we ask you to put your complaint or question in writing and we do not receive it within 10 business days, we may not credit your account.

For errors involving new accounts, point-of-sale, or foreign-initiated transactions, we may take up to 90 days to investigate your complaint or question. For new accounts, we may take up to 20 business days to credit your account for the amount you think is in error.

We will tell you the results within three business days after completing our investigation. If we decide that there was no error, we will send you a written explanation. You may ask for copies of the documents that we used in our investigation.

If you need more information about our error resolution procedures, call us at [telephone number][the telephone number shown above].

A–6—Model Clauses for Authorizing One-Time Electronic Fund Transfers Using Information From a Check (§ 1005.3(b)(2))

(a) Notice About Electronic Check Conversion.

When you provide a check as payment, you authorize us either to use information from your check to make a one-time electronic fund transfer from your account or to process the payment as a check transaction.

(b) Alternative Notice About Electronic Check Conversion (Optional).

When you provide a check as payment, you authorize us to use information from your check to make a one-time electronic fund transfer from your account. In certain circumstances, such as for technical or processing reasons, we may process your payment as a check transaction.

[*Specify other circumstances (at payee's option).*]

(c) Notice For Providing Additional Information About Electronic Check Conversion.

When we use information from your check to make an electronic fund transfer, funds may be withdrawn from your account as soon as the same day [you make] [we receive] your payment[, and you will not receive your check back from your financial institution].

A–7—Model Clauses for Financial Institutions Offering Payroll Card Accounts (§ 1005.18(c))

(a) Disclosure by financial institutions of information about obtaining account information for payroll card accounts. § 1005.18(c)(1).

You may obtain information about the amount of money you have remaining in your payroll card account by calling [telephone number]. This information, along with a 60-day history of account transactions, is also available online at [internet address].

You also have the right to obtain a 60-day written history of account transactions by calling [telephone number], or by writing us at [address].

(b) Disclosure of error-resolution procedures for financial institutions that provide alternative means of obtaining payroll card account information (§ 1005.18(c)(1)(ii) and (c)(2)).

In Case of Errors or Questions About Your Payroll Card Account Telephone us at [telephone number] or Write us at [address] [or email us at [email address]] as soon as you can, if you think an error has occurred in your payroll card account. We must allow you to report an error until 60 days after the earlier of the date you electronically access your account, if the error could be viewed in your electronic history, or the date we sent the FIRST written history on which the error appeared. You may request a written history of your transactions at any time by calling us at [telephone number] or writing us at [address]. You will need to tell us:

Your name and [payroll card account] number.

Why you believe there is an error, and the dollar amount involved.

Approximately when the error took place.

If you tell us orally, we may require that you send us your complaint or question in writing within 10 business days.

We will determine whether an error occurred within 10 business days after we hear from you and will correct any error promptly. If we need more time, however, we may take up to 45 days to investigate your complaint or question. If we decide to do this, we will credit your account within 10 business days for the amount you think is in error, so that you will have the money during the time it takes us to complete our investigation. If we ask you to put your complaint or question in writing and we do not receive it within 10 business days, we may not credit your account.

For errors involving new accounts, point-of-sale, or foreign-initiated transactions, we may take up to 90 days to investigate your complaint or question. For new accounts, we may take up to 20 business days to credit your account for the amount you think is in error.

We will tell you the results within three business days after completing our investigation. If we decide that there was no error, we will send you a written explanation.

You may ask for copies of the documents that we used in our investigation.

If you need more information about our error-resolution procedures, call us at [telephone number] [the telephone number shown above] [or visit [internet address]].

A–8—Model Clause for Electronic Collection of Returned Item Fees (§ 1005.3(b)(3))

If your payment is returned unpaid, you authorize [us/name of person collecting the fee electronically] to make a one-time electronic fund transfer from your account to collect a fee of [$_____]. [If your payment

is returned unpaid, you authorize [us/name of person collecting the fee electronically] to make a one-time electronic fund transfer from your account to collect a fee. The fee will be determined [by]/[as follows]: [_____].]

A-9 Model Consent Form for Overdraft Services § 1005.17

What You Need to Know about Overdrafts and Overdraft Fees

An overdraft occurs when you do not have enough money in your account to cover a transaction, but we pay it anyway. We can cover your overdrafts in two different ways:

1. We have standard overdraft practices that come with your account.
2. We also offer overdraft protection plans, such as a link to a savings account, which may be less expensive than our standard overdraft practices. To learn more, ask us about these plans.

This notice explains our standard overdraft practices.

➢ **What are the standard overdraft practices that come with my account?**

We do authorize and pay overdrafts for the following types of transactions:

- Checks and other transactions made using your checking account number
- Automatic bill payments

We do not authorize and pay overdrafts for the following types of transactions unless you ask us to (see below)

- ATM transactions
- Everyday debit card transactions

We pay overdrafts at our discretion, which means we do not guarantee that we will always authorize and pay any type of transaction.

If we do not authorize and pay an overdraft, your transaction will be declined.

➢ **What fees will I be charged if [Institution Name] pays my overdraft?**

Under our standard overdraft practices:

- We will charge you a fee of up to **$30** each time we pay an overdraft.
- Also, if your account is overdrawn for 5 or more consecutive business days, we will charge an additional $5 per day.
- There is no limit on the total fees we can charge you for overdrawing your account.

➢ **What if I want [Institution Name] to authorize and pay overdrafts on my ATM and everyday debit card transactions?**

If you also want us to authorize and pay overdrafts on ATM and everyday debit card transactions, call [telephone number], visit [website], or complete the form below and [present it at a branch][mail it to:

____ I do not want [Institution Name] to authorize and pay overdrafts on my ATM and everyday debit card transactions.

____ I want [Institution Name] to authorize and pay overdrafts on my ATM and everyday debit card transactions.

Printed Name: _____

Date: _____

[Account Number]: _____

Appendix B to Part 1005—[Reserved]

Appendix C to Part 1005—Issuance of Official Interpretations

Official Interpretations

Pursuant to section 916(d) of the Act, the Bureau has designated the Associate Director and other officials of the Division of Research, Markets, and Regulations as officials ''duly authorized'' to issue, at their discretion, official interpretations of this part. Except in unusual circumstances, such interpretations will not be issued separately but will be incorporated in an official commentary to this part, which will be amended periodically.

Requests for Issuance of Official Interpretations

A request for an official interpretation shall be in writing and addressed to the Bureau of Consumer Financial Protection, 1700 G Street NW., Washington, DC 20006. The request shall contain a complete statement of all relevant facts concerning the issue, including copies of all pertinent documents.

Scope of Interpretations

No interpretations will be issued approving financial institutions' forms or statements. This restriction does not apply to forms or statements whose use is required or sanctioned by a government agency.

Supplement I to Part 1005—Official Interpretations

Section 1005.2 Definitions

2(a) Access Device

1. *Examples.* The term ''access device'' includes debit cards, personal identification numbers (PINs), telephone transfer and telephone bill payment codes, and other means that may be used by a consumer to initiate an electronic fund transfer (EFT) to

or from a consumer account. The term does not include magnetic tape or other devices used internally by a financial institution to initiate electronic transfers.

2. *Checks used to capture information.* The term ''access device'' does not include a check or draft used to capture the Magnetic Ink Character Recognition (MICR) encoding to initiate a one-time automated clearinghouse (ACH) debit. For example, if a consumer authorizes a one-time ACH debit from the consumer's account using a blank, partially completed, or fully completed and signed check for the merchant to capture the routing, account, and serial numbers to initiate the debit, the check is not an access device. (Although the check is not an access device under Regulation E, the transaction is nonetheless covered by the regulation. *See* comment 3(b)(1)–1.v.)

2(b) Account

1. *Consumer asset account.* The term ''consumer asset account'' includes:

i. Club accounts, such as vacation clubs. In many cases, however, these accounts are exempt from the regulation under § 1005.3(c)(5) because all electronic transfers to or from the account have been preauthorized by the consumer and involve another account of the consumer at the same institution.

ii. A retail repurchase agreement (repo), which is a loan made to a financial institution by a consumer that is collateralized by government or government-insured securities.

2. *Certain employment-related cards not covered.* The term ''payroll card account'' does not include a card used solely to disburse incentive-based payments (other than commissions which can represent the primary means through which a consumer is paid), such as bonuses, which are unlikely to be a consumer's primary source of salary or other compensation. The term also does not include a card used solely to make disbursements unrelated to compensation, such as petty cash reimbursements or travel per diem payments. Similarly, a payroll card account does not include a card that is used in isolated instances to which an employer typically does not make recurring payments, such as when providing final payments or in emergency situations when other payment methods are unavailable. However, all transactions involving the transfer of funds to or from a payroll card account are covered by the regulation, even if a particular transaction involves payment of a bonus, other incentive-based payment, or reimbursement, or the transaction does not represent a transfer of wages, salary, or other employee compensation.

3. Examples of accounts not covered by Regulation E (12 CFR Part 1005) include:

i. Profit-sharing and pension accounts established under a trust agreement, which are exempt under § 1005.2(b)(2).

ii. Escrow accounts, such as those established to ensure payment of items such as real estate taxes, insurance premiums, or completion of repairs or improvements.

iii. Accounts for accumulating funds to purchase U.S. savings bonds.

Paragraph 2(b)(2)

1. *Bona fide trust agreements.* The term ''bona fide trust agreement'' is not defined by the Act or regulation; therefore, financial institutions must look to state or other applicable law for interpretation.

2. *Custodial agreements.* An account held under a custodial agreement that qualifies as a trust under the Internal Revenue Code, such as an individual retirement account, is considered to be held under a trust agreement for purposes of Regulation E.

2(d) Business Day

1. *Duration.* A business day includes the entire 24-hour period ending at midnight, and a notice required by the regulation is effective even if given outside normal business hours. The regulation does not require, however, that a financial institution make telephone lines available on a 24-hour basis.

2. *Substantially all business functions.* Substantially all business functions include both the public and the back-office operations of the institution. For example, if the offices of an institution are open on Saturdays for handling some consumer transactions (such as deposits, withdrawals, and other teller transactions), but not for performing internal functions (such as investigating account errors), then Saturday is not a business day for that institution. In this case, Saturday does not count toward the business-day standard set by the regulation for reporting lost or stolen access devices, resolving errors, *etc.*

3. *Short hours.* A financial institution may determine, at its election, whether an abbreviated day is a business day. For example, if an institution engages in substantially all business functions until noon on Saturdays instead of its usual 3 p.m. closing, it may consider Saturday a business day.

4. *Telephone line.* If a financial institution makes a telephone line available on Sundays for reporting the loss or theft of an access device, but performs no other business functions, Sunday is not a business day under the substantially all business functions standard.

2(h) Electronic Terminal

1. *Point-of-sale (POS) payments initiated by telephone.* Because the term ''electronic terminal'' excludes a telephone operated by a consumer, a financial institution need not provide a terminal receipt when:

i. A consumer uses a debit card at a public telephone to pay for the call.

ii. A consumer initiates a transfer by a means analogous in function to a telephone, such as by home banking equipment or a facsimile machine.

2. *POS terminals.* A POS terminal that captures data electronically, for debiting or crediting to a consumer's asset account, is an electronic terminal for purposes of Regulation E even if no access device is used to initiate the transaction. *See* § 1005.9 for receipt requirements.

3. *Teller-operated terminals.* A terminal or other computer equipment operated by an employee of a financial institution is not an electronic terminal for purposes of the regulation. However, transfers initiated at such terminals by means of a consumer's access device (using the consumer's PIN, for example) are EFTs and are subject to other requirements of the regulation. If an access device is used only for identification purposes or for determining the account balance, the transfers are not EFTs for purposes of the regulation.

2(k) Preauthorized Electronic Fund Transfer

1. *Advance authorization.* A preauthorized electronic fund transfer under Regulation E is one authorized by the consumer in advance of a transfer that will take place on a recurring basis, at substantially regular intervals, and will require no further action by the consumer to initiate the transfer. In a bill-payment system, for example, if the consumer authorizes a financial institution to make monthly payments to a payee by means of EFTs, and the payments take place without further action by the consumer, the payments are preauthorized EFTs. In contrast, if the consumer must take action each month to initiate a payment (such as by entering instructions on a touch-tone telephone or home computer), the payments are not preauthorized EFTs.

2(m) Unauthorized Electronic Fund Transfer

1. *Transfer by institution's employee.* A consumer has no liability for erroneous or fraudulent transfers initiated by an employee of a financial institution.

2. *Authority.* If a consumer furnishes an access device and grants authority to make transfers to a person (such as a family member or co-worker) who exceeds the authority given, the consumer is fully liable for the transfers unless the consumer has notified the financial institution that transfers by that person are no longer authorized.

3. *Access device obtained through robbery or fraud.* An unauthorized EFT includes a transfer initiated by a person who obtained the access device from the consumer through fraud or robbery.

4. *Forced initiation.* An EFT at an ATM is an unauthorized transfer if the consumer has been induced by force to initiate the transfer.

5. *Reversal of direct deposits.* The reversal of a direct deposit made in error is not an unauthorized EFT when it involves:

i. A credit made to the wrong consumer's account;

ii. A duplicate credit made to a consumer's account; or

iii. A credit in the wrong amount (for example, when the amount credited to the consumer's account differs from the amount in the transmittal instructions).

Section 1005.3 Coverage

3(a) General

1. *Accounts covered.* The requirements of the regulation apply only to an account for which an agreement for EFT services to or from the account has been entered into between:

i. The consumer and the financial institution (including an account for which an access device has been issued to the consumer, for example);

ii. The consumer and a third party (for preauthorized debits or credits, for example),

when the account-holding institution has received notice of the agreement and the fund transfers have begun.

2. *Automated clearing house (ACH) membership.* The fact that membership in an ACH requires a financial institution to accept EFTs to accounts at the institution does not make every account of that institution subject to the regulation.

3. *Foreign applicability.* Regulation E applies to all persons (including branches and other offices of foreign banks located in the United States) that offer EFT services to residents of any state, including resident aliens. It covers any account located in the United States through which EFTs are offered to a resident of a state. This is the case whether or not a particular transfer takes place in the United States and whether or not the financial institution is chartered in the United States or a foreign country. The regulation does not apply to a foreign branch of a U.S. bank unless the EFT services are offered in connection with an account in a state as defined in § 1005.2(l).

3(b) Electronic Fund Transfer

3(b)(1) Definition

1. *Fund transfers covered.* The term ''electronic fund transfer'' includes:

i. A deposit made at an ATM or other electronic terminal (including a deposit in cash or by check) provided a specific agreement exists between the financial institution and the consumer for EFTs to or from the account to which the deposit is made.

ii. A transfer sent via ACH. For example, social security benefits under the U.S. Treasury's direct-deposit program are covered, even if the listing of payees and payment amounts reaches the account-holding institution by means of a computer printout from a correspondent bank.

iii. A preauthorized transfer credited or debited to an account in accordance with instructions contained on magnetic tape, even if the financial institution holding the account sends or receives a composite check.

iv. A transfer from the consumer's account resulting from a debit-card transaction at a merchant location, even if no electronic terminal is involved at the time of the transaction, if the consumer's asset account is subsequently debited for the amount of the transfer.

v. A transfer via ACH where a consumer has provided a check to enable the merchant or other payee to capture the routing, account, and serial numbers to initiate the transfer, whether the check is blank, partially completed, or fully completed and signed; whether the check is presented at POS or is mailed to a merchant or other payee or lockbox and later converted to an EFT; or whether the check is retained by the consumer, the merchant or other payee, or the payee's financial institution.

vi. A payment made by a bill payer under a bill-payment service available to a consumer via computer or other electronic means, unless the terms of the bill-payment service explicitly state that all payments, or all payments to a particular payee or payees, will be solely by check, draft, or similar paper instrument drawn on the consumer's account, and the payee or payees that will be paid in this manner are identified to the consumer.

2. *Fund transfers not covered.* The term ''electronic fund transfer'' does not include:

i. A payment that does not debit or credit a consumer asset account, such as a payroll allotment to a creditor to repay a credit extension (which is deducted from salary).

ii. A payment made in currency by a consumer to another person at an electronic terminal.

iii. A preauthorized check drawn by the financial institution on the consumer's account (such as an interest or other recurring payment to the consumer or another party), even if the check is computer-generated.

iv. Transactions arising from the electronic collection, presentment, or return of checks through the check collection system, such as through transmission of electronic check images.

3(b)(2) Electronic Fund Transfer Using Information From a Check

1. *Notice at POS not furnished due to inadvertent error.* If the copy of the notice under section 1005.3(b)(2)(ii) for electronic check conversion (ECK) transactions is not provided to the consumer at POS because of a bona fide unintentional error, such as when a terminal printing mechanism jams, no violation results if the payee maintains procedures reasonably adapted to avoid such occurrences.

2. *Authorization to process a transaction as an EFT or as a check.* In order to process a transaction as an EFT, or alternatively as a check, the payee must obtain the consumer's authorization to do so. A payee may, at its option, specify the circumstances under which a check may not be converted to an EFT. *See* model clauses in Appendix A–6.

3. *Notice for each transfer.* Generally, a notice to authorize an electronic check conversion transaction must be provided for each transaction. For example, a consumer must receive a notice that the transaction will be processed as an EFT for each transaction at POS or each time a consumer mails a check in an accounts receivable (ARC) transaction to pay a bill, such as a utility bill, if the payee intends to convert a check received as payment. Similarly, the consumer must receive notice if the payee intends to collect a service fee for insufficient or uncollected funds via an EFT for each transaction whether at POS or if the consumer mails a check to pay a bill. The notice about when funds may be debited from a consumer's account and the non-return of consumer checks by the consumer's financial institution must also be provided for each transaction. However, if in an ARC transaction, a payee provides a coupon book to a consumer, for example, for mortgage loan payments, and the payment dates and amounts are set out in the coupon book, the payee may provide a single notice on the coupon book stating all of the required disclosures under paragraph (b)(2) of this section in order to obtain authorization for each conversion of a check and any debits via EFT to the consumer's account to collect any service fees imposed by the payee for insufficient or uncollected funds in the consumer's account. The notice must be placed on a conspicuous location of the coupon book that a consumer can retain—for example, on the first page, or inside the front cover.

4. *Multiple payments/multiple consumers.* If a merchant or other payee will use information from a consumer's check to initiate an EFT from the consumer's account, notice to a consumer listed on the billing account that a check provided as payment during a single billing cycle or after receiving an invoice or statement will be processed as a one-time EFT or as a check transaction constitutes notice for all checks provided in payment for the billing cycle or the invoice for which notice has been provided, whether the check(s) is submitted by the consumer or someone else. The notice applies to all checks provided in payment for the billing cycle or invoice until the provision of notice on or with the next invoice or statement. Thus, if a merchant or other payee receives a check as payment for the consumer listed on the billing account after providing notice that the check will be processed as a one-time EFT, the authorization from that consumer constitutes authorization to convert any other checks provided for that invoice or statement. Other notices required under this paragraph (b)(2) (for example, to collect a service fee for insufficient or uncollected funds via an EFT) provided to the consumer listed on the billing account also constitutes notice to any other consumer who may provide a check for the billing cycle or invoice.

5. *Additional disclosures about ECK transactions at POS.* When a payee initiates an EFT at POS using information from the consumer's check, and returns the check to the consumer at POS, the payee need not provide a notice to the consumer that the check will not be returned by the consumer's financial institution.

3(b)(3) Collection of Returned Item Fees via Electronic Fund Transfer

1. *Fees imposed by account-holding institution.* The requirement to obtain a consumer's authorization to collect a fee via EFT for the return of an EFT or check unpaid applies only to the person that intends to initiate an EFT to collect the returned item fee from the consumer's account. The authorization requirement does not apply to any fees assessed by the consumer's account-holding financial institution when it returns the unpaid underlying EFT or check or pays the amount of an overdraft.

2. *Accounts receivable transactions.* In an ARC transaction where a consumer sends in a payment for amounts owed (or makes an in-person payment at a biller's physical location, such as when a consumer makes a loan payment at a bank branch or places a payment in a drop box), a person seeking to electronically collect a fee for items returned unpaid must obtain the consumer's authorization to collect the fee in this manner. A consumer authorizes a person to electronically collect a returned item fee when the consumer receives notice, typically on an invoice or statement, that the person may collect the fee through an EFT to the

consumer's account, and the consumer goes forward with the underlying transaction by providing payment. The notice must also state the dollar amount of the fee. However, an explanation of how that fee will be determined may be provided in place of the dollar amount of the fee if the fee may vary due to the amount of the transaction or due to other factors, such as the number of days the underlying transaction is left outstanding. For example, if a state law permits a maximum fee of $30 or 10% of the underlying transaction, whichever is greater, the person collecting the fee may explain how the fee is determined, rather than state a specific dollar amount for the fee.

3. *Disclosure of dollar amount of fee for POS transactions.* The notice provided to the consumer in connection with a POS transaction under § 1005.3(b)(3)(ii) must state the amount of the fee for a returned item if the dollar amount of the fee can be calculated at the time the notice is provided or mailed. For example, if notice is provided to the consumer at the time of the transaction, if the applicable state law sets a maximum fee that may be collected for a returned item based on the amount of the underlying transaction (such as where the amount of the fee is expressed as a percentage of the underlying transaction), the person collecting the fee must state the actual dollar amount of the fee on the notice provided to the consumer. Alternatively, if the amount of the fee to be collected cannot be calculated at the time of the transaction (for example, where the amount of the fee will depend on the number of days a debt continues to be owed), the person collecting the fee may provide a description of how the fee will be determined on both the posted notice as well as on the notice provided at the time of the transaction. However, if the person collecting the fee elects to send the consumer notice after the person has initiated an EFT to collect the fee, that notice must state the amount of the fee to be collected.

4. *Third party providing notice.* The person initiating an EFT to a consumer's account to electronically collect a fee for an item returned unpaid may obtain the authorization and provide the notices required under § 1005.3(b)(3) through third parties, such as merchants.

3(c) Exclusions From Coverage

3(c)(1) Checks

1. *Re-presented checks.* The electronic re-presentment of a returned check is not covered by Regulation E because the transaction originated by check. Regulation E does apply, however, to any fee debited via an EFT from a consumer's account by the payee because the check was returned for insufficient or uncollected funds. The person debiting the fee electronically must obtain the consumer's authorization.

2. *Check used to capture information for a one-time EFT. See* comment 3(b)(1)–1.v.

3(c)(2) Check Guarantee or Authorization

1. *Memo posting.* Under a check guarantee or check authorization service, debiting of the consumer's account occurs when the check or draft is presented for payment. These services are exempt from coverage, even when a temporary hold on the account is memo-posted electronically at the time of authorization.

3(c)(3) Wire or Other Similar Transfers

1. *Fedwire and ACH.* If a financial institution makes a fund transfer to a consumer's account after receiving funds through Fedwire or a similar network, the transfer by ACH is covered by the regulation even though the Fedwire or network transfer is exempt.

2. *Article 4A.* Financial institutions that offer telephone-initiated Fedwire payments are subject to the requirements of UCC section 4A–202, which encourages verification of Fedwire payment orders pursuant to a security procedure established by agreement between the consumer and the receiving bank. These transfers are not subject to Regulation E and the agreement is not considered a telephone plan if the service is offered separately from a telephone bill-payment or other prearranged plan subject to Regulation E. Regulation J of the Board of Governors of the Federal Reserve System (12 CFR part 210) specifies the rules applicable to funds handled by Federal Reserve Banks. To ensure that the rules for all fund transfers through Fedwire are consistent, the Board of Governors used its preemptive authority under UCC section 4A–107 to determine that subpart B of the Board's Regulation J, including the provisions of Article 4A, applies to all fund transfers through Fedwire, even if a portion of the fund transfer is governed by the EFTA. The portion of the fund transfer that is governed by the EFTA is not governed by subpart B of the Board's Regulation J.

3. *Similar fund transfer systems.* Fund transfer systems that are similar to Fedwire include the Clearing House Interbank Payments System (CHIPS), Society for Worldwide Interbank Financial Telecommunication (SWIFT), Telex, and transfers made on the books of correspondent banks.

3(c)(4) Securities and Commodities Transfers

1. *Coverage.* The securities exemption applies to securities and commodities that may be sold by a registered broker-dealer or futures commission merchant, even when the security or commodity itself is not regulated by the Securities and Exchange Commission or the Commodity Futures Trading Commission.

2. *Example of exempt transfer.* The exemption applies to a transfer involving a transfer initiated by a telephone order to a stockbroker to buy or sell securities or to exercise a margin call.

3. *Examples of nonexempt transfers.* The exemption does not apply to a transfer involving:

i. A debit card or other access device that accesses a securities or commodities account such as a money market mutual fund and that the consumer uses for purchasing goods or services or for obtaining cash.

ii. A payment of interest or dividends into the consumer's account (for example, from a brokerage firm or from a Federal Reserve Bank for government securities).

3(c)(5) Automatic Transfers by Account-Holding Institution

1. *Automatic transfers exempted.* The exemption applies to:

i. Electronic debits or credits to consumer accounts for check charges, stop-payment charges, non-sufficient funds (NSF) charges, overdraft charges, provisional credits, error adjustments, and similar items that are initiated automatically on the occurrence of certain events.

ii. Debits to consumer accounts for group insurance available only through the financial institution and payable only by means of an aggregate payment from the institution to the insurer.

iii. EFTs between a thrift institution and its paired commercial bank in the state of Rhode Island, which are deemed under state law to be intra-institutional.

iv. Automatic transfers between a consumer's accounts within the same financial institution, even if the account holders on the two accounts are not identical.

2. *Automatic transfers not exempted.* Transfers between accounts of the consumer at affiliated institutions (such as between a bank and its subsidiary or within a holding company) are not intra-institutional transfers, and thus do not qualify for the exemption.

3(c)(6) Telephone-Initiated Transfers

1. *Written plan or agreement.* A transfer that the consumer initiates by telephone is covered by Regulation E if the transfer is made under a written plan or agreement between the consumer and the financial institution making the transfer. A written statement available to the public or to account holders that describes a service allowing a consumer to initiate transfers by telephone constitutes a plan; for example, a brochure, or material included with periodic statements. The following, however, do not by themselves constitute a written plan or agreement:

i. A hold-harmless agreement on a signature card that protects the institution if the consumer requests a transfer.

ii. A legend on a signature card, periodic statement, or passbook that limits the number of telephone-initiated transfers the consumer can make from a savings account because of reserve requirements under Regulation D of the Board of Governors of the Federal Reserve System (12 CFR part 204).

iii. An agreement permitting the consumer to approve by telephone the rollover of funds at the maturity of an instrument.

2. *Examples of covered transfers.* When a written plan or agreement has been entered into, a transfer initiated by a telephone call from a consumer is covered even though:

i. An employee of the financial institution completes the transfer manually (for example, by means of a debit memo or deposit slip).

ii. The consumer is required to make a separate request for each transfer.

iii. The consumer uses the plan infrequently.

iv. The consumer initiates the transfer via a facsimile machine.

v. The consumer initiates the transfer using a financial institution's audio-response or voice-response telephone system.

3(c)(7) Small Institutions

1. *Coverage.* This exemption is limited to preauthorized transfers; institutions that offer other EFTs must comply with the applicable sections of the regulation as to such services. The preauthorized transfers remain subject to sections 913, 916, and 917 of the Act and § 1005.10(e), and are therefore exempt from UCC Article 4A.

Section 1005.4 General Disclosure Requirements; Jointly Offered Services

4(a) Form of Disclosures

1. *General.* Although no particular rules govern type size, number of pages, or the relative conspicuousness of various terms, the disclosures must be in a clear and readily understandable written form that the consumer may retain. Numbers or codes are considered readily understandable if explained elsewhere on the disclosure form.

2. *Foreign language disclosures.* Disclosures may be made in languages other than English, provided they are available in English upon request.

Section 1005.5 Issuance of Access Devices

1. *Coverage.* The provisions of this section limit the circumstances under which a financial institution may issue an access device to a consumer. Making an additional account accessible through an existing access device is equivalent to issuing an access device and is subject to the limitations of this section.

5(a) Solicited Issuance

Paragraph 5(a)(1)

1. *Joint account.* For a joint account, a financial institution may issue an access device to each account holder if the requesting holder specifically authorizes the issuance.

2. *Permissible forms of request.* The request for an access device may be written or oral (for example, in response to a telephone solicitation by a card issuer).

Paragraph 5(a)(2)

1. *One-for-one rule.* In issuing a renewal or substitute access device, only one renewal or substitute device may replace a previously issued device. For example, only one new card and PIN may replace a card and PIN previously issued. A financial institution may provide additional devices at the time it issues the renewal or substitute access device, however, provided the institution complies with § 1005.5(b). *See* comment 5(b)–5. If the replacement device or the additional device permits either fewer or additional types of electronic fund transfer services, a change-in-terms notice or new disclosures are required.

2. *Renewal or substitution by a successor institution.* A successor institution is an entity that replaces the original financial institution (for example, following a corporate merger or acquisition) or that acquires accounts or assumes the operation of an EFT system.

5(b) Unsolicited Issuance

1. *Compliance.* A financial institution may issue an unsolicited access device (such as the combination of a debit card and PIN) if the institution's ATM system has been programmed not to accept the access device until after the consumer requests and the institution validates the device. Merely instructing a consumer not to use an unsolicited debit card and PIN until after the institution verifies the consumer's identity does not comply with the regulation.

2. *PINs.* A financial institution may impose no liability on a consumer for unauthorized transfers involving an unsolicited access device until the device becomes an ''accepted access device'' under the regulation. A card and PIN combination may be treated as an accepted access device once the consumer has used it to make a transfer.

3. *Functions of PIN.* If an institution issues a PIN at the consumer's request, the issuance may constitute both a way of validating the debit card and the means to identify the consumer (required as a condition of imposing liability for unauthorized transfers).

4. *Verification of identity.* To verify the consumer's identity, a financial institution may use any reasonable means, such as a photograph, fingerprint, personal visit, signature comparison, or personal information about the consumer. However, even if reasonable means were used, if an institution fails to verify correctly the consumer's identity and an imposter succeeds in having the device validated, the consumer is not liable for any unauthorized transfers from the account.

5. *Additional access devices in a renewal or substitution.* A financial institution may issue more than one access device in connection with the renewal or substitution of a previously issued accepted access device, provided that any additional access device (beyond the device replacing the accepted access device) is not validated at the time it is issued, and the institution complies with the other requirements of § 1005.5(b). The institution may, if it chooses, set up the validation procedure such that both the device replacing the previously issued device and the additional device are not validated at the time they are issued, and validation will apply to both devices. If the institution sets up the validation procedure in this way, the institution should provide a clear and readily understandable disclosure to the consumer that both devices are unvalidated and that validation will apply to both devices.

Section 1005.6 Liability of Consumer for Unauthorized Transfers

6(a) Conditions for Liability

1. *Means of identification.* A financial institution may use various means for identifying the consumer to whom the access device is issued, including but not limited to:

i. Electronic or mechanical confirmation (such as a PIN).

ii. Comparison of the consumer's signature, fingerprint, or photograph.

2. *Multiple users.* When more than one access device is issued for an account, the financial institution may, but need not, provide a separate means to identify each user of the account.

6(b) Limitations on Amount of Liability

1. *Application of liability provisions.* There are three possible tiers of consumer liability for unauthorized EFTs depending on the situation. A consumer may be liable for: (1) up to $50; (2) up to $500; or (3) an unlimited amount depending on when the unauthorized EFT occurs. More than one tier may apply to a given situation because each corresponds to a different (sometimes overlapping) time period or set of conditions.

2. *Consumer negligence.* Negligence by the consumer cannot be used as the basis for imposing greater liability than is permissible under Regulation E. Thus, consumer behavior that may constitute negligence under state law, such as writing the PIN on a debit card or on a piece of paper kept with the card, does not affect the consumer's liability for unauthorized transfers. (However, refer to comment 2(m)–2 regarding termination of the authority of given by the consumer to another person.)

3. *Limits on liability.* The extent of the consumer's liability is determined solely by the consumer's promptness in reporting the loss or theft of an access device. Similarly, no agreement between the consumer and an institution may impose greater liability on the consumer for an unauthorized transfer than the limits provided in Regulation E.

6(b)(1) Timely Notice Given

1. *$50 limit applies.* The basic liability limit is $50. For example, the consumer's card is lost or stolen on Monday and the consumer learns of the loss or theft on Wednesday. If the consumer notifies the financial institution within two business days of learning of the loss or theft (by midnight Friday), the consumer's liability is limited to $50 or the amount of the unauthorized transfers that occurred before notification, whichever is less.

2. *Knowledge of loss or theft of access device.* The fact that a consumer has received a periodic statement that reflects unauthorized transfers may be a factor in determining whether the consumer had knowledge of the loss or theft, but cannot be deemed to represent conclusive evidence that the consumer had such knowledge.

3. *Two business day rule.* The two business day period does not include the day the consumer learns of the loss or theft or any day that is not a business day. The rule is calculated based on two 24-hour periods, without regard to the financial institution's business hours or the time of day that the consumer learns of the loss or theft. For example, a consumer learns of the loss or theft at 6 p.m. on Friday. Assuming that Saturday is a business day and Sunday is not, the two business day period begins on Saturday and expires at 11:59 p.m. on Monday, not at the end of the financial institution's business day on Monday.

6(b)(2) Timely Notice Not Given

1. *$500 limit applies.* The second tier of liability is $500. For example, the consumer's card is stolen on Monday and the consumer learns of the theft that same day. The consumer reports the theft on Friday. The $500 limit applies because the consumer failed to notify the financial institution

within two business days of learning of the theft (which would have been by midnight Wednesday). How much the consumer is actually liable for, however, depends on when the unauthorized transfers take place. In this example, assume a $100 unauthorized transfer was made on Tuesday and a $600 unauthorized transfer on Thursday. Because the consumer is liable for the amount of the loss that occurs within the first two business days (but no more than $50), plus the amount of the unauthorized transfers that occurs after the first two business days and before the consumer gives notice, the consumer's total liability is $500 ($50 of the $100 transfer plus $450 of the $600 transfer, in this example). But if $600 was taken on Tuesday and $100 on Thursday, the consumer's maximum liability would be $150 ($50 of the $600 plus $100).

6(b)(3) Periodic Statement; Timely Notice Not Given

1. *Unlimited liability applies.* The standard of unlimited liability applies if unauthorized transfers appear on a periodic statement, and may apply in conjunction with the first two tiers of liability. If a periodic statement shows an unauthorized transfer made with a lost or stolen debit card, the consumer must notify the financial institution within 60 calendar days after the periodic statement was sent; otherwise, the consumer faces unlimited liability for all unauthorized transfers made after the 60-day period. The consumer's liability for unauthorized transfers before the statement is sent, and up to 60 days following, is determined based on the first two tiers of liability: up to $50 if the consumer notifies the financial institution within two business days of learning of the loss or theft of the card and up to $500 if the consumer notifies the institution after two business days of learning of the loss or theft.

2. *Transfers not involving access device.* The first two tiers of liability do not apply to unauthorized transfers from a consumer's account made without an access device. If, however, the consumer fails to report such unauthorized transfers within 60 calendar days of the financial institution's transmittal of the periodic statement, the consumer may be liable for any transfers occurring after the close of the 60 days and before notice is given to the institution. For example, a consumer's account is electronically debited for $200 without the consumer's authorization and by means other than the consumer's access device. If the consumer notifies the institution within 60 days of the transmittal of the periodic statement that shows the unauthorized transfer, the consumer has no liability. However, if in addition to the $200, the consumer's account is debited for a $400 unauthorized transfer on the 61st day and the consumer fails to notify the institution of the first unauthorized transfer until the 62nd day, the consumer may be liable for the full $400.

6(b)(4) Extension of Time Limits

1. *Extenuating circumstances.* Examples of circumstances that require extension of the notification periods under this section include the consumer's extended travel or hospitalization.

6(b)(5) Notice to Financial Institution

1. *Receipt of notice.* A financial institution is considered to have received notice for purposes of limiting the consumer's liability if notice is given in a reasonable manner, even if the consumer notifies the institution but uses an address or telephone number other than the one specified by the institution.

2. *Notice by third party.* Notice to a financial institution by a person acting on the consumer's behalf is considered valid under this section. For example, if a consumer is hospitalized and unable to report the loss or theft of an access device, notice is considered given when someone acting on the consumer's behalf notifies the bank of the loss or theft. A financial institution may require appropriate documentation from the person representing the consumer to establish that the person is acting on the consumer's behalf.

3. *Content of notice.* Notice to a financial institution is considered given when a consumer takes reasonable steps to provide the institution with the pertinent account information. Even when the consumer is unable to provide the account number or the card number in reporting a lost or stolen access device or an unauthorized transfer, the notice effectively limits the consumer's liability if the consumer otherwise identifies sufficiently the account in question. For example, the consumer may identify the account by the name on the account and the type of account in question.

Section 1005.7 Initial Disclosures

7(a) Timing of Disclosures

1. *Early disclosures.* Disclosures given by a financial institution earlier than the regulation requires (for example, when the consumer opens a checking account) need not be repeated when the consumer later enters into an agreement with a third party to initiate preauthorized transfers to or from the consumer's account, unless the terms and conditions differ from those that the institution previously disclosed. This interpretation also applies to any notice provided about one-time EFTs from a consumer's account initiated using information from the consumer's check. On the other hand, if an agreement for EFT services to be provided by an account-holding institution is directly between the consumer and the account-holding institution, disclosures must be given in close proximity to the event requiring disclosure, for example, when the consumer contracts for a new service.

2. *Lack of advance notice of a transfer.* Where a consumer authorizes a third party to debit or credit the consumer's account, an account-holding institution that has not received advance notice of the transfer or transfers must provide the required disclosures as soon as reasonably possible after the first debit or credit is made, unless the institution has previously given the disclosures.

3. *Addition of new accounts.* If a consumer opens a new account permitting EFTs at a financial institution, and the consumer already has received Regulation E disclosures for another account at that institution, the institution need only disclose terms and conditions that differ from those previously given.

4. *Addition of service in interchange systems.* If a financial institution joins an interchange or shared network system (which provides access to terminals operated by other institutions), disclosures are required for additional EFT services not previously available to consumers if the terms and conditions differ from those previously disclosed.

5. *Disclosures covering all EFT services offered.* An institution may provide disclosures covering all EFT services that it offers, even if some consumers have not arranged to use all services.

7(b) Content of Disclosures

7(b)(1) Liability of Consumer

1. *No liability imposed by financial institution.* If a financial institution chooses to impose zero liability for unauthorized EFTs, it need not provide the liability disclosures. If the institution later decides to impose liability, however, it must first provide the disclosures.

2. *Preauthorized transfers.* If the only EFTs from an account are preauthorized transfers, liability could arise if the consumer fails to report unauthorized transfers reflected on a periodic statement. To impose such liability on the consumer, the institution must have disclosed the potential liability and the telephone number and address for reporting unauthorized transfers.

3. *Additional information.* At the institution's option, the summary of the consumer's liability may include advice on promptly reporting unauthorized transfers or the loss or theft of the access device.

7(b)(2) Telephone Number and Address

1. *Disclosure of telephone numbers.* An institution may use the same or different telephone numbers in the disclosures for the purpose of:

i. Reporting the loss or theft of an access device or possible unauthorized transfers;

ii. Inquiring about the receipt of a preauthorized credit;

iii. Stopping payment of a preauthorized debit;

iv. Giving notice of an error.

2. *Location of telephone number.* The telephone number need not be incorporated into the text of the disclosure; for example, the institution may instead insert a reference to a telephone number that is readily available to the consumer, such as ''Call your branch office. The number is shown on your periodic statement.'' However, an institution must provide a specific telephone number and address, on or with the disclosure statement, for reporting a lost or stolen access device or a possible unauthorized transfer.

7(b)(4) Types of Transfers; Limitations

1. *Security limitations.* Information about limitations on the frequency and dollar amount of transfers generally must be disclosed in detail, even if related to security aspects of the system. If the confidentiality of certain details is essential to the security of an account or system, these details may be

withheld (but the fact that limitations exist must still be disclosed). For example, an institution limits cash ATM withdrawals to $100 per day. The institution may disclose that daily withdrawal limitations apply and need not disclose that the limitations may not always be in force (such as during periods when its ATMs are off-line).

2. *Restrictions on certain deposit accounts.* A limitation on account activity that restricts the consumer's ability to make EFTs must be disclosed even if the restriction also applies to transfers made by non-electronic means. For example, Regulation D of the Board of Governors of the Federal Reserve System (12 CFR Part 204) restricts the number of payments to third parties that may be made from a money market deposit account; an institution that does not execute fund transfers in excess of those limits must disclose the restriction as a limitation on the frequency of EFTs.

3. *Preauthorized transfers.* Financial institutions are not required to list preauthorized transfers among the types of transfers that a consumer can make.

4. *One-time EFTs initiated using information from a check.* Financial institutions must disclose the fact that one-time EFTs initiated using information from a consumer's check are among the types of transfers that a consumer can make. *See* Appendix A–2.

7(b)(5) Fees

1. *Disclosure of EFT fees.* An institution is required to disclose all fees for EFTs or the right to make them. Others fees (for example, minimum-balance fees, stop-payment fees, or account overdrafts) may, but need not, be disclosed. *But see* Regulation DD, 12 CFR Part 1030. An institution is not required to disclose fees for inquiries made at an ATM since no transfer of funds is involved.

2. *Fees also applicable to non-EFT.* A per-item fee for EFTs must be disclosed even if the same fee is imposed on non-electronic transfers. If a per-item fee is imposed only under certain conditions, such as when the transactions in the cycle exceed a certain number, those conditions must be disclosed. Itemization of the various fees may be provided on the disclosure statement or on an accompanying document that is referenced in the statement.

3. *Interchange system fees.* Fees paid by the account-holding institution to the operator of a shared or interchange ATM system need not be disclosed, unless they are imposed on the consumer by the account-holding institution. Fees for use of an ATM that are debited directly from the consumer's account by an institution other than the account-holding institution (for example, fees included in the transfer amount) need not be disclosed. *See* § 1005.7(b)(11) for the general notice requirement regarding fees that may be imposed by ATM operators and by a network used to complete the transfer.

7(b)(9) Confidentiality

1. *Information provided to third parties.* An institution must describe the circumstances under which any information relating to an account to or from which EFTs are permitted will be made available to third parties, not just information concerning those EFTs. The term ''third parties'' includes affiliates such as other subsidiaries of the same holding company.

7(b)(10) Error Resolution

1. *Substantially similar.* The error resolution notice must be substantially similar to the model form in Appendix A of part 1005. An institution may use different wording so long as the substance of the notice remains the same, may delete inapplicable provisions (for example, the requirement for written confirmation of an oral notification), and may substitute substantive state law requirements affording greater consumer protection than Regulation E.

2. *Extended time-period for certain transactions.* To take advantage of the longer time periods for resolving errors under § 1005.11(c)(3) (for new accounts as defined in Regulation CC of the Board of Governors of the Federal Reserve System (12 CFR part 229), transfers initiated outside the United States, or transfers resulting from POS debit-card transactions), a financial institution must have disclosed these longer time periods. Similarly, an institution that relies on the exception from provisional crediting in § 1005.11(c)(2) for accounts subject to Regulation T of the Board of Governors of the Federal Reserve System (12 CFR part 220) must have disclosed accordingly.

7(c) Addition of Electronic Fund Transfer Services

1. *Addition of electronic check conversion services.* One-time EFTs initiated using information from a consumer's check are a new type of transfer requiring new disclosures, as applicable. *See* Appendix A–2.

Section 1005.8 Change-in-Terms Notice; Error Resolution Notice

8(a) Change-in-Terms Notice

1. *Form of notice.* No specific form or wording is required for a change-in-terms notice. The notice may appear on a periodic statement, or may be given by sending a copy of a revised disclosure statement, provided attention is directed to the change (for example, in a cover letter referencing the changed term).

2. *Changes not requiring notice.* The following changes do not require disclosure:

i. Closing some of an institution's ATMs;

ii. Cancellation of an access device.

3. *Limitations on transfers.* When the initial disclosures omit details about limitations because secrecy is essential to the security of the account or system, a subsequent increase in those limitations need not be disclosed if secrecy is still essential. If, however, an institution had no limits in place when the initial disclosures were given and now wishes to impose limits for the first time, it must disclose at least the fact that limits have been adopted. *See also* § 1005.7(b)(4) and the related commentary.

4. *Change in telephone number or address.* When a financial institution changes the telephone number or address used for reporting possible unauthorized transfers, a change-in-terms notice is required only if the institution will impose liability on the consumer for unauthorized transfers under § 1005.6. *See also* § 1005.6(a) and the related commentary.

8(b) Error Resolution Notice

1. *Change between annual and periodic notice.* If an institution switches from an annual to a periodic notice, or vice versa, the first notice under the new method must be sent no later than 12 months after the last notice sent under the old method.

2. *Exception for new accounts.* For new accounts, disclosure of the longer error resolution time periods under § 1005.11(c)(3) is not required in the annual error resolution notice or in the notice that may be provided with each periodic statement as an alternative to the annual notice.

Section 1005.9 Receipts at Electronic Terminals; Periodic Statements

9(a) Receipts at Electronic Terminals

1. *Receipts furnished only on request.* The regulation requires that a receipt be ''made available.'' A financial institution may program its electronic terminals to provide a receipt only to consumers who elect to receive one.

2. *Third party providing receipt.* An account-holding institution may make terminal receipts available through third parties such as merchants or other financial institutions.

3. *Inclusion of promotional material.* A financial institution may include promotional material on receipts if the required information is set forth clearly (for example, by separating it from the promotional material). In addition, a consumer may not be required to surrender the receipt or that portion containing the required disclosures in order to take advantage of a promotion.

4. *Transfer not completed.* The receipt requirement does not apply to a transfer that is initiated but not completed (for example, if the ATM is out of currency or the consumer decides not to complete the transfer).

5. *Receipts not furnished due to inadvertent error.* If a receipt is not provided to the consumer because of a bona fide unintentional error, such as when a terminal runs out of paper or the mechanism jams, no violation results if the financial institution maintains procedures reasonably adapted to avoid such occurrences.

6. *Multiple transfers.* If the consumer makes multiple transfers at the same time, the financial institution may document them on a single or on separate receipts.

9(a)(1) Amount

1. *Disclosure of transaction fee.* The required display of a fee amount on or at the terminal may be accomplished by displaying the fee on a sign at the terminal or on the terminal screen for a reasonable duration. Displaying the fee on a screen provides adequate notice, as long as a consumer is given the option to cancel the transaction after receiving notice of a fee. *See* § 1005.16 for the notice requirements applicable to ATM operators that impose a fee for providing EFT services.

2. *Relationship between § 1005.9(a)(1) and § 1005.16.* The requirements of §§ 1005.9(a)(1) and 1005.16 are similar but not identical.

i. Section 1005.9(a)(1) requires that if the amount of the transfer as shown on the receipt will include the fee, then the fee must be disclosed either on a sign on or at the terminal, or on the terminal screen. Section 1005.16 requires disclosure both on a sign on or at the terminal (in a prominent and conspicuous location) and on the terminal screen. Section 1005.16 permits disclosure on a paper notice as an alternative to the on-screen disclosure.

ii. The disclosure of the fee on the receipt under § 1005.9(a)(1) cannot be used to comply with the alternative paper disclosure procedure under § 1005.16, if the receipt is provided at the completion of the transaction because, pursuant to the statute, the paper notice must be provided before the consumer is committed to paying the fee.

iii. Section 1005.9(a)(1) applies to any type of electronic terminal as defined in Regulation E (for example, to POS terminals as well as to ATMs), while § 1005.16 applies only to ATMs.

9(a)(2) Date

1. *Calendar date.* The receipt must disclose the calendar date on which the consumer uses the electronic terminal. An accounting or business date may be disclosed in addition if the dates are clearly distinguished.

9(a)(3) Type

1. *Identifying transfer and account.* Examples identifying the type of transfer and the type of the consumer's account include ''withdrawal from checking,'' ''transfer from savings to checking,'' or ''payment from savings.''

2. *Exception.* Identification of an account is not required when the consumer can access only one asset account at a particular time or terminal, even if the access device can normally be used to access more than one account. For example, the consumer may be able to access only one particular account at terminals not operated by the account-holding institution, or may be able to access only one particular account when the terminal is off-line. The exception is available even if, in addition to accessing one asset account, the consumer also can access a credit line.

3. *Access to multiple accounts.* If the consumer can use an access device to make transfers to or from different accounts of the same type, the terminal receipt must specify which account was accessed, such as ''withdrawal from checking I'' or ''withdrawal from checking II.'' If only one account besides the primary checking account can be debited, the receipt can identify the account as ''withdrawal from other account.''

4. *Generic descriptions.* Generic descriptions may be used for accounts that are similar in function, such as share draft or NOW accounts and checking accounts. In a shared system, for example, when a credit union member initiates transfers to or from a share draft account at a terminal owned or operated by a bank, the receipt may identify a withdrawal from the account as a ''withdrawal from checking.''

5. *Point-of-sale transactions.* There is no prescribed terminology for identifying a transfer at a merchant's POS terminal. A transfer may be identified, for example, as a purchase, a sale of goods or services, or a payment to a third party. When a consumer obtains cash from a POS terminal in addition to purchasing goods, or obtains cash only, the documentation need not differentiate the transaction from one involving the purchase of goods.

9(a)(5) Terminal Location

1. *Options for identifying terminal.* The institution may provide either:

i. The city, state or foreign country, and the information in § 1005.9(a)(5) (i), (ii), or (iii), or

ii. A number or a code identifying the terminal. If the institution chooses the second option, the code or terminal number identifying the terminal where the transfer is initiated may be given as part of a transaction code.

2. *Omission of city name.* The city may be omitted if the generally accepted name (such as a branch name) contains the city name.

3. *Omission of a state.* A state may be omitted from the location information on the receipt if:

i. All the terminals owned or operated by the financial institution providing the statement (or by the system in which it participates) are located in that state, or

ii. All transfers occur at terminals located within 50 miles of the financial institution's main office.

4. *Omission of a city and state.* A city and state may be omitted if all the terminals owned or operated by the financial institution providing the statement (or by the system in which it participates) are located in the same city.

Paragraph 9(a)(5)(i)

1. *Street address.* The address should include number and street (or intersection); the number (or intersecting street) may be omitted if the street alone uniquely identifies the terminal location.

Paragraph 9(a)(5)(ii)

1. *Generally accepted name.* Examples of a generally accepted name for a specific location include a branch of the financial institution, a shopping center, or an airport.

Paragraph 9(a)(5)(iii)

1. *Name of owner or operator of terminal.* Examples of an owner or operator of a terminal are a financial institution or a retail merchant.

9(a)(6) Third Party Transfer

1. *Omission of third-party name.* The receipt need not disclose the third-party name if the name is provided by the consumer in a form that is not machine readable (for example, if the consumer indicates the payee by depositing a payment stub into the ATM). If, on the other hand, the consumer keys in the identity of the payee, the receipt must identify the payee by name or by using a code that is explained elsewhere on the receipt.

2. *Receipt as proof of payment.* Documentation required under the regulation constitutes prima facie proof of a payment to another person, except in the case of a terminal receipt documenting a deposit.

9(b) Periodic Statements

1. *Periodic cycles.* Periodic statements may be sent on a cycle that is shorter than monthly. The statements must correspond to periodic cycles that are reasonably equal, that is, do not vary by more than four days from the regular cycle. The requirement of reasonably equal cycles does not apply when an institution changes cycles for operational or other reasons, such as to establish a new statement day or date.

2. *Interim statements.* Generally, a financial institution must provide periodic statements for each monthly cycle in which an EFT occurs, and at least quarterly if a transfer has not occurred. Where EFTs occur between regularly-scheduled cycles, interim statements must be provided. For example, if an institution issues quarterly statements at the end of March, June, September and December, and the consumer initiates an EFT in February, an interim statement for February must be provided. If an interim statement contains interest or rate information, the institution must comply with Regulation DD, 12 CFR 1030.6.

3. *Inactive accounts.* A financial institution need not send statements to consumers whose accounts are inactive as defined by the institution.

4. *Statement pickup.* A financial institution may permit, but may not require, consumers to pick up their periodic statements at the financial institution.

5. *Periodic statements limited to EFT activity.* A financial institution that uses a passbook as the primary means for displaying account activity, but also allows the account to be debited electronically, may provide a periodic statement requirement that reflects only the EFTs and other required disclosures (such as charges, account balances, and address and telephone number for inquiries). *See* § 1005.9(c)(1)(i) for the exception applicable to preauthorized transfers for passbook accounts.

6. *Codes and accompanying documents.* To meet the documentation requirements for periodic statements, a financial institution may:

i. Include copies of terminal receipts to reflect transfers initiated by the consumer at electronic terminals;

ii. Enclose posting memos, deposit slips, and other documents that, together with the statement, disclose all the required information;

iii. Use codes for names of third parties or terminal locations and explain the information to which the codes relate on an accompanying document.

9(b)(1) Transaction Information

1. *Information obtained from others.* While financial institutions must maintain reasonable procedures to ensure the integrity of data obtained from another institution, a merchant, or other third parties, verification of each transfer that appears on the periodic statement is not required.

Paragraph 9(b)(1)(i)

1. *Incorrect deposit amount.* If a financial institution determines that the amount actually deposited at an ATM is different from the amount entered by the consumer, the institution need not immediately notify the consumer of the discrepancy. The periodic statement reflecting the deposit may show either the correct amount of the deposit or the amount entered by the consumer along with the institution's adjustment.

Paragraph 9(b)(1)(iii)

1. *Type of transfer.* There is no prescribed terminology for describing a type of transfer. Placement of the amount of the transfer in the debit or the credit column is sufficient if other information on the statement, such as a terminal location or third-party name, enables the consumer to identify the type of transfer.

Paragraph 9(b)(1)(iv)

1. *Nonproprietary terminal in network.* An institution need not reflect on the periodic statement the street addresses, identification codes, or terminal numbers for transfers initiated in a shared or interchange system at a terminal operated by an institution other than the account-holding institution. The statement must, however, specify the entity that owns or operates the terminal, plus the city and state.

Paragraph 9(b)(1)(v)

1. *Recurring payments by government agency.* The third-party name for recurring payments from Federal, state, or local governments need not list the particular agency. For example, ''U.S. gov't'' or ''N.Y. sal'' will suffice.

2. *Consumer as third-party payee.* If a consumer makes an electronic fund transfer to another consumer, the financial institution must identify the recipient by name (not just by an account number, for example).

3. *Terminal location/third party.* A single entry may be used to identify both the terminal location and the name of the third party to or from whom funds are transferred. For example, if a consumer purchases goods from a merchant, the name of the party to whom funds are transferred (the merchant) and the location of the terminal where the transfer is initiated will be satisfied by a disclosure such as ''XYZ Store, Anytown, Ohio.''

4. *Account-holding institution as third party.* Transfers to the account-holding institution (by ATM, for example) must show the institution as the recipient, unless other information on the statement (such as, ''loan payment from checking'') clearly indicates that the payment was to the account-holding institution.

5. *Consistency in third-party identity.* The periodic statement must disclose a third-party name as it appeared on the receipt, whether it was, for example, the ''dba'' (doing business as) name of the third party or the parent corporation's name.

6. *Third-party identity on deposits at electronic terminal.* A financial institution need not identify third parties whose names appear on checks, drafts, or similar paper instruments deposited to the consumer's account at an electronic terminal.

9(b)(3) Fees

1. *Disclosure of fees.* The fees disclosed may include fees for EFTs and for other non-electronic services, and both fixed fees and per-item fees; they may be given as a total or may be itemized in part or in full.

2. *Fees in interchange system.* An account-holding institution must disclose any fees it imposes on the consumer for EFTs, including fees for ATM transactions in an interchange or shared ATM system. Fees for use of an ATM imposed on the consumer by an institution other than the account-holding institution and included in the amount of the transfer by the terminal-operating institution need not be separately disclosed on the periodic statement.

3. *Finance charges.* The requirement to disclose any fees assessed against the account does not include a finance charge imposed on the account during the statement period.

9(b)(4) Account Balances

1. *Opening and closing balances.* The opening and closing balances must reflect both EFTs and other account activity.

9(b)(5) Address and Telephone Number for Inquiries

1. *Telephone number.* A single telephone number, preceded by the ''direct inquiries to'' language, will satisfy the requirements of §§ 1005.9(b)(5) and (6).

9(b)(6) Telephone Number for Preauthorized Transfers

1. *Telephone number. See* comment 9(b)(5)–1.

9(c) Exceptions to the Periodic Statement Requirements for Certain Accounts

1. *Transfers between accounts.* The regulation provides an exception from the periodic statement requirement for certain intra-institutional transfers between a consumer's accounts. The financial institution must still comply with the applicable periodic statement requirements for any other EFTs to or from the account. For example, a Regulation E statement must be provided quarterly for an account that also receives payroll deposits electronically, or for any month in which an account is also accessed by a withdrawal at an ATM.

9(c)(1) Preauthorized Transfers to Accounts

1. *Accounts that may be accessed only by preauthorized transfers to the account.* The exception for ''accounts that may be accessed only by preauthorized transfers to the account'' includes accounts that can be accessed by means other than EFTs, such as checks. If, however, an account may be accessed by any EFT other than preauthorized credits to the account, such as preauthorized debits or ATM transactions, the account does not qualify for the exception.

2. *Reversal of direct deposits.* For direct-deposit-only accounts, a financial institution must send a periodic statement at least quarterly. A reversal of a direct deposit to correct an error does not trigger the monthly statement requirement when the error represented a credit to the wrong consumer's account, a duplicate credit, or a credit in the wrong amount. *See also* comment 2(m)–5.

9(d) Documentation for Foreign-Initiated Transfers

1. *Foreign-initiated transfers.* An institution must make a good faith effort to provide all required information for foreign-initiated transfers. For example, even if the institution is not able to provide a specific terminal location, it should identify the country and city in which the transfer was initiated.

Section 1005.10 Preauthorized Transfers

10(a) Preauthorized Transfers to Consumer's Account

10(a)(1) Notice by Financial Institution

1. *Content.* No specific language is required for notice regarding receipt of a preauthorized transfer. Identifying the deposit is sufficient; however, simply providing the current account balance is not.

2. *Notice of credit.* A financial institution may use different methods of notice for various types or series of preauthorized transfers, and the institution need not offer consumers a choice of notice methods.

3. *Positive notice.* A periodic statement sent within two business days of the scheduled transfer, showing the transfer, can serve as notice of receipt.

4. *Negative notice.* The absence of a deposit entry (on a periodic statement sent within two business days of the scheduled transfer date) will serve as negative notice.

5. *Telephone notice.* If a financial institution uses the telephone notice option, the institution should be able in most instances to verify during a consumer's initial call whether a transfer was received. The institution must respond within two business days to any inquiry not answered immediately.

6. *Phone number for passbook accounts.* The financial institution may use any reasonable means necessary to provide the telephone number to consumers with passbook accounts that can only be accessed by preauthorized credits and that do not receive periodic statements. For example, it may print the telephone number in the passbook, or include the number with the annual error resolution notice.

7. *Telephone line availability.* To satisfy the readily-available standard, the financial institution must provide enough telephone lines so that consumers get a reasonably prompt response. The institution need only provide telephone service during normal business hours. Within its primary service area, an institution must provide a local or toll-free telephone number. It need not provide a toll-free number or accept collect long-distance calls from outside the area where it normally conducts business.

10(b) Written Authorization for Preauthorized Transfers From Consumer's Account

1. *Preexisting authorizations.* The financial institution need not require a new authorization before changing from paper-based to electronic debiting when the existing authorization does not specify that debiting is to occur electronically or specifies that the debiting will occur by paper means. A new authorization also is not required

when a successor institution begins collecting payments.

2. *Authorization obtained by third party.* The account-holding financial institution does not violate the regulation when a third-party payee fails to obtain the authorization in writing or fails to give a copy to the consumer; rather, it is the third-party payee that is in violation of the regulation.

3. *Written authorization for preauthorized transfers.* The requirement that preauthorized EFTs be authorized by the consumer ''only by a writing'' cannot be met by a payee's signing a written authorization on the consumer's behalf with only an oral authorization from the consumer.

4. *Use of a confirmation form.* A financial institution or designated payee may comply with the requirements of this section in various ways. For example, a payee may provide the consumer with two copies of a preauthorization form, and ask the consumer to sign and return one and to retain the second copy.

5. *Similarly authenticated.* The similarly authenticated standard permits signed, written authorizations to be provided electronically. The writing and signature requirements of this section are satisfied by complying with the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. 7001 *et seq.,* which defines electronic records and electronic signatures. Examples of electronic signatures include, but are not limited to, digital signatures and security codes. A security code need not originate with the account-holding institution. The authorization process should evidence the consumer's identity and assent to the authorization. The person that obtains the authorization must provide a copy of the terms of the authorization to the consumer either electronically or in paper form. Only the consumer may authorize the transfer and not, for example, a third-party merchant on behalf of the consumer.

6. *Requirements of an authorization.* An authorization is valid if it is readily identifiable as such and the terms of the preauthorized transfer are clear and readily understandable.

7. *Bona fide error.* Consumers sometimes authorize third-party payees, by telephone or online, to submit recurring charges against a credit card account. If the consumer indicates use of a credit card account when in fact a debit card is being used, the payee does not violate the requirement to obtain a written authorization if the failure to obtain written authorization was not intentional and resulted from a bona fide error, and if the payee maintains procedures reasonably adapted to avoid any such error. Procedures reasonably adapted to avoid error will depend upon the circumstances. Generally, requesting the consumer to specify whether the card to be used for the authorization is a debit (or check) card or a credit card is a reasonable procedure. Where the consumer has indicated that the card is a credit card (or that the card is not a debit or check card), the payee may rely on the consumer's statement without seeking further information about the type of card. If the payee believes, at the time of the authorization, that a credit card is involved, and later finds that the card used is a debit card (for example, because the consumer later brings the matter to the payee's attention), the payee must obtain a written and signed or (where appropriate) a similarly authenticated authorization as soon as reasonably possible, or cease debiting the consumer's account.

10(c) Consumer's Right to Stop Payment

1. *Stop-payment order.* The financial institution must honor an oral stop-payment order made at least three business days before a scheduled debit. If the debit item is resubmitted, the institution must continue to honor the stop-payment order (for example, by suspending all subsequent payments to the payee-originator until the consumer notifies the institution that payments should resume).

2. *Revocation of authorization.* Once a financial institution has been notified that the consumer's authorization is no longer valid, it must block all future payments for the particular debit transmitted by the designated payee-originator. *But see* comment 10(c)–3. The institution may not wait for the payee-originator to terminate the automatic debits. The institution may confirm that the consumer has informed the payee-originator of the revocation (for example, by requiring a copy of the consumer's revocation as written confirmation to be provided within 14 days of an oral notification). If the institution does not receive the required written confirmation within the 14-day period, it may honor subsequent debits to the account.

3. *Alternative procedure for processing a stop-payment request.* If an institution does not have the capability to block a preauthorized debit from being posted to the consumer's account—as in the case of a preauthorized debit made through a debit card network or other system, for example—the institution may instead comply with the stop-payment requirements by using a third party to block the transfer(s), as long as the consumer's account is not debited for the payment.

10(d) Notice of Transfers Varying in Amount

10(d)(1) Notice

1. *Preexisting authorizations.* A financial institution holding the consumer's account does not violate the regulation if the designated payee fails to provide notice of varying amounts.

10(d)(2) Range

1. *Range.* A financial institution or designated payee that elects to offer the consumer a specified range of amounts for debiting (in lieu of providing the notice of transfers varying in amount) must provide an acceptable range that could be anticipated by the consumer. For example, if the transfer is for payment of a gas bill, an appropriate range might be based on the highest bill in winter and the lowest bill in summer.

2. *Transfers to an account of the consumer held at another institution.* A financial institution need not provide a consumer the option of receiving notice with each varying transfer, and may instead provide notice only when a debit to an account of the consumer falls outside a specified range or differs by more than a specified amount from the most recent transfer, if the funds are transferred and credited to an account of the consumer held at another financial institution. The specified range or amount, however, must be one that reasonably could be anticipated by the consumer, and the institution must notify the consumer of the range or amount at the time the consumer provides authorization for the preauthorized transfers. For example, if the transfer is for payment of interest for a fixed-rate certificate of deposit account, an appropriate range might be based on a month containing 28 days and a month containing 31 days.

10(e) Compulsory Use

10(e)(1) Credit

1. *Loan payments.* Creditors may not require repayment of loans by electronic means on a preauthorized, recurring basis. A creditor may offer a program with a reduced annual percentage rate or other cost-related incentive for an automatic repayment feature, provided the program with the automatic payment feature is not the only loan program offered by the creditor for the type of credit involved. Examples include:

i. Mortgages with graduated payments in which a pledged savings account is automatically debited during an initial period to supplement the monthly payments made by the borrower.

ii. Mortgage plans calling for preauthorized biweekly payments that are debited electronically to the consumer's account and produce a lower total finance charge.

2. *Overdraft.* A financial institution may require the automatic repayment of an overdraft credit plan even if the overdraft extension is charged to an open-end account that may be accessed by the consumer in ways other than by overdrafts.

10(e)(2) Employment or Government Benefit

1. *Payroll.* An employer (including a financial institution) may not require its employees to receive their salary by direct deposit to any particular institution. An employer may require direct deposit of salary by electronic means if employees are allowed to choose the institution that will receive the direct deposit. Alternatively, an employer may give employees the choice of having their salary deposited at a particular institution (designated by the employer) or receiving their salary by another means, such as by check or cash.

Section 1005.11 Procedures for Resolving Errors

11(a) Definition of Error

1. *Terminal location.* With regard to deposits at an ATM, a consumer's request for the terminal location or other information triggers the error resolution procedures, but the financial institution need only provide the ATM location if it has captured that information.

2. *Verifying an account debit or credit.* If the consumer contacts the financial institution to ascertain whether a payment (for example, in a home-banking or bill-payment program) or any other type of EFT

was debited to the account, or whether a deposit made via ATM, preauthorized transfer, or any other type of EFT was credited to the account, without asserting an error, the error resolution procedures do not apply.

3. *Loss or theft of access device.* A financial institution is required to comply with the error resolution procedures when a consumer reports the loss or theft of an access device if the consumer also alleges possible unauthorized use as a consequence of the loss or theft.

4. *Error asserted after account closed.* The financial institution must comply with the error resolution procedures when a consumer properly asserts an error, even if the account has been closed.

5. *Request for documentation or information.* A request for documentation or other information must be treated as an error unless it is clear that the consumer is requesting a duplicate copy for tax or other record-keeping purposes.

6. *Terminal receipts for transfers of $15 or less.* The fact that an institution does not make a terminal receipt available for a transfer of $15 or less in accordance with § 1005.9(e) is not an error for purposes of § 1005.11(a)(1)(vi) or (vii).

11(b) Notice of Error From Consumer

11(b)(1) Timing; Contents

1. *Content of error notice.* The notice of error is effective even if it does not contain the consumer's account number, so long as the financial institution is able to identify the account in question. For example, the consumer could provide a Social Security number or other unique means of identification.

2. *Investigation pending receipt of information.* While a financial institution may request a written, signed statement from the consumer relating to a notice of error, it may not delay initiating or completing an investigation pending receipt of the statement.

3. *Statement held for consumer.* When a consumer has arranged for periodic statements to be held until picked up, the statement for a particular cycle is deemed to have been transmitted on the date the financial institution first makes the statement available to the consumer.

4. *Failure to provide statement.* When a financial institution fails to provide the consumer with a periodic statement, a request for a copy is governed by this section if the consumer gives notice within 60 days from the date on which the statement should have been transmitted.

5. *Discovery of error by institution.* The error resolution procedures of this section apply when a notice of error is received from the consumer, and not when the financial institution itself discovers and corrects an error.

6. *Notice at particular phone number or address.* A financial institution may require the consumer to give notice only at the telephone number or address disclosed by the institution, provided the institution maintains reasonable procedures to refer the consumer to the specified telephone number or address if the consumer attempts to give notice to the institution in a different manner.

7. *Effect of late notice.* An institution is not required to comply with the requirements of this section for any notice of error from the consumer that is received by the institution later than 60 days from the date on which the periodic statement first reflecting the error is sent. Where the consumer's assertion of error involves an unauthorized EFT, however, the institution must comply with § 1005.6 before it may impose any liability on the consumer.

11(b)(2) Written Confirmation

1. *Written confirmation-of-error notice.* If the consumer sends a written confirmation of error to the wrong address, the financial institution must process the confirmation through normal procedures. But the institution need not provisionally credit the consumer's account if the written confirmation is delayed beyond 10 business days in getting to the right place because it was sent to the wrong address.

11(c) Time Limits and Extent of Investigation

1. *Notice to consumer.* Unless otherwise indicated in this section, the financial institution may provide the required notices to the consumer either orally or in writing.

2. *Written confirmation of oral notice.* A financial institution must begin its investigation promptly upon receipt of an oral notice. It may not delay until it has received a written confirmation.

3. *Charges for error resolution.* If a billing error occurred, whether as alleged or in a different amount or manner, the financial institution may not impose a charge related to any aspect of the error-resolution process (including charges for documentation or investigation). Since the Act grants the consumer error-resolution rights, the institution should avoid any chilling effect on the good-faith assertion of errors that might result if charges are assessed when no billing error has occurred.

4. *Correction without investigation.* A financial institution may make, without investigation, a final correction to a consumer's account in the amount or manner alleged by the consumer to be in error, but must comply with all other applicable requirements of § 1005.11.

5. *Correction notice.* A financial institution may include the notice of correction on a periodic statement that is mailed or delivered within the 10-business-day or 45-calendar-day time limits and that clearly identifies the correction to the consumer's account. The institution must determine whether such a mailing will be prompt enough to satisfy the requirements of this section, taking into account the specific facts involved.

6. *Correction of an error.* If the financial institution determines an error occurred, within either the 10-day or 45-day period, it must correct the error (subject to the liability provisions of §§ 1005.6(a) and (b)) including, where applicable, the crediting of interest and the refunding of any fees imposed by the institution. In a combined credit/EFT transaction, for example, the institution must refund any finance charges incurred as a result of the error. The institution need not refund fees that would have been imposed whether or not the error occurred.

7. *Extent of required investigation.* A financial institution complies with its duty to investigate, correct, and report its determination regarding an error described in § 1005.11(a)(1)(vii) by transmitting the requested information, clarification, or documentation within the time limits set forth in § 1005.11(c). If the institution has provisionally credited the consumer's account in accordance with § 1005.11(c)(2), it may debit the amount upon transmitting the requested information, clarification, or documentation.

Paragraph 11(c)(2)(i)

1. *Compliance with all requirements.* Financial institutions exempted from provisionally crediting a consumer's account under §§ 1005.11(c)(2)(i)(A) and (B) must still comply with all other requirements of § 1005.11.

11(c)(3) Extension of Time Periods

1. *POS debit card transactions.* The extended deadlines for investigating errors resulting from POS debit card transactions apply to all debit card transactions, including those for cash only, at merchants' POS terminals, and also including mail and telephone orders. The deadlines do not apply to transactions at an ATM, however, even though the ATM may be in a merchant location.

11(c)(4) Investigation

1. *Third parties.* When information or documentation requested by the consumer is in the possession of a third party with whom the financial institution does not have an agreement, the institution satisfies the error resolution requirement by so advising the consumer within the specified time period.

2. *Scope of investigation.* When an alleged error involves a payment to a third party under the financial institution's telephone bill-payment plan, a review of the institution's own records is sufficient, assuming no agreement exists between the institution and the third party concerning the bill-payment service.

3. *POS transfers.* When a consumer alleges an error involving a transfer to a merchant via a POS terminal, the institution must verify the information previously transmitted when executing the transfer. For example, the financial institution may request a copy of the sales receipt to verify that the amount of the transfer correctly corresponds to the amount of the consumer's purchase.

4. *Agreement.* An agreement that a third party will honor an access device is an agreement for purposes of this paragraph. A financial institution does not have an agreement for purposes of § 1005.11(c)(4)(ii) solely because it participates in transactions that occur under the Federal recurring payments programs, or that are cleared through an ACH or similar arrangement for the clearing and settlement of fund transfers generally, or because the institution agrees to be bound by the rules of such an arrangement.

5. *No EFT agreement.* When there is no agreement between the institution and the third party for the type of EFT involved, the financial institution must review any relevant information within the institution's

own records for the particular account to resolve the consumer's claim. The extent of the investigation required may vary depending on the facts and circumstances. However, a financial institution may not limit its investigation solely to the payment instructions where additional information within its own records pertaining to the particular account in question could help to resolve a consumer's claim. Information that may be reviewed as part of an investigation might include:

i. The ACH transaction records for the transfer;

ii. The transaction history of the particular account for a reasonable period of time immediately preceding the allegation of error;

iii. Whether the check number of the transaction in question is notably out-of-sequence;

iv. The location of either the transaction or the payee in question relative to the consumer's place of residence and habitual transaction area;

v. Information relative to the account in question within the control of the institution's third-party service providers if the financial institution reasonably believes that it may have records or other information that could be dispositive; or

vi. Any other information appropriate to resolve the claim.

11(d) Procedures if Financial Institution Determines No Error or Different Error Occurred

1. *Error different from that alleged.* When a financial institution determines that an error occurred in a manner or amount different from that described by the consumer, it must comply with the requirements of both §§ 1005.11(c) and (d), as relevant. The institution may give the notice of correction and the explanation separately or in a combined form.

11(d)(1) Written Explanation

1. *Request for documentation.* When a consumer requests copies of documents, the financial institution must provide the copies in an understandable form. If an institution relied on magnetic tape, it must convert the applicable data into readable form, for example, by printing it and explaining any codes.

11(d)(2) Debiting Provisional Credit

1. *Alternative procedure for debiting of credited funds.* The financial institution may comply with the requirements of this section by notifying the consumer that the consumer's account will be debited five business days from the transmittal of the notification, specifying the calendar date on which the debiting will occur.

2. *Fees for overdrafts.* The financial institution may not impose fees for items it is required to honor under § 1005.11. It may, however, impose any normal transaction or item fee that is unrelated to an overdraft resulting from the debiting. If the account is still overdrawn after five business days, the institution may impose the fees or finance charges to which it is entitled, if any, under an overdraft credit plan.

11(e) Reassertion of Error

1. *Withdrawal of error; right to reassert.* The financial institution has no further error resolution responsibilities if the consumer voluntarily withdraws the notice alleging an error. A consumer who has withdrawn an allegation of error has the right to reassert the allegation unless the financial institution had already complied with all of the error resolution requirements before the allegation was withdrawn. The consumer must do so, however, within the original 60-day period.

Section 1005.12 Relation to Other Laws

12(a) Relation to Truth in Lending

1. *Determining applicable regulation.* i. For transactions involving access devices that also function as credit cards, whether Regulation E or Regulation Z (12 CFR part 1026) applies depends on the nature of the transaction. For example, if the transaction solely involves an extension of credit, and does not include a debit to a checking account (or other consumer asset account), the liability limitations and error resolution requirements of Regulation Z apply. If the transaction debits a checking account only (with no credit extended), the provisions of Regulation E apply. If the transaction debits a checking account but also draws on an overdraft line of credit attached to the account, Regulation E's liability limitations apply, in addition to §§ 1026.13(d) and (g) of Regulation Z (which apply because of the extension of credit associated with the overdraft feature on the checking account). If a consumer's access device is also a credit card and the device is used to make unauthorized withdrawals from a checking account, but also is used to obtain unauthorized cash advances directly from a line of credit that is separate from the checking account, both Regulation E and Regulation Z apply.

ii. The following examples illustrate these principles:

A. A consumer has a card that can be used either as a credit card or a debit card. When used as a debit card, the card draws on the consumer's checking account. When used as a credit card, the card draws only on a separate line of credit. If the card is stolen and used as a credit card to make purchases or to get cash advances at an ATM from the line of credit, the liability limits and error resolution provisions of Regulation Z apply; Regulation E does not apply.

B. In the same situation, if the card is stolen and is used as a debit card to make purchases or to get cash withdrawals at an ATM from the checking account, the liability limits and error resolution provisions of Regulation E apply; Regulation Z does not apply.

C. In the same situation, assume the card is stolen and used both as a debit card and as a credit card; for example, the thief makes some purchases using the card as a debit card, and other purchases using the card as a credit card. Here, the liability limits and error resolution provisions of Regulation E apply to the unauthorized transactions in which the card was used as a debit card, and the corresponding provisions of Regulation Z apply to the unauthorized transactions in which the card was used as a credit card.

D. Assume a somewhat different type of card, one that draws on the consumer's checking account and can also draw on an overdraft line of credit attached to the checking account. There is no separate line of credit, only the overdraft line, associated with the card. In this situation, if the card is stolen and used, the liability limits and the error resolution provisions of Regulation E apply. In addition, if the use of the card has resulted in accessing the overdraft line of credit, the error resolution provisions of §§ 1026.13(d) and (g) of Regulation Z also apply, but not the other error resolution provisions of Regulation Z.

2. *Issuance rules.* For access devices that also constitute credit cards, the issuance rules of Regulation E apply if the only credit feature is a preexisting credit line attached to the asset account to cover overdrafts (or to maintain a specified minimum balance) or an overdraft service, as defined in § 1005.17(a). Regulation Z (12 CFR part 1026) rules apply if there is another type of credit feature; for example, one permitting direct extensions of credit that do not involve the asset account.

3. *Overdraft service.* The addition of an overdraft service, as that term is defined in § 1005.17(a), to an accepted access device does not constitute the addition of a credit feature subject to Regulation Z. Instead, the provisions of Regulation E apply, including the liability limitations (§ 1005.6) and the requirement to obtain consumer consent to the service before any fees or charges for paying an overdraft may be assessed on the account (§ 1005.17).

12(b) Preemption of Inconsistent State Laws

1. *Specific determinations.* The regulation prescribes standards for determining whether state laws that govern EFTs, and state laws regarding gift certificates, store gift cards, or general-use prepaid cards that govern dormancy, inactivity, or service fees, or expiration dates, are preempted by the Act and the regulation. A state law that is inconsistent may be preempted even if the Bureau has not issued a determination. However, nothing in § 1005.12(b) provides a financial institution with immunity for violations of state law if the institution chooses not to make state disclosures and the Bureau later determines that the state law is not preempted.

2. *Preemption determination.* The Bureau recognizes state law preemption determinations made by the Board of Governors of the Federal Reserve System prior to July 21, 2011, until and unless the Bureau makes and publishes any contrary determination. The Board of Governors determined that certain provisions in the state law of Michigan are preempted by the Federal law, effective March 30, 1981:

i. Definition of unauthorized use. Section 5(4) is preempted to the extent that it relates to the section of state law governing consumer liability for unauthorized use of an access device.

ii. Consumer liability for unauthorized use of an account. Section 14 is inconsistent with § 1005.6 and is less protective of the consumer than the Federal law. The state law places liability on the consumer for the unauthorized use of an account in cases

involving the consumer's negligence. Under the Federal law, a consumer's liability for unauthorized use is not related to the consumer's negligence and depends instead on the consumer's promptness in reporting the loss or theft of the access device.

iii. Error resolution. Section 15 is preempted because it is inconsistent with § 1005.11 and is less protective of the consumer than the Federal law. The state law allows financial institutions up to 70 days to resolve errors, whereas the Federal law generally requires errors to be resolved within 45 days.

iv. Receipts and periodic statements. Sections 17 and 18 are preempted because they are inconsistent with § 1005.9. The state provisions require a different disclosure of information than does the Federal law. The receipt provision is also preempted because it allows the consumer to be charged for receiving a receipt if a machine cannot furnish one at the time of a transfer.

Section 1005.13 Administrative Enforcement; Record Retention

13(b) Record Retention

1. *Requirements.* A financial institution need not retain records that it has given disclosures and documentation to each consumer; it need only retain evidence demonstrating that its procedures reasonably ensure the consumers' receipt of required disclosures and documentation.

Section 1005.14 Electronic Fund Transfer Service Provider Not Holding Consumer's Account

14(a) Electronic Fund Transfer Service Providers Subject to Regulation

1. *Applicability.* This section applies only when a service provider issues an access device to a consumer for initiating transfers to or from the consumer's account at a financial institution and the two entities have no agreement regarding this EFT service. If the service provider does not issue an access device to the consumer for accessing an account held by another institution, it does not qualify for the treatment accorded by § 1005.14. For example, this section does not apply to an institution that initiates preauthorized payroll deposits to consumer accounts on behalf of an employer. By contrast, § 1005.14 can apply to an institution that issues a code for initiating telephone transfers to be carried out through the ACH from a consumer's account at another institution. This is the case even if the consumer has accounts at both institutions.

2. *ACH agreements.* The ACH rules generally do not constitute an agreement for purposes of this section. However, an ACH agreement under which members specifically agree to honor each other's debit cards is an ''agreement,'' and thus this section does not apply.

14(b) Compliance by Electronic Fund Transfer Service Provider

1. *Liability.* The service provider is liable for unauthorized EFTs that exceed limits on the consumer's liability under § 1005.6.

14(b)(1) Disclosures and Documentation

1. *Periodic statements from electronic fund transfer service provider.* A service provider that meets the conditions set forth in this paragraph does not have to issue periodic statements. A service provider that does not meet the conditions need only include on periodic statements information about transfers initiated with the access device it has issued.

14(b)(2) Error Resolution

1. *Error resolution.* When a consumer notifies the service provider of an error, the EFT service provider must investigate and resolve the error in compliance with § 1005.11 as modified by § 1005.14(b)(2). If an error occurred, any fees or charges imposed as a result of the error, either by the service provider or by the account-holding institution (for example, overdraft or dishonor fees) must be reimbursed to the consumer by the service provider.

14(c) Compliance by Account-Holding Institution

14(c)(1) Documentation

1. *Periodic statements from account-holding institution.* The periodic statement provided by the account-holding institution need only contain the information required by § 1005.9(b)(1).

Section 1005.16 Disclosures at Automated Teller Machines

16(b) General

Paragraph 16(b)(1)

1. *Specific notices.* An ATM operator that imposes a fee for a specific type of transaction—such as for a cash withdrawal, but not for a balance inquiry, or for some cash withdrawals, but not for others (such as where the card was issued by a foreign bank or by a card issuer that has entered into a special contractual relationship with the ATM operator regarding surcharges)—may provide a notice on or at the ATM that a fee will be imposed or a notice that a fee may be imposed for providing EFT services or may specify the type of EFT for which a fee is imposed. If, however, a fee will be imposed in all instances, the notice must state that a fee will be imposed.

Section 1005.17 Requirements for Overdraft Services

17(a) Definition

1. *Exempt securities- and commodities-related lines of credit.* The definition of ''overdraft service'' does not include the payment of transactions in a securities or commodities account pursuant to which credit is extended by a broker-dealer registered with the Securities and Exchange Commission or the Commodity Futures Trading Commission.

17(b) Opt-In Requirement

1. *Scope.* i. *Account-holding institutions.* Section 1005.17(b) applies to ATM and one-time debit card transactions made with a debit card issued by or on behalf of the account-holding institution. Section 1005.17(b) does not apply to ATM and one-time debit card transactions made with a debit card issued by or through a third party unless the debit card is issued on behalf of the account-holding institution.

ii. *Coding of transactions.* A financial institution complies with the rule if it adapts its systems to identify debit card transactions as either one-time or recurring. If it does so, the financial institution may rely on the transaction's coding by merchants, other institutions, and other third parties as a one-time or a preauthorized or recurring debit card transaction.

iii. *One-time debit card transactions.* The opt-in applies to any one-time debit card transaction, whether the card is used, for example, at a point-of-sale, in an online transaction, or in a telephone transaction.

iv. *Application of fee prohibition.* The prohibition on assessing overdraft fees under § 1005.17(b)(1) applies to all institutions. For example, the prohibition applies to an institution that has a policy and practice of declining to authorize and pay any ATM or one-time debit card transactions when the institution has a reasonable belief at the time of the authorization request that the consumer does not have sufficient funds available to cover the transaction. However, the institution is not required to comply with §§ 1005.17(b)(1)(i)–(iv), including the notice and opt-in requirements, if it does not assess overdraft fees for paying ATM or one-time debit card transactions that overdraw the consumer's account. Assume an institution does not provide an opt-in notice, but authorizes an ATM or one-time debit card transaction on the reasonable belief that the consumer has sufficient funds in the account to cover the transaction. If, at settlement, the consumer has insufficient funds in the account (for example, due to intervening transactions that post to the consumer's account), the institution is not permitted to assess an overdraft fee or charge for paying that transaction.

2. *No affirmative consent.* A financial institution may pay overdrafts for ATM and one-time debit card transactions even if a consumer has not affirmatively consented or opted in to the institution's overdraft service. If the institution pays such an overdraft without the consumer's affirmative consent, however, it may not impose a fee or charge for doing so. These provisions do not limit the institution's ability to debit the consumer's account for the amount overdrawn if the institution is permitted to do so under applicable law.

3. *Overdraft transactions not required to be authorized or paid.* Section 1005.17 does not require a financial institution to authorize or pay an overdraft on an ATM or one-time debit card transaction even if the consumer has affirmatively consented to an institution's overdraft service for such transactions.

4. *Reasonable opportunity to provide affirmative consent.* A financial institution provides a consumer with a reasonable opportunity to provide affirmative consent when, among other things, it provides reasonable methods by which the consumer may affirmatively consent. A financial institution provides such reasonable methods, if:

i. *By mail.* The institution provides a form for the consumer to fill out and mail to affirmatively consent to the service.

ii. *By telephone.* The institution provides a readily-available telephone line that consumers may call to provide affirmative consent.

iii. *By electronic means.* The institution provides an electronic means for the consumer to affirmatively consent. For example, the institution could provide a form that can be accessed and processed at its Web site, where the consumer may click on a check box to provide consent and confirm that choice by clicking on a button that affirms the consumer's consent.

iv. *In person.* The institution provides a form for the consumer to complete and present at a branch or office to affirmatively consent to the service.

5. *Implementing opt-in at account-opening.* A financial institution may provide notice regarding the institution's overdraft service prior to or at account-opening. A financial institution may require a consumer, as a necessary step to opening an account, to choose whether or not to opt into the payment of ATM or one-time debit card transactions pursuant to the institution's overdraft service. For example, the institution could require the consumer, at account opening, to sign a signature line or check a box on a form (consistent with comment 17(b)–6) indicating whether or not the consumer affirmatively consents at account opening. If the consumer does not check any box or provide a signature, the institution must assume that the consumer does not opt in. Or, the institution could require the consumer to choose between an account that does not permit the payment of ATM or one-time debit card transactions pursuant to the institution's overdraft service and an account that permits the payment of such overdrafts, provided that the accounts comply with § 1005.17(b)(2) and § 1005.17(b)(3).

6. *Affirmative consent required.* A consumer's affirmative consent, or opt-in, to a financial institution's overdraft service must be obtained separately from other consents or acknowledgements obtained by the institution, including a consent to receive disclosures electronically. An institution may obtain a consumer's affirmative consent by providing a blank signature line or check box that the consumer could sign or select to affirmatively consent, provided that the signature line or check box is used solely for purposes of evidencing the consumer's choice whether or not to opt into the overdraft service and not for other purposes. An institution does not obtain a consumer's affirmative consent by including preprinted language about the overdraft service in an account disclosure provided with a signature card or contract that the consumer must sign to open the account and that acknowledges the consumer's acceptance of the account terms. Nor does an institution obtain a consumer's affirmative consent by providing a signature card that contains a pre-selected check box indicating that the consumer is requesting the service.

7. *Confirmation.* A financial institution may comply with the requirement in § 1005.17(b)(1)(iv) to provide confirmation of the consumer's affirmative consent by mailing or delivering to the consumer a copy of the consumer's completed opt-in notice, or by mailing or delivering a letter or notice to the consumer acknowledging that the consumer has elected to opt into the institution's service. The confirmation, which must be provided in writing, or electronically if the consumer agrees, must include a statement informing the consumer of the right to revoke the opt-in at any time. *See* § 1005.17(d)(6), which permits institutions to include the revocation statement on the initial opt-in notice. An institution complies with the confirmation requirement if it has adopted reasonable procedures designed to ensure that overdraft fees are assessed only in connection with transactions paid after the confirmation has been mailed or delivered to the consumer.

8. *Outstanding Negative Balance.* If a fee or charge is based on the amount of the outstanding negative balance, an institution is prohibited from assessing any such fee if the negative balance is solely attributable to an ATM or one-time debit card transaction, unless the consumer has opted into the institution's overdraft service for ATM or one-time debit card transactions. However, the rule does not prohibit an institution from assessing such a fee if the negative balance is attributable in whole or in part to a check, ACH, or other type of transaction not subject to the prohibition on assessing overdraft fees in § 1005.17(b)(1).

9. *Daily or Sustained Overdraft, Negative Balance, or Similar Fee or Charge* i. *Daily or sustained overdraft, negative balance, or similar fees or charges.* If a consumer has not opted into the institution's overdraft service for ATM or one-time debit card transactions, the fee prohibition in § 1005.17(b)(1) applies to all overdraft fees or charges for paying those transactions, including but not limited to daily or sustained overdraft, negative balance, or similar fees or charges. Thus, where a consumer's negative balance is solely attributable to an ATM or one-time debit card transaction, the rule prohibits the assessment of such fees unless the consumer has opted in. However, the rule does not prohibit an institution from assessing daily or sustained overdraft, negative balance, or similar fees or charges if a negative balance is attributable in whole or in part to a check, ACH, or other type of transaction not subject to the fee prohibition. When the negative balance is attributable in part to an ATM or one-time debit card transaction, and in part to a check, ACH, or other type of transaction not subject to the fee prohibition, the date on which such a fee may be assessed is based on the date on which the check, ACH, or other type of transaction is paid into overdraft.

ii. *Examples.* The following examples illustrate how an institution complies with the fee prohibition. For each example, assume the following: (a) The consumer has not opted into the payment of ATM or one-time debit card overdrafts; (b) these transactions are paid into overdraft because the amount of the transaction at settlement exceeded the amount authorized or the amount was not submitted for authorization; (c) under the account agreement, the institution may charge a per-item fee of $20 for each overdraft, and a one-time sustained overdraft fee of $20 on the fifth consecutive day the consumer's account remains overdrawn; (d) the institution posts ATM and debit card transactions before other transactions; and (e) the institution allocates deposits to account debits in the same order in which it posts debits.

A. Assume that a consumer has a $50 account balance on March 1. That day, the institution posts a one-time debit card transaction of $60 and a check transaction of $40. The institution charges an overdraft fee of $20 for the check overdraft but cannot assess an overdraft fee for the debit card transaction. At the end of the day, the consumer has an account balance of negative $70. The consumer does not make any deposits to the account, and no other transactions occur between March 2 and March 6. Because the consumer's negative balance is attributable in part to the $40 check (and associated overdraft fee), the institution may charge a sustained overdraft fee on March 6 in connection with the check.

B. Same facts as in A., except that on March 3, the consumer deposits $40 in the account. The institution allocates the $40 to the debit card transaction first, consistent with its posting order policy. At the end of the day on March 3, the consumer has an account balance of negative $30, which is attributable to the check transaction (and associated overdraft fee). The consumer does not make any further deposits to the account, and no other transactions occur between March 4 and March 6. Because the remaining negative balance is attributable to the March 1 check transaction, the institution may charge a sustained overdraft fee on March 6 in connection with the check.

C. Assume that a consumer has a $50 account balance on March 1. That day, the institution posts a one-time debit card transaction of $60. At the end of that day, the consumer has an account balance of negative $10. The institution may not assess an overdraft fee for the debit card transaction. On March 3, the institution pays a check transaction of $100 and charges an overdraft fee of $20. At the end of that day, the consumer has an account balance of negative $130. The consumer does not make any deposits to the account, and no other transactions occur between March 4 and March 8. Because the consumer's negative balance is attributable in part to the check, the institution may assess a $20 sustained overdraft fee. However, because the check was paid on March 3, the institution must use March 3 as the start date for determining the date on which the sustained overdraft fee may be assessed. Thus, the institution may charge a $20 sustained overdraft fee on March 8.

iii. *Alternative approach.* For a consumer who does not opt into the institution's overdraft service for ATM and one-time debit card transactions, an institution may also comply with the fee prohibition in § 1005.17(b)(1) by not assessing daily or sustained overdraft, negative balance, or similar fees or charges unless a consumer's negative balance is attributable solely to

check, ACH or other types of transactions not subject to the fee prohibition while that negative balance remains outstanding. In such case, the institution would not have to determine how to allocate subsequent deposits that reduce but do not eliminate the negative balance. For example, if a consumer has a negative balance of $30, of which $10 is attributable to a one-time debit card transaction, an institution complies with the fee prohibition if it does not assess a sustained overdraft fee while that negative balance remains outstanding.

17(b)(2) Conditioning Payment of Other Overdrafts on Consumer's Affirmative Consent

1. *Application of the same criteria.* The prohibitions on conditioning in § 1005.17(b)(2) generally require an institution to apply the same criteria for deciding when to pay overdrafts for checks, ACH transactions, and other types of transactions, whether or not the consumer has affirmatively consented to the institution's overdraft service with respect to ATM and one-time debit card overdrafts. For example, if an institution's internal criteria would lead the institution to pay a check overdraft if the consumer had affirmatively consented to the institution's overdraft service for ATM and one-time debit card transactions, it must also apply the same criteria in a consistent manner in determining whether to pay the check overdraft if the consumer has not opted in.

2. *No requirement to pay overdrafts on checks, ACH transactions, or other types of transactions.* The prohibition on conditioning in § 1005.17(b)(2) does not require an institution to pay overdrafts on checks, ACH transactions, or other types of transactions in all circumstances. Rather, the rule simply prohibits institutions from considering the consumer's decision not to opt in when deciding whether to pay overdrafts for checks, ACH transactions, or other types of transactions.

17(b)(3) Same Account Terms, Conditions, and Features

1. *Variations in terms, conditions, or features.* A financial institution may not vary the terms, conditions, or features of an account provided to a consumer who does not affirmatively consent to the payment of ATM or one-time debit card transactions pursuant to the institution's overdraft service. This includes, but is not limited to:

i. Interest rates paid and fees assessed;

ii. The type of ATM or debit card provided to the consumer. For instance, an institution may not provide consumers who do not opt in a PIN-only card while providing a debit card with both PIN and signature-debit functionality to consumers who opt in;

iii. Minimum balance requirements; or

iv. Account features such as online bill payment services.

2. *Limited-feature bank accounts.* Section 1005.17(b)(3) does not prohibit institutions from offering deposit account products with limited features, provided that a consumer is not required to open such an account because the consumer did not opt in. For example, § 1005.17(b)(3) does not prohibit an institution from offering a checking account designed to comply with state basic banking laws, or designed for consumers who are not eligible for a checking account because of their credit or checking account history, which may include features limiting the payment of overdrafts. However, a consumer who applies, and is otherwise eligible, for a full-service or other particular deposit account product may not be provided instead with the account with more limited features because the consumer has declined to opt in.

17(c) Timing

1. *Permitted fees or charges.* Fees or charges for ATM and one-time debit card overdrafts may be assessed only for overdrafts paid on or after the date the financial institution receives the consumer's affirmative consent to the institution's overdraft service. *See also* comment 17(b)–7.

17(d) Content and Format

1. *Overdraft service.* The description of the institution's overdraft service should indicate that the consumer has the right to affirmatively consent, or opt into payment of overdrafts for ATM and one-time debit card transactions. The description should also disclose the institution's policies regarding the payment of overdrafts for other transactions, including checks, ACH transactions, and automatic bill payments, provided that this content is not more prominent than the description of the consumer's right to opt into payment of overdrafts for ATM and one-time debit card transactions. As applicable, the institution also should indicate that it pays overdrafts at its discretion, and should briefly explain that if the institution does not authorize and pay an overdraft, it may decline the transaction.

2. *Maximum fee.* If the amount of a fee may vary from transaction to transaction, the financial institution may indicate that the consumer may be assessed a fee ''up to'' the maximum fee. The financial institution must disclose all applicable overdraft fees, including but not limited to:

i. Per item or per transaction fees;

ii. Daily overdraft fees;

iii. Sustained overdraft fees, where fees are assessed when the consumer has not repaid the amount of the overdraft after some period of time (for example, if an account remains overdrawn for five or more business days); or

iv. Negative balance fees.

3. *Opt-in methods.* The opt-in notice must include the methods by which the consumer may consent to the overdraft service for ATM and one-time debit card transactions. Institutions may tailor Model Form A–9 to the methods offered to consumers for affirmatively consenting to the service. For example, an institution need not provide the tear-off portion of Model Form A–9 if it is only permitting consumers to opt-in telephonically or electronically. Institutions may, but are not required, to provide a signature line or check box where the consumer can indicate that he or she declines to opt in.

4. *Identification of consumer's account.* An institution may use any reasonable method to identify the account for which the consumer submits the opt-in notice. For example, the institution may include a line for a printed name and an account number, as shown in Model Form A–9. Or, the institution may print a bar code or use other tracking information. *See also* comment 17(b)–6, which describes how an institution obtains a consumer's affirmative consent.

5. *Alternative plans for covering overdrafts.* If the institution offers both a line of credit subject to Regulation Z (12 CFR part 1026) and a service that transfers funds from another account of the consumer held at the institution to cover overdrafts, the institution must state in its opt-in notice that both alternative plans are offered. For example, the notice might state ''We also offer *overdraft protection plans,* such as a link to a savings account or to an overdraft line of credit, which may be less expensive than our standard overdraft practices.'' If the institution offers one, but not the other, it must state in its opt-in notice the alternative plan that it offers. If the institution does not offer either plan, it should omit the reference to the alternative plans.

17(f) Continuing Right To Opt-In or To Revoke the Opt-In

1. *Fees or charges for overdrafts incurred prior to revocation.* Section 1005.17(f)(1) provides that a consumer may revoke his or her prior consent at any time. If a consumer does so, this provision does not require the financial institution to waive or reverse any overdraft fees assessed on the consumer's account prior to the institution's implementation of the consumer's revocation request.

17(g) Duration of Opt-In

1. *Termination of overdraft service.* A financial institution may, for example, terminate the overdraft service when the consumer makes excessive use of the service.

Section 1005.18 Requirements for Financial Institutions Offering Payroll Card Accounts

18(a) Coverage

1. *Issuance of access device.* Consistent with § 1005.5(a), a financial institution may issue an access device only in response to an oral or written request for the device, or as a renewal or substitute for an accepted access device. A consumer is deemed to request an access device for a payroll card account when the consumer chooses to receive salary or other compensation through a payroll card account.

2. *Application to employers and service providers.* Typically, employers and third-party service providers do not meet the definition of a ''financial institution'' subject to the regulation because they neither hold payroll card accounts nor issue payroll cards and agree with consumers to provide EFT services in connection with payroll card accounts. However, to the extent an employer or a service provider undertakes either of these functions, it would be deemed a financial institution under the regulation.

18(b) Alternative to Periodic Statements

1. *Posted transactions.* A history of transactions provided under §§ 1005.18(b)(1)(ii) and (iii) shall reflect

transfers once they have been posted to the account. Thus, an institution does not need to include transactions that have been authorized, but that have not yet posted to the account.

2. *Electronic history.* The electronic history required under § 1005.18(b)(1)(ii) must be provided in a form that the consumer may keep, as required under § 1005.4(a)(1). Financial institutions may satisfy this requirement if they make the electronic history available in a format that is capable of being retained. For example, an institution satisfies the requirement if it provides a history at a Web site in a format that is capable of being printed or stored electronically using a web browser.

18(c) Modified Requirements

1. *Error resolution safe harbor provision.* Institutions that choose to investigate notices of error provided up to 120 days from the date a transaction has posted to a consumer's account may still disclose the error resolution time period required by the regulation (as set forth in the Model Form in Appendix A–7). Specifically, an institution may disclose to payroll card account holders that the institution will investigate any notice of error provided within 60 days of the consumer electronically accessing an account or receiving a written history upon request that reflects the error, even if, for some or all transactions, the institution investigates any notice of error provided up to 120 days from the date that the transaction alleged to be in error has posted to the consumer's account. Similarly, an institution's summary of the consumer's liability (as required under § 1005.7(b)(1)) may disclose that liability is based on the consumer providing notice of error within 60 days of the consumer electronically accessing an account or receiving a written history reflecting the error, even if, for some or all transactions, the institution allows a consumer to assert a notice of error up to 120 days from the date of posting of the alleged error.

2. *Electronic access.* A consumer is deemed to have accessed a payroll card account electronically when the consumer enters a user identification code or password or otherwise complies with a security procedure used by an institution to verify the consumer's identity. An institution is not required to determine whether a consumer has in fact accessed information about specific transactions to trigger the beginning of the 60-day periods for liability limits and error resolution under §§ 1005.6 and 1005.11.

3. *Untimely notice of error.* An institution that provides a transaction history under § 1005.18(b)(1) is not required to comply with the requirements of § 1005.11 for any notice of error from the consumer pertaining to a transfer that occurred more than 60 days prior to the earlier of the date the consumer electronically accesses the account or the date the financial institution sends a written history upon the consumer's request. (Alternatively, as provided in § 1005.18(c)(4)(ii), an institution need not comply with the requirements of § 1005.11 with respect to any notice of error received from the consumer more than 120 days after the date of posting of the transfer allegedly in error.) Where the consumer's assertion of error involves an unauthorized EFT, however, the institution must comply with § 1005.6 before it may impose any liability on the consumer.

Section 1005.20 Requirements for Gift Cards and Gift Certificates

20(a) Definitions

1. *Form of card, code, or device.* Section 1005.20 applies to any card, code, or other device that meets one of the definitions in §§ 1005.20(a)(1) through (a)(3) (and is not otherwise excluded by § 1005.20(b)), even if it is not issued in card form. Section 1005.20 applies, for example, to an account number or bar code that can be used to access underlying funds. Similarly, § 1005.20 applies to a device with a chip or other embedded mechanism that links the device to stored funds, such as a mobile phone or sticker containing a contactless chip that enables the consumer to access the stored funds. A card, code, or other device that meets the definition in §§ 1005.20(a)(1) through (a)(3) includes an electronic promise (*see* comment 20(a)–2) as well as a promise that is not electronic. *See, however,* § 1005.20(b)(5). In addition, § 1005.20 applies if a merchant issues a code that entitles a consumer to redeem the code for goods or services, regardless of the medium in which the code is issued (*see, however,* § 1005.20(b)(5)), and whether or not it may be redeemed electronically or in the merchant's store. Thus, for example, if a merchant emails a code that a consumer may redeem in a specified amount either online or in the merchant's store, that code is covered under § 1005.20, unless one of the exclusions in § 1005.20(b) apply.

2. *Electronic promise.* The term ''electronic promise'' as used in EFTA sections 915(a)(2)(B), (a)(2)(C), and (a)(2)(D) means a person's commitment or obligation communicated or stored in electronic form made to a consumer to provide payment for goods or services for transactions initiated by the consumer. The electronic promise is itself represented by a card, code or other device that is issued or honored by the person, reflecting the person's commitment or obligation to pay. For example, if a merchant issues a code that can be given as a gift and that entitles the recipient to redeem the code in an online transaction for goods or services, that code represents an electronic promise by the merchant and is a card, code, or other device covered by § 1005.20.

3. *Cards, codes, or other devices redeemable for specific goods or services.* Certain cards, codes, or other devices may be redeemable upon presentation for a specific good or service, or ''experience,'' such as a spa treatment, hotel stay, or airline flight. In other cases, a card, code, or other device may entitle the consumer to a certain percentage off the purchase of a good or service, such as 20% off of any purchase in a store. Such cards, codes, or other devices generally are not subject to the requirements of this section because they are not issued to a consumer ''in a specified amount'' as required under the definitions of ''gift certificate,'' ''store gift card,'' or ''general-use prepaid card.'' However, if the card, code, or other device is issued in a specified or denominated amount that can be applied toward the purchase of a specific good or service, such as a certificate or card redeemable for a spa treatment up to $50, the card, code, or other device is subject to this section, unless one of the exceptions in § 1005.20(b) apply. *See, e.g.,* § 1005.20(b)(3). Similarly, if the card, code, or other device states a specific monetary value, such as ''a $50 value,'' the card, code, or other device is subject to this section, unless an exclusion in § 1005.20(b) applies.

4. *Issued primarily for personal, family, or household purposes.* Section 1005.20 only applies to cards, codes, or other devices that are sold or issued to a consumer primarily for personal, family, or household purposes. A card, code, or other device initially purchased by a business is subject to this section if the card, code, or other device is purchased for redistribution or resale to consumers primarily for personal, family, or household purposes. Moreover, the fact that a card, code, or other device may be primarily funded by a business, for example, in the case of certain rewards or incentive cards, does not mean the card, code, or other device is outside the scope of § 1005.20, if the card, code, or other device will be provided to a consumer primarily for personal, family, or household purposes. *But see* § 1005.20(b)(3). Whether a card, code, or other device is issued to a consumer primarily for personal, family, or household purposes will depend on the facts and circumstances. For example, if a program manager purchases store gift cards directly from an issuing merchant and sells those cards through the program manager's retail outlets, such gift cards are subject to the requirements of § 1005.20 because the store gift cards are sold to consumers primarily for personal, family, or household purposes. In contrast, a card, code, or other device generally would not be issued to consumers primarily for personal, family, or household purposes, and therefore would fall outside the scope of § 1005.20, if the purchaser of the card, code, or device is contractually prohibited from reselling or redistributing the card, code, or device to consumers primarily for personal, family, or household purposes, and reasonable policies and procedures are maintained to avoid such sale or distribution for such purposes. However, if an entity that has purchased cards, codes, or other devices for business purposes sells or distributes such cards, codes, or other devices to consumers primarily for personal, family, or household purposes, that entity does not comply with § 1005.20 if it has not otherwise met the substantive and disclosure requirements of the rule or unless an exclusion in § 1005.20(b) applies.

5. *Examples of cards, codes, or other devices issued for business purposes.* Examples of cards, codes, or other devices that are issued and used for business purposes and therefore excluded from the definitions of ''gift certificate,'' ''store gift card,'' or ''general-use prepaid card'' include:

i. Cards, codes, or other devices to reimburse employees for travel or moving expenses.

ii. Cards, codes, or other devices for employees to use to purchase office supplies and other business-related items.

20(a)(2) Store Gift Card

1. *Relationship between ''gift certificate'' and ''store gift card.''* The term ''store gift card'' in § 1005.20(a)(2) includes ''gift certificate'' as defined in § 1005.20(a)(1). For example, a numeric or alphanumeric code representing a specified dollar amount or value that is electronically sent to a consumer as a gift which can be redeemed or exchanged by the recipient to obtain goods or services may be both a ''gift certificate'' and a ''store gift card'' if the specified amount or value cannot be increased.

2. *Affiliated group of merchants.* The term ''affiliated group of merchants'' means two or more affiliated merchants or other persons that are related by common ownership or common corporate control (*see, e.g.,* 12 CFR 227.3(b) and 12 CFR 223.2) and that share the same name, mark, or logo. For example, the term includes franchisees that are subject to a common set of corporate policies or practices under the terms of their franchise licenses. The term also applies to two or more merchants or other persons that agree among themselves, by contract or otherwise, to redeem cards, codes, or other devices bearing the same name, mark, or logo (other than the mark, logo, or brand of a payment network), for the purchase of goods or services solely at such merchants or persons. For example, assume a movie theatre chain and a restaurant chain jointly agree to issue cards that share the same ''Flix and Food'' logo that can be redeemed solely towards the purchase of movie tickets or concessions at any of the participating movie theatres, or towards the purchase of food or beverages at any of the participating restaurants. For purposes of § 1005.20, the movie theatre chain and the restaurant chain would be considered to be an affiliated group of merchants, and the cards are considered to be ''store gift cards.'' However, merchants or other persons are not considered to be affiliated merely because they agree to accept a card that bears the mark, logo, or brand of a payment network.

3. *Mall gift cards. See* comment 20(a)(3)–2.

20(a)(3) General-Use Prepaid Card

1. *Redeemable upon presentation at multiple, unaffiliated merchants.* A card, code, or other device is redeemable upon presentation at multiple, unaffiliated merchants if, for example, such merchants agree to honor the card, code, or device if it bears the mark, logo, or brand of a payment network, pursuant to the rules of the payment network.

2. *Mall gift cards.* Mall gift cards that are intended to be used or redeemed for goods or services at participating retailers within a shopping mall may be considered store gift cards or general-use prepaid cards depending on the merchants with which the cards may be redeemed. For example, if a mall card may only be redeemed at merchants within the mall itself, the card is more likely to be redeemable at an affiliated group of merchants and considered a store gift card. However, certain mall cards also carry the brand of a payment network and can be used at any retailer that accepts that card brand, including retailers located outside of the mall. Such cards are considered general-use prepaid cards.

20(a)(4) Loyalty, Award, or Promotional Gift Card

1. *Examples of loyalty, award, or promotional programs.* Examples of loyalty, award, or promotional programs under § 1005.20(a)(4) include, but are not limited to:

i. Consumer retention programs operated or administered by a merchant or other person that provide to consumers cards or coupons redeemable for or towards goods or services or other monetary value as a reward for purchases made or for visits to the participating merchant.

ii. Sales promotions operated or administered by a merchant or product manufacturer that provide coupons or discounts redeemable for or towards goods or services or other monetary value.

iii. Rebate programs operated or administered by a merchant or product manufacturer that provide cards redeemable for or towards goods or services or other monetary value to consumers in connection with the consumer's purchase of a product or service and the consumer's completion of the rebate submission process.

iv. Sweepstakes or contests that distribute cards redeemable for or towards goods or services or other monetary value to consumers as an invitation to enter into the promotion for a chance to win a prize.

v. Referral programs that provide cards redeemable for or towards goods or services or other monetary value to consumers in exchange for referring other potential consumers to a merchant.

vi. Incentive programs through which an employer provides cards redeemable for or towards goods or services or other monetary value to employees, for example, to recognize job performance, such as increased sales, or to encourage employee wellness and safety.

vii. Charitable or community relations programs through which a company provides cards redeemable for or towards goods or services or other monetary value to a charity or community group for their fundraising purposes, for example, as a reward for a donation or as a prize in a charitable event.

2. *Issued for loyalty, award, or promotional purposes.* To indicate that a card, code, or other device is issued for loyalty, award, or promotional purposes as required by § 1005.20(a)(4)(iii), it is sufficient for the card, code, or other device to state on the front, for example, ''Reward'' or ''Promotional.''

3. *Reference to toll-free number and Web site.* If a card, code, or other device issued in connection with a loyalty, award, or promotional program does not have any fees, the disclosure under § 1005.20(a)(4)(iii)(D) is not required on the card, code, or other device.

20(a)(6) Service Fee

1. *Service fees.* Under § 1005.20(a)(6), a service fee includes a periodic fee for holding or use of a gift certificate, store gift card, or general-use prepaid card. A periodic fee includes any fee that may be imposed on a gift certificate, store gift card, or general-use prepaid card from time to time for holding or using the certificate or card, such as a monthly maintenance fee, a transaction fee, an ATM fee, a reload fee, a foreign currency transaction fee, or a balance inquiry fee, whether or not the fee is waived for a certain period of time or is only imposed after a certain period of time. A service fee does not include a one-time fee or a fee that is unlikely to be imposed more than once while the underlying funds are still valid, such as an initial issuance fee, a cash-out fee, a supplemental card fee, or a lost or stolen certificate or card replacement fee.

20(a)(7) Activity

1. *Activity.* Under § 1005.20(a)(7), any action that results in an increase or decrease of the funds underlying a gift certificate, store gift card, or general-use prepaid card, other than the imposition of a fee, or an adjustment due to an error or a reversal of a prior transaction, constitutes activity for purposes of § 1005.20. For example, the purchase and activation of a certificate or card, the use of the certificate or card to purchase a good or service, or the reloading of funds onto a store gift card or general-use prepaid card constitutes activity. However, the imposition of a fee, the replacement of an expired, lost, or stolen certificate or card, and a balance inquiry do not constitute activity. In addition, if a consumer attempts to engage in a transaction with a gift certificate, store gift card, or general-use prepaid card, but the transaction cannot be completed due to technical or other reasons, such attempt does not constitute activity. Furthermore, if the funds underlying a gift certificate, store gift card, or general-use prepaid card are adjusted because there was an error or the consumer has returned a previously purchased good, the adjustment also does not constitute activity with respect to the certificate or card.

20(b) Exclusions

1. *Application of exclusion.* A card, code, or other device is excluded from the definition of ''gift certificate,'' ''store gift card,'' or ''general-use prepaid card'' if it meets any of the exclusions in § 1005.20(b). An excluded card, code, or other device generally is not subject to any of the requirements of this section. *See, however,* § 1005.20(a)(4)(iii), requiring certain disclosures for loyalty, award, or promotional gift cards.

2. *Eligibility for multiple exclusions.* A card, code, or other device may qualify for one or more exclusions. For example, a corporation may give its employees a gift card that is marketed solely to businesses for incentive-related purposes, such as to reward job performance or promote employee safety. In this case, the card may qualify for the exclusion for loyalty, award, or promotional gift cards under § 1005.20(b)(3), or for the exclusion for cards, codes, or other devices not marketed to the general public under § 1005.20(b)(4). In addition, as long as any one of the exclusions applies, a card, code, or other device is not covered by § 1005.20,

even if other exclusions do not apply. In the above example, the corporation may give its employees a type of gift card that can also be purchased by a consumer directly from a merchant. Under these circumstances, while the card does not qualify for the exclusion for cards, codes, or other devices not marketed to the general public under § 1005.20(b)(4) because the card can also be obtained through retail channels, it is nevertheless exempt from the substantive requirements of § 1005.20 because it is a loyalty, award, or promotional gift card. *See, however,* § 1005.20(a)(4)(iii), requiring certain disclosures for loyalty, award, or promotional gift cards. Similarly, a person may market a reloadable card to teenagers for occasional expenses that enables parents to monitor spending. Although the card does not qualify for the exclusion for cards, codes, or other devices not marketed to the general public under § 1005.20(b)(4), it may nevertheless be exempt from the requirements of § 1005.20 under § 1005.20(b)(2) if it is reloadable and not marketed or labeled as a gift card or gift certificate.

Paragraph 20(b)(1)

1. *Examples of excluded products.* The exclusion for products usable solely for telephone services applies to prepaid cards for long-distance telephone service, prepaid cards for wireless telephone service and prepaid cards for other services that function similar to telephone services, such as prepaid cards for voice over Internet protocol (VoIP) access time.

Paragraph 20(b)(2)

1. *Reloadable.* A card, code, or other device is ''reloadable'' if the terms and conditions of the agreement permit funds to be added to the card, code, or other device after the initial purchase or issuance. A card, code, or other device is not ''reloadable'' merely because the issuer or processor is technically able to add functionality that would otherwise enable the card, code, or other device to be reloaded.

2. *Marketed or labeled as a gift card or gift certificate.* The term ''marketed or labeled as a gift card or gift certificate'' means directly or indirectly offering, advertising, or otherwise suggesting the potential use of a card, code or other device, as a gift for another person. Whether the exclusion applies generally does not depend on the type of entity that makes the promotional message. For example, a card may be marketed or labeled as a gift card or gift certificate if anyone (other than the purchaser of the card), including the issuer, the retailer, the program manager that may distribute the card, or the payment network on which a card is used, promotes the use of the card as a gift card or gift certificate. A card, code, or other device, including a general-purpose reloadable card, is marketed or labeled as a gift card or gift certificate even if it is only occasionally marketed as a gift card or gift certificate. For example, a network-branded general purpose reloadable card would be marketed or labeled as a gift card or gift certificate if the issuer principally advertises the card as a less costly alternative to a bank account but promotes the card in a television, radio, newspaper, or Internet advertisement, or on signage as ''the perfect gift'' during the holiday season. However, the mere mention of the availability of gift cards or gift certificates in an advertisement or on a sign that also indicates the availability of other excluded prepaid cards does not by itself cause the excluded prepaid cards to be marketed as a gift card or a gift certificate. For example, the posting of a sign in a store that refers to the availability of gift cards does not by itself constitute the marketing of otherwise excluded prepaid cards that may also be sold in the store as gift cards or gift certificates, provided that a consumer acting reasonably under the circumstances would not be led to believe that the sign applies to all prepaid cards sold in the store. *See, however,* comment 20(b)(2)–4.ii.

3. *Examples of marketed or labeled as a gift card or gift certificate.* i. Examples of marketed or labeled as a gift card or gift certificate include:

A. Using the word ''gift'' or ''present'' on a card, certificate, or accompanying material, including documentation, packaging and promotional displays.

B. Representing or suggesting that a certificate or card can be given to another person, for example, as a ''token of appreciation'' or a ''stocking stuffer,'' or displaying a congratulatory message on the card, certificate or accompanying material.

C. Incorporating gift-giving or celebratory imagery or motifs, such as a bow, ribbon, wrapped present, candle, or congratulatory message, on a card, certificate, accompanying documentation, or promotional material.

ii. The term does not include:

A. Representing that a card or certificate can be used as a substitute for a checking, savings, or deposit account.

B. Representing that a card or certificate can be used to pay for a consumer's health-related expenses—for example, a card tied to a health savings account.

C. Representing that a card or certificate can be used as a substitute for traveler's checks or cash.

D. Representing that a card or certificate can be used as a budgetary tool, for example, by teenagers, or to cover emergency expenses.

4. *Reasonable policies and procedures to avoid marketing as a gift card.* The exclusion for a card, code, or other device that is reloadable and not marketed or labeled as a gift card or gift certificate in § 1005.20(b)(2) applies if a reloadable card, code, or other device is not marketed or labeled as a gift card or gift certificate and if persons subject to the rule, including issuers, program managers, and retailers, maintain policies and procedures reasonably designed to avoid such marketing. Such policies and procedures may include contractual provisions prohibiting a reloadable card, code, or other device from being marketed or labeled as a gift card or gift certificate, merchandising guidelines or plans regarding how the product must be displayed in a retail outlet, and controls to regularly monitor or otherwise verify that the card, code or other device is not being marketed as a gift card. Whether a reloadable card, code, or other device has been marketed as a gift card or gift certificate will depend on the facts and circumstances, including whether a reasonable consumer would be led to believe that the card, code, or other device is a gift card or gift certificate. The following examples illustrate the application of § 1005.20(b)(2):

i. An issuer or program manager of prepaid cards agrees to sell general-purpose reloadable cards through a retailer. The contract between the issuer or program manager and the retailer establishes the terms and conditions under which the cards may be sold and marketed at the retailer. The terms and conditions prohibit the general-purpose reloadable cards from being marketed as a gift card or gift certificate, and require policies and procedures to regularly monitor or otherwise verify that the cards are not being marketed as such. The issuer or program manager sets up one promotional display at the retailer for gift cards and another physically separated display for excluded products under § 1005.20(b), including general-purpose reloadable cards and wireless telephone cards, such that a reasonable consumer would not believe that the excluded cards are gift cards. The exclusion in § 1005.20(b)(2) applies because policies and procedures reasonably designed to avoid the marketing of the general-purpose reloadable cards as gift cards or gift certificates are maintained, even if a retail clerk inadvertently stocks or a consumer inadvertently places a general-purpose reloadable card on the gift card display.

ii. Same facts as in i., except that the issuer or program manager sets up a single promotional display at the retailer on which a variety of prepaid cards are sold, including store gift cards and general-purpose reloadable cards. A sign stating ''Gift Cards'' appears prominently at the top of the display. The exclusion in § 1005.20(b)(2) does not apply with respect to the general-purpose reloadable cards because policies and procedures reasonably designed to avoid the marketing of excluded cards as gift cards or gift certificates are not maintained.

iii. Same facts as in i., except that the issuer or program manager sets up a single promotional multi-sided display at the retailer on which a variety of prepaid card products, including store gift cards and general-purpose reloadable cards are sold. Gift cards are segregated from excluded cards, with gift cards on one side of the display and excluded cards on a different side of a display. Signs of equal prominence at the top of each side of the display clearly differentiate between gift cards and the other types of prepaid cards that are available for sale. The retailer does not use any more conspicuous signage suggesting the general availability of gift cards, such as a large sign stating ''Gift Cards'' at the top of the display or located near the display. The exclusion in § 1005.20(b)(2) applies because policies and procedures reasonably designed to avoid the marketing of the general-purpose reloadable cards as gift cards or gift certificates are maintained, even if a retail clerk inadvertently stocks or a consumer inadvertently places a general-purpose reloadable card on the gift card display.

iv. Same facts as in i., except that the retailer sells a variety of prepaid card

products, including store gift cards and general-purpose reloadable cards, arranged side-by-side in the same checkout lane. The retailer does not affirmatively indicate or represent that gift cards are available, such as by displaying any signage or other indicia at the checkout lane suggesting the general availability of gift cards. The exclusion in § 1005.20(b)(2) applies because policies and procedures reasonably designed to avoid marketing the general-purpose reloadable cards as gift cards or gift certificates are maintained.

5. *Online sales of prepaid cards.* Some Web sites may prominently advertise or promote the availability of gift cards or gift certificates in a manner that suggests to a consumer that the Web site exclusively sells gift cards or gift certificates. For example, a Web site may display a banner advertisement or a graphic on the home page that prominently states ''Gift Cards,'' ''Gift Giving,'' or similar language without mention of other available products, or use a web address that includes only a reference to gift cards or gift certificates in the address. In such a case, a consumer acting reasonably under the circumstances could be led to believe that all prepaid products sold on the Web site are gift cards or gift certificates. Under these facts, the Web site has marketed all such products, including general-purpose reloadable cards, as gift cards or gift certificates, and the exclusion in § 1005.20(b)(2) does not apply.

6. *Temporary non-reloadable cards issued in connection with a general-purpose reloadable card.* Certain general-purpose reloadable cards that are typically marketed as an account substitute initially may be sold or issued in the form of a temporary non-reloadable card. After the card is purchased, the cardholder is typically required to call the issuer to register the card and to provide identifying information in order to obtain a reloadable replacement card. In most cases, the temporary non-reloadable card can be used for purchases until the replacement reloadable card arrives and is activated by the cardholder. Because the temporary non-reloadable card may only be obtained in connection with the general-purpose reloadable card, the exclusion in § 1005.20(b)(2) applies so long as the card is not marketed as a gift card or gift certificate.

Paragraph 20(b)(4)

1. *Marketed to the general public.* A card, code, or other device is marketed to the general public if the potential use of the card, code, or other device is directly or indirectly offered, advertised, or otherwise promoted to the general public. A card, code, or other device may be marketed to the general public through any advertising medium, including television, radio, newspaper, the Internet, or signage. However, the posting of a company policy that funds may be disbursed by prepaid card (such as a sign posted at a cash register or customer service center stating that store credit will be issued by prepaid card) does not constitute the marketing of a card, code, or other device to the general public. In addition, the method of distribution by itself is not dispositive in determining whether a card, code, or other device is marketed to the general public. Factors that may be considered in determining whether the exclusion applies to a particular card, code, or other device include the means or channel through which the card, code, or device may be obtained by a consumer, the subset of consumers that are eligible to obtain the card, code, or device, and whether the availability of the card, code, or device is advertised or otherwise promoted in the marketplace.

2. *Examples.* The following examples illustrate the application of the exclusion in § 1005.20(b)(4):

i. A merchant sells its gift cards at a discount to a business which may give them to employees or loyal consumers as incentives or rewards. In determining whether the gift card falls within the exclusion in § 1005.20(b)(4), the merchant must consider whether the card is of a type that is advertised or made available to consumers generally or can be obtained elsewhere. If the card can also be purchased through retail channels, the exclusion in § 1005.20(b)(4) does not apply, even if the consumer obtained the card from the business as an incentive or reward. *See, however,* § 1005.20(b)(3).

ii. A national retail chain decides to market its gift cards only to members of its frequent buyer program. Similarly, a bank may decide to sell gift cards only to its customers. If a member of the general public may become a member of the program or a customer of the bank, the card does not fall within the exclusion in § 1005.20(b)(4) because the general public has the ability to obtain the cards. *See, however,* § 1005.20(b)(3).

iii. A card issuer advertises a reloadable card to teenagers and their parents promoting the card for use by teenagers for occasional expenses, schoolbooks and emergencies and by parents to monitor spending. Because the card is marketed to and may be sold to any member of the general public, the exclusion in § 1005.20(b)(4) does not apply. *See, however,* § 1005.20(b)(2).

iv. An insurance company settles a policyholder's claim and distributes the insurance proceeds to the consumer by means of a prepaid card. Because the prepaid card is simply the means for providing the insurance proceeds to the consumer and the availability of the card is not advertised to the general public, the exclusion in § 1005.20(b)(4) applies.

v. A merchant provides store credit to a consumer following a merchandise return by issuing a prepaid card that clearly indicates that the card contains funds for store credit. Because the prepaid card is issued for the stated purpose of providing store credit to the consumer and the ability to receive refunds by a prepaid card is not advertised to the general public, the exclusion in § 1005.20(b)(4) applies.

vi. A tax preparation company elects to distribute tax refunds to its clients by issuing prepaid cards, but does not advertise or otherwise promote the ability to receive proceeds in this manner. Because the prepaid card is simply the mechanism for providing the tax refund to the consumer, and the tax preparer does not advertise the ability to obtain tax refunds by a prepaid card, the exclusion in § 1005.20(b)(4) applies. However, if the tax preparer promotes the ability to receive tax refund proceeds through a prepaid card as a way to obtain ''faster'' access to the proceeds, the exclusion in § 1005.20(b)(4) does not apply.

Paragraph 20(b)(5)

1. *Exclusion explained.* To qualify for the exclusion in § 1005.20(b)(5), the sole means of issuing the card, code, or other device must be in a paper form. Thus, the exclusion generally applies to certificates issued in paper form where solely the paper itself may be used to purchase goods or services. A card, code or other device is not issued solely in paper form simply because it may be reproduced or printed on paper. For example, a bar code, card or certificate number, or certificate or coupon electronically provided to a consumer and redeemable for goods and services is not issued in paper form, even if it may be reproduced or otherwise printed on paper by the consumer. In this circumstance, although the consumer might hold a paper facsimile of the card, code, or other device, the exclusion does not apply because the information necessary to redeem the value was initially issued in electronic form. A paper certificate is within the exclusion regardless of whether it may be redeemed electronically. For example, a paper certificate or receipt that bears a bar code, code, or account number falls within the exclusion in § 1005.20(b)(5) if the bar code, code, or account number is not issued in any form other than on the paper. In addition, the exclusion in § 1005.20(b)(5) continues to apply in circumstances where an issuer replaces a gift certificate that was initially issued in paper form with a card or electronic code (for example, to replace a lost paper certificate).

2. *Examples.* The following examples illustrate the application of the exclusion in § 1005.20(b)(5):

i. A merchant issues a paper gift certificate that entitles the bearer to a specified dollar amount that can be applied towards a future meal. The merchant fills in the certificate with the name of the certificate holder and the amount of the certificate. The certificate falls within the exclusion in § 1005.20(b)(5) because it is issued in paper form only.

ii. A merchant allows a consumer to prepay for a good or service, such as a car wash or time at a parking meter, and issues a paper receipt bearing a numerical or bar code that the consumer may redeem to obtain the good or service. The exclusion in § 1005.20(b)(5) applies because the code is issued in paper form only.

iii. A merchant issues a paper certificate or receipt bearing a bar code or certificate number that can later be scanned or entered into the merchant's system and redeemed by the certificate or receipt holder towards the purchase of goods or services. The bar code or certificate number is not issued by the merchant in any form other than paper. The exclusion in § 1005.20(b)(5) applies because the bar code or certificate number is issued in paper form only.

iv. An online merchant electronically provides a bar code, card or certificate number, or certificate or coupon to a

consumer that the consumer may print on a home printer and later redeem towards the purchase of goods or services. The exclusion in § 1005.20(b)(5) does not apply because the bar code or card or certificate number was issued to the consumer in electronic form, even though it can be reproduced or otherwise printed on paper by the consumer.

Paragraph 20(b)(6)

1. *Exclusion explained.* The exclusion for cards, codes, or other devices that are redeemable solely for admission to events or venues at a particular location or group of affiliated locations generally applies to cards, codes, or other devices that are not redeemed for a specified monetary value, but rather solely for admission or entry to an event or venue. The exclusion also covers a card, code, or other device that is usable to purchase goods or services in addition to entry into the event or the venue, either at the event or venue or at an affiliated location or location in geographic proximity to the event or venue.

2. *Examples.* The following examples illustrate the application of the exclusion in § 1005.20(b)(6):

i. A consumer purchases a prepaid card that entitles the holder to a ticket for entry to an amusement park. The prepaid card may only be used for entry to the park. The card qualifies for the exclusion in § 1005.20(b)(6) because it is redeemable for admission or entry and for goods or services in conjunction with that admission. In addition, if the prepaid card does not have a monetary value, and therefore is not ''issued in a specified amount,'' the card does not meet the definitions of ''gift certificate,'' ''store gift card,'' or ''general-use prepaid card'' in § 1005.20(a). *See* comment 20(a)–3.

ii. Same facts as in i., except that the gift card also entitles the holder of the gift card to a dollar amount that can be applied towards the purchase of food and beverages or goods or services at the park or at nearby affiliated locations. The card qualifies for the exclusion in § 1005.20(b)(6) because it is redeemable for admission or entry and for goods or services in conjunction with that admission.

iii. A consumer purchases a $25 gift card that the holder of the gift card can use to make purchases at a merchant, or, alternatively, can apply towards the cost of admission to the merchant's affiliated amusement park. The card is not eligible for the exclusion in § 1005.20(b)(6) because it is not redeemable solely for the admission or ticket itself (or for goods and services purchased in conjunction with such admission). The card meets the definition of ''store gift card'' and is therefore subject to § 1005.20, unless a different exclusion applies.

20(c) Form of Disclosures

20(c)(1) Clear and Conspicuous

1. *Clear and conspicuous standard.* All disclosures required by this section must be clear and conspicuous. Disclosures are clear and conspicuous for purposes of this section if they are readily understandable and, in the case of written and electronic disclosures, the location and type size are readily noticeable to consumers. Disclosures need not be located on the front of the certificate or card, except where otherwise required, to be considered clear and conspicuous. Disclosures are clear and conspicuous for the purposes of this section if they are in a print that contrasts with and is otherwise not obstructed by the background on which they are printed. For example, disclosures on a card or computer screen are not likely to be conspicuous if obscured by a logo printed in the background. Similarly, disclosures on the back of a card that are printed on top of indentations from embossed type on the front of the card are not likely to be conspicuous if the indentations obstruct the readability of the disclosures. To the extent permitted, oral disclosures meet the standard when they are given at a volume and speed sufficient for a consumer to hear and comprehend them.

2. *Abbreviations and symbols.* Disclosures may contain commonly accepted or readily understandable abbreviations or symbols, such as ''mo.'' for month or a ''/'' to indicate ''per.'' Under the clear and conspicuous standard, it is sufficient to state, for example, that a particular fee is charged ''$2.50/mo. after 12 mos.''

20(c)(2) Format

1. *Electronic disclosures.* Disclosures provided electronically pursuant to this section are not subject to compliance with the consumer consent and other applicable provisions of the Electronic Signatures in Global and National Commerce Act (E–Sign Act) (15 U.S.C. 7001 *et seq.).* Electronic disclosures must be in a retainable form. For example, a person may satisfy the requirement if it provides an online disclosure in a format that is capable of being printed. Electronic disclosures may not be provided through a hyperlink or in another manner by which the purchaser can bypass the disclosure. A person is not required to confirm that the consumer has read the electronic disclosures.

20(c)(3) Disclosure Prior to Purchase

1. *Method of purchase.* The disclosures required by this paragraph must be provided before a certificate or card is purchased regardless of whether the certificate or card is purchased in person, online, by telephone, or by other means.

2. *Electronic disclosures.* Section 1005.20(c)(3) provides that the disclosures required by this section must be provided to the consumer prior to purchase. For certificates or cards purchased electronically, disclosures made to the consumer after a consumer has initiated an online purchase of a certificate or card, but prior to completing the purchase of the certificate or card, would satisfy the prior-to-purchase requirement. However, electronic disclosures made available on a person's Web site that may or may not be accessed by the consumer are not provided to the consumer and therefore would not satisfy the prior-to-purchase requirement.

3. *Non-physical certificates and cards.* If no physical certificate or card is issued, the disclosures must be provided to the consumer before the certificate or card is purchased. For example, where a gift certificate or card is a code that is provided by telephone, the required disclosures may be provided orally prior to purchase. *See also* § 1005.20(c)(2).

20(c)(4) Disclosures on the Certificate or Card

1. *Non-physical certificates and cards.* If no physical certificate or card is issued, the disclosures required by this paragraph must be disclosed on the code, confirmation, or other written or electronic document provided to the consumer. For example, where a gift certificate or card is a code or confirmation that is provided to a consumer online or sent to a consumer's email address, the required disclosures may be provided electronically on the same document as the code or confirmation.

2. *No disclosures on a certificate or card.* Disclosures required by § 1005.20(c)(4) need not be made on a certificate or card if it is accompanied by a certificate or card that complies with this section. For example, a person may issue or sell a supplemental gift card that is smaller than a standard size and that does not bear the applicable disclosures if it is accompanied by a fully compliant certificate or card. *See also* comment 20(c)(2)–2.

20(d) Prohibition on Imposition of Fees or Charges

1. *One-year period.* Section 1005.20(d) provides that a person may impose a dormancy, inactivity, or service fee only if there has been no activity with respect to a certificate or card for one year. The following examples illustrate this rule:

i. A certificate or card is purchased on January 15 of year one. If there has been no activity on the certificate or card since the certificate or card was purchased, a dormancy, inactivity, or service fee may be imposed on the certificate or card on January 15 of year two.

ii. Same facts as i., and a fee was imposed on January 15 of year two. Because no more than one dormancy, inactivity, or service fee may be imposed in any given calendar month, the earliest date that another dormancy, inactivity, or service fee may be imposed, assuming there continues to be no activity on the certificate or card, is February 1 of year two. A dormancy, inactivity, or service fee is permitted to be imposed on February 1 of year two because there has been no activity on the certificate or card for the preceding year (February 1 of year one through January 31 of year two), and February is a new calendar month. The imposition of a fee on January 15 of year two is not activity for purposes of § 1005.20(d). *See* comment 20(a)(7)–1.

iii. Same facts as i., and a fee was imposed on January 15 of year two. On January 31 of year two, the consumer uses the card to make a purchase. Another dormancy, inactivity, or service fee could not be imposed until January 31 of year three, assuming there has been no activity on the certificate or card since January 31 of year two.

2. *Relationship between §§ 1005.20(d)(2) and (c)(3).* Sections 1005.20(d)(2) and (c)(3) contain similar, but not identical, disclosure requirements. Section 1005.20(d)(2) requires the disclosure of dormancy, inactivity, and

service fees on a certificate or card. Section 1005.20(c)(3) requires that vendor person that issues or sells such certificate or card disclose to a consumer any dormancy, inactivity, and service fees associated with the certificate or card before such certificate or card may be purchased. Depending on the context, a single disclosure that meets the clear and conspicuous requirements of both §§ 1005.20(d)(2) and (c)(3) may be used to disclose a dormancy, inactivity, or service fee. For example, if the disclosures on a certificate or card, required by § 1005.20(d)(2), are visible to the consumer without having to remove packaging or other materials sold with the certificate or card, for a purchase made in person, the disclosures also meet the requirements of § 1005.20(c)(3). Otherwise, a dormancy, inactivity, or service fee may need to be disclosed multiple times to satisfy the requirements of §§ 1005.20(d)(2) and (c)(3). For example, if the disclosures on a certificate or card, required by § 1005.20(d)(2), are obstructed by packaging sold with the certificate or card, for a purchase made in person, they also must be disclosed on the packaging sold with the certificate or card to meet the requirements of § 1005.20(c)(3).

3. *Relationship between §§ 1005.20(d)(2), (e)(3), and (f)(2).* In addition to any disclosures required under § 1005.20(d)(2), any applicable disclosures under §§ 1005.20(e)(3) and (f)(2) of this section must also be provided on the certificate or card.

4. *One fee per month.* Under § 1005.20(d)(3), no more than one dormancy, inactivity, or service fee may be imposed in any given calendar month. For example, if a dormancy fee is imposed on January 1, following a year of inactivity, and a consumer makes a balance inquiry on January 15, a balance inquiry fee may not be imposed at that time because a dormancy fee was already imposed earlier that month and a balance inquiry fee is a type of service fee. If, however, the dormancy fee could be imposed on January 1, following a year of inactivity, and the consumer makes a balance inquiry on the same date, the person assessing the fees may choose whether to impose the dormancy fee or the balance inquiry fee on January 1. The restriction in § 1005.20(d)(3) does not apply to any fee that is not a dormancy, inactivity, or service fee. For example, assume a service fee is imposed on a general-use prepaid card on January 1, following a year of inactivity. If a consumer cashes out the remaining funds by check on January 15, a cash-out fee, to the extent such cash-out fee is permitted under § 1005.20(e)(4), may be imposed at that time because a cash-out fee is not a dormancy, inactivity, or service fee.

5. *Accumulation of fees.* Section 1005.20(d) prohibits the accumulation of dormancy, inactivity, or service fees for previous periods into a single fee because such a practice would circumvent the limitation in § 1005.20(d)(3) that only one fee may be charged per month. For example, if a consumer purchases and activates a store gift card on January 1 but never uses the card, a monthly maintenance fee of $2.00 a month may not be accumulated such that a fee of $24 is imposed on January 1 the following year.

20(e) Prohibition on Sale of Gift Certificates or Cards With Expiration Dates

1. *Reasonable opportunity.* Under § 1005.20(e)(1), no person may sell or issue a gift certificate, store gift card, or general-use prepaid card with an expiration date, unless there are policies and procedures in place to provide consumers with a reasonable opportunity to purchase a certificate or card with at least five years remaining until the certificate or card expiration date. Consumers are deemed to have a reasonable opportunity to purchase a certificate or card with at least five years remaining until the certificate or card expiration date if:

i. There are policies and procedures established to prevent the sale of a certificate or card unless the certificate or card expiration date is at least five years after the date the certificate or card was sold or initially issued to a consumer; or

ii. A certificate or card is available to consumers to purchase five years and six months before the certificate or card expiration date.

2. *Applicability to replacement certificates or cards.* Section 1005.20(e)(1) applies solely to the *purchase* of a certificate or card. Therefore, § 1005.20(e)(1) does not apply to the replacement of such certificates or cards. Certificates or cards issued as a replacement may bear a certificate or card expiration date of less than five years from the date of issuance of the replacement certificate or card. If the certificate or card expiration date for a replacement certificate or card is later than the date set forth in § 1005.20(e)(2)(i), then pursuant to § 1005.20(e)(2), the expiration date for the underlying funds at the time the replacement certificate or card is issued must be no earlier than the expiration date for the replacement certificate or card. For purposes of § 1005.20(e)(2), funds are not considered to be loaded to a store gift card or general-use prepaid card solely because a replacement card has been issued or activated for use.

3. *Disclosure of funds expiration—date not required.* Section 1005.20(e)(3)(i) does not require disclosure of the precise date the funds will expire. It is sufficient to disclose, for example, ''Funds expire 5 years from the date funds last loaded to the card.''; ''Funds can be used 5 years from the date money was last added to the card.''; or ''Funds do not expire.''

4. *Disclosure not required if no expiration date.* If the certificate or card and underlying funds do not expire, the disclosure required by § 1005.20(e)(3)(i) need not be stated on the certificate or card. If the certificate or card and underlying funds expire at the same time, only one expiration date need be disclosed on the certificate or card.

5. *Reference to toll-free telephone number and Web site.* If a certificate or card does not expire, or if the underlying funds are not available after the certificate or card expires, the disclosure required by § 1005.20(e)(3)(ii) need not be stated on the certificate or card. *See, however,* § 1005.20(f)(2).

6. *Relationship to § 226.20(f)(2).* The same toll-free telephone number and Web site may be used to comply with §§ 226.20(e)(3)(ii) and (f)(2). Neither a toll-free number nor a Web site must be maintained or disclosed if no fees are imposed in connection with a certificate or card, and the certificate or card and the underlying funds do not expire.

7. *Distinguishing between certificate or card expiration and funds expiration.* If applicable, a disclosure must be made on the certificate or card that notifies a consumer that the certificate or card expires, but the funds either do not expire or expire later than the certificate or card, and that the consumer may contact the issuer for a replacement card. The disclosure must be made with equal prominence and in close proximity to the certificate or card expiration date. The close proximity requirement does not apply to oral disclosures. In the case of a certificate or card, close proximity means that the disclosure must be on the same side as the certificate or card expiration date. For example, if the disclosure is the same type size and is located immediately next to or directly above or below the certificate or card expiration date, without any intervening text or graphical displays, the disclosures would be deemed to be equally prominent and in close proximity. The disclosure need not be embossed on the certificate or card to be deemed equally prominent, even if the expiration date is embossed on the certificate or card. The disclosure may state on the front of the card, for example, ''Funds expire after card. Call for replacement card.'' or ''Funds do not expire. Call for new card after 09/2016.'' Disclosures made pursuant to § 1005.20(e)(3)(iii)(A) may also fulfill the requirements of § 1005.20(e)(3)(i). For example, making a disclosure that ''Funds do not expire'' to comply with § 1005.20(e)(3)(iii)(A) also fulfills the requirements of § 1005.20(e)(3)(i).

8. *Expiration date safe harbor.* A non-reloadable certificate or card that bears an expiration date that is at least seven years from the date of manufacture need not state the disclosure required by § 1005.20(e)(3)(iii). However, § 1005.20(e)(1) still prohibits the sale or issuance of such certificate or card unless there are policies and procedures in place to provide a consumer with a reasonable opportunity to purchase the certificate or card with at least five years remaining until the certificate or card expiration date. In addition, under § 1005.20(e)(2), the funds may not expire before the certificate or card expiration date, even if the expiration date of the certificate or card bears an expiration date that is more than five years from the date of purchase. For purposes of this safe harbor, the date of manufacture is the date on which the certificate or card expiration date is printed on the certificate or card.

9. *Relationship between §§ 1005.20(d)(2), (e)(3), and (f)(2).* In addition to any disclosures required to be made under § 1005.20(e)(3), any applicable disclosures under §§ 1005.20(d)(2) and (f)(2) must also be provided on the certificate or card.

10. *Replacement or remaining balance of an expired certificate or card.* When a certificate or card expires, but the underlying funds have not expired, an issuer, at its option in accordance with applicable state

law, may provide either a replacement certificate or card or otherwise provide the certificate or card holder, for example, by check, with the remaining balance on the certificate or card. In either case, the issuer may not charge a fee for the service.

11. *Replacement of a lost or stolen certificate or card not required.* Section 1005.20(e)(4) does not require the replacement of a certificate or card that has been lost or stolen.

12. *Date of issuance or loading.* For purposes of § 1005.20(e)(2)(i), a certificate or card is not issued or loaded with funds until the certificate or card is activated for use.

13. *Application of expiration date provisions after redemption of certificate or card.* The requirement that funds underlying a certificate or card must not expire for at least five years from the date of issuance or date of last load ceases to apply once the certificate or card has been fully redeemed, even if the underlying funds are not used to contemporaneously purchase a specific good or service. For example, some certificates or cards can be used to purchase music, media, or virtual goods. Once redeemed by a consumer, the entire balance on the certificate or card is debited from the certificate or card and credited or transferred to another ''account'' established by the merchant of such goods or services. The consumer can then make purchases of songs, media, or virtual goods from the merchant using that ''account'' either at the time the value is transferred from the certificate or card or at a later time. Under these circumstances, once the card has been fully redeemed and the ''account'' credited with the amount of the underlying funds, the five-year minimum expiration term no longer applies to the underlying funds. However, if the consumer only partially redeems the value of the certificate or card, the five-year minimum expiration term requirement continues to apply to the funds remaining on the certificate or card.

20(f) Additional Disclosure Requirements for Gift Certificates or Cards

1. *Reference to toll-free telephone number and Web site.* If a certificate or card does not have any fees, the disclosure under § 1005.20(f)(2) is not required on the certificate or card. *See, however,* § 1005.20(e)(3)(ii).

2. *Relationship to § 226.20(e)(3)(ii).* The same toll-free telephone number and Web site may be used to comply with §§ 226.20(e)(3)(ii) and (f)(2). Neither a toll-free number nor a Web site must be maintained or disclosed if no fees are imposed in connection with a certificate or card, and both the certificate or card and underlying funds do not expire.

3. *Relationship between §§ 1005.20(d)(2), (e)(3), and (f)(2).* In addition to any disclosures required pursuant to § 1005.20(f)(2), any applicable disclosures under §§ 1005.20(d)(2) and (e)(3) must also be provided on the certificate or card.

20(g) Compliance Dates

1. *Period of eligibility for loyalty, award, or promotional programs.* For purposes of § 1005.20(g)(2), the period of eligibility is the time period during which a consumer must engage in a certain action or actions to meet the terms of eligibility for a loyalty, award, or promotional program and obtain the card, code, or other device. Under § 1005.20(g)(2), a gift card issued pursuant to a loyalty, award, or promotional program that began prior to August 22, 2010 need not state the disclosures in § 1005.20(a)(4)(iii) regardless of whether the consumer became eligible to receive the gift card prior to August 22, 2010, or after that date. For example, a product manufacturer may provide a $20 rebate card to a consumer if the consumer purchases a particular product and submits a fully completed entry between January 1, 2010 and December 31, 2010. Similarly, a merchant may provide a $20 gift card to a consumer if the consumer makes $200 worth of qualifying purchases between June 1, 2010 and October 30, 2010. Under both examples, gift cards provided pursuant to these loyalty, award, or promotional programs need not state the disclosures in § 1005.20(a)(4)(iii) to qualify for the exclusion in § 1005.20(b)(3) for loyalty, award, or promotional gift cards because the period of eligibility for each program began prior to August 22, 2010.

20(h) Temporary Exemption

20(h)(1) Delayed Effective Date

1. *Application to certificates or cards produced prior to April 1, 2010.* Certificates or cards produced prior to April 1, 2010 may be sold to a consumer on or after August 22, 2010 without satisfying the requirements of §§ 1005.20(c)(3), (d)(2), (e)(1), (e)(3), and (f) through January 30, 2011, provided that issuers of such certificates or cards comply with the additional substantive and disclosure requirements of §§ 1005.20(h)(1)(i) through (iv). Issuers of certificates or cards produced prior to April 1, 2010 need not satisfy these additional requirements if the certificates or cards fully comply with the rule (§§ 1005.20(a) through (f)). For example, the in-store signage and other disclosures required by § 1005.20(h)(2) do not apply to gift cards produced prior to April 1, 2010 that do not have fees and do not expire, and which otherwise comply with the rule.

2. *Expiration of temporary exemption.* Certificates or cards produced prior to April 1, 2010 that do not fully comply with §§ 1005.20(a) through (f) may not be issued or sold to consumers on or after January 31, 2011.

20(h)(2) Additional Disclosures

1. *Disclosures through third parties.* Issuers may make the disclosures required by § 1005.20(h)(2) through a third party, such as a retailer or merchant. For example, an issuer may have a merchant install in-store signage with the disclosures required by § 1005.20(h)(2) on the issuer's behalf.

2. *General advertising disclosures.* Section 1005.20(h)(2) does not impose an obligation on the issuer to advertise gift certificates, store gift cards, or general-use prepaid cards.

Appendix A—Model Disclosure Clauses and Forms

1. *Review of forms.* The Bureau will not review or approve disclosure forms or statements for financial institutions. However, the Bureau has issued model clauses for institutions to use in designing their disclosures. If an institution uses these clauses accurately to reflect its service, the institution is protected from liability for failure to make disclosures in proper form.

2. *Use of forms.* The appendix contains model disclosure clauses for optional use by financial institutions to facilitate compliance with the disclosure requirements of sections 1005.5(b)(2) and (b)(3), 1005.6(a), 1005.7, 1005.8(b), 1005.14(b)(1)(ii), 1005.15(d)(1) and (d)(2), and 1005.18(c)(1) and (c)(2). The use of appropriate clauses in making disclosures will protect a financial institution from liability under sections 916 and 917 of the Act provided the clauses accurately reflect the institution's EFT services.

3. *Altering the clauses.* Financial institutions may use clauses of their own design in conjunction with the Bureau's model clauses. The inapplicable words or portions of phrases in parentheses should be deleted. The catchlines are not part of the clauses and need not be used. Financial institutions may make alterations, substitutions, or additions in the clauses to reflect the services offered, such as technical changes (including the substitution of a trade name for the word ''card,'' deletion of inapplicable services, or substitution of lesser liability limits). Several of the model clauses include references to a telephone number and address. Where two or more of these clauses are used in a disclosure, the telephone number and address may be referenced and need not be repeated.

Dated: October 24, 2011.

Alastair M. Fitzpayne,

Deputy Chief of Staff and Executive Secretary, Department of the Treasury.

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Part III

Department of the Treasury

Internal Revenue Service

26 CFR Part 1

Guidance Regarding Deduction and Capitalization of Expenditures Related to Tangible Property; Temporary Regulation and Proposed Rule

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9564]

RIN 1545–BJ93

Guidance Regarding Deduction and Capitalization of Expenditures Related to Tangible Property

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Temporary regulations.

SUMMARY: This document contains temporary regulations that provide guidance on the application of sections 162(a) and 263(a) of the Internal Revenue Code to amounts paid to acquire, produce, or improve tangible property. The temporary regulations clarify and expand the standards in the current regulations under sections 162(a) and 263(a) and provide certain bright-line tests (for example, a de minimis rule for certain acquisitions) for applying these standards. The temporary regulations also provide guidance under section 168 regarding the accounting for, and dispositions of, property subject to section 168. The temporary regulations also amend the general asset account regulations. The temporary regulations will affect all taxpayers that acquire, produce, or improve tangible property. The text of the temporary regulations also serves as the text of proposed regulations set forth in the notice of proposed rulemaking on this subject appearing elsewhere in this issue of the **Federal Register**.

DATES: *Effective Date:* These regulations are effective on January 1, 2012.

Applicability Dates: For dates of applicability of the temporary regulations, see §§ 1.162–3T, 1.162–4T, 1.162–11T, 1.165–2T, 1.167(a)–4T, 1.167(a)–7T, 1.167(a)–8T, 1.168(i)–1T, 1.168(i)–7T, 1.168(i)–8T, 1.263(a)–1T, 1.263(a)–2T, 1.263(a)–3T, 1.263(a)–6T, 1.263A–1T, and 1.1016–3T.

FOR FURTHER INFORMATION CONTACT: Concerning §§ 1.162–3T, 1.162–4T, 1.162–11T, 1.263(a)–1T, 1.263(a)–2T, 1.263(a)–3T, 1.263(a)–6T, Merrill D. Feldstein or Alan S. Williams, Office of Associate Chief Counsel (Income Tax & Accounting), (202) 622–4950 (not a toll-free call); Concerning §§ 1.165–2T, 1.167(a)–4T, 1.167(a)–7T, 1.167(a)–8T, 1.168(i)–1T, 1.168(i)–7T, 1.168(i)–8T, 1.263A–1T, and 1.1016–3T, Kathleen Reed or Patrick Clinton, Office Associate Chief Counsel (Income Tax & Accounting), (202) 622–4930 (not a toll-free call).

SUPPLEMENTARY INFORMATION:

Background

Section 263(a) provides that no deduction is allowed for (1) any amount paid out for new buildings or permanent improvements or betterments made to increase the value of any property or estate, or (2) any amount expended in restoring property or in making good the exhaustion thereof for which an allowance has been made. Regulations issued under section 263(a) provided that capital expenditures included amounts paid or incurred to (1) add to the value, or substantially prolong the useful life, of property owned by the taxpayer, or (2) adapt the property to a new or different use. However, those regulations also provided that amounts paid or incurred for incidental repairs and maintenance of property within the meaning of section 162 and § 1.162–4 of the Income Tax Regulations are not capital expenditures under § 1.263(a)–1.

The United States Supreme Court has recognized the highly factual nature of determining whether expenditures are for capital improvements or for ordinary repairs. *See Welch* v. *Helvering,* 290 U.S. 111, 114 (1933) (''decisive distinctions [between capital and ordinary expenditures] are those of degree and not of kind''); *Deputy* v. *du Pont,* 308 U.S. 488, 496 (1940) (each case ''turns on its special facts''). Because of the factual nature of the issue, the courts have articulated a number of ways to distinguish between deductible repairs and non-deductible capital improvements. For example, in *Illinois Merchants Trust Co.* v. *Commissioner,* 4 B.T.A. 103, 106 (1926), acq. (V–2 CB 2), the court explained that repair and maintenance expenses are incurred for the purpose of keeping property in an ordinarily efficient operating condition over its probable useful life for the uses for which the property was acquired. Capital expenditures, in contrast, are for replacements, alterations, improvements, or additions that appreciably prolong the life of the property, materially increase its value, or make it adaptable to a different use. In *Estate of Walling* v. *Commissioner,* 373 F.2d 190, 192–193 (3rd Cir. 1966), the court explained that the relevant distinction between capital improvements and repairs is whether the expenditures were made to ''put'' or ''keep'' property in efficient operating condition. In *Plainfield-Union Water Co.* v. *Commissioner,* 39 T.C. 333, 338 (1962), nonacq. on other grounds (1964–2 CB 8), the court stated that if the expenditure merely restores the property to the state it was in before the situation prompting the expenditure arose and does not make the property more valuable, more useful, or longer-lived, then such an expenditure is usually considered a deductible repair. In contrast, a capital expenditure is generally considered to be a more permanent increment in the longevity, utility, or worth of the property.

The standards for applying section 263(a), as set forth in the regulations, case law, and administrative guidance, are difficult to discern and apply in practice and have led to considerable uncertainty and controversy for taxpayers. On January 20, 2004, the IRS and the Treasury Department published Notice 2004–6 (2004–3 IRB 308) announcing an intention to propose regulations providing guidance in this area. The notice identified issues under consideration by the IRS and the Treasury Department and invited public comment on whether these or other issues should be addressed in the regulations and, if so, what specific rules and principles should be provided.

On August 21, 2006, the IRS and the Treasury Department published in the **Federal Register** (71 FR 48590–01) proposed amendments to the regulations under section 263(a) (2006 proposed regulations) relating to amounts paid to acquire, produce, or improve tangible property. The IRS and the Treasury Department received numerous written comments on the 2006 proposed regulations and held a public hearing on December 19, 2006. On March 10, 2008, after consideration of the comment letters and the statements at the public hearing, the IRS and the Treasury Department withdrew the 2006 proposed regulations and proposed new regulations (2008 proposed regulations) in the **Federal Register** (73 FR 47 12838–01) under sections 162(a) (relating to the deduction for ordinary and necessary trade or business expenses) and section 263(a) (relating to the capitalization requirement). The IRS and the Treasury Department received several comment letters on the 2008 proposed regulations and held a public hearing on the 2008 proposed regulations on June 24, 2008. After considering the comment letters and the statements at the public hearing, the IRS and the Treasury Department are issuing temporary regulations amending 26 CFR part 1. The IRS and the Treasury Department are also withdrawing the 2008 proposed regulations and are proposing new regulations that incorporate the text of these temporary regulations.

Explanation of Provisions

I. Overview

Section 263(a) generally requires the capitalization of amounts paid to acquire, produce, or improve tangible property. These temporary regulations provide a general framework for capitalization and retain many of the provisions of the 2008 proposed regulations, which in many instances incorporated standards from existing authorities under section 263(a). The temporary regulations also modify several sections of the 2008 proposed regulations in response to comments received and to achieve results that are more consistent with the established authorities. The temporary regulations adopt the same general format as the 2006 and 2008 proposed regulations, whereby § 1.263(a)–1T provides general rules for capital expenditures, § 1.263(a)–2T provides rules for amounts paid for the acquisition or production of tangible property, and § 1.263(a)–3T provides rules for amounts paid for the improvement of tangible property. The temporary regulations also adopt and refine many of the rules contained in the 2008 proposed regulations. For example, the temporary regulations adopt and refine the definition and treatment of materials and supplies under § 1.162–3T, the de minimis rule for the acquisition and production of property under § 1.263(a)–2T, and the safe harbor for routine maintenance under § 1.263(a)–3T.

The temporary regulations also modify some of the rules set out in the 2008 proposed regulations. For example, the temporary regulations revise certain rules for determining whether there has been an improvement to a unit of property under § 1.263(a)–3T. Notably, the temporary regulations revise the rules for determining whether an amount is paid for an improvement to a building. The temporary regulations also revise the rule for determining whether an amount is paid for the replacement of a major component or substantial structural part of a unit of property. In addition, the temporary regulations include numerous new and revised examples to illustrate the application of the improvement rules. Finally, the temporary regulations provide several additional rules that were not included in the 2008 proposed regulations. For example, the temporary regulations provide rules under § 1.263(a)–3T(f) for the treatment of amounts paid to improve leased property and provide rules under § 1.168(i)–8T that revise the definition of *disposition* for property subject to section 168 to include the retirement of a structural component of a building.

II. Materials and Supplies Under § 1.162–3

Section 1.162–3 provides, in part, that a taxpayer carrying materials and supplies on hand should include in expenses the charges for materials and supplies only in the amount that are actually consumed and used in operation during the taxable year for which the return is made. Section 1.162–3 does not define materials and supplies; however various judicial and administrative authorities have ruled on whether property constitutes a material or supply (rather than inventory or depreciable property). *See,* for example, Rev. Rul. 81–185 (1981–2 CB 59); Rev. Rul. 78–382 (1978–2 CB 111).

In response to practitioner comments that the 2006 proposed regulations failed to address the relationship between the treatment of acquisition costs and the treatment of materials and supplies, the 2008 proposed regulations proposed substantial modifications to § 1.162–3. The 2008 proposed regulations defined materials and supplies as tangible property that is used or consumed in the taxpayer's operations that (1) is not a unit of property or acquired as part of a single unit of property; (2) is a unit of property that had an economic useful life of 12 months or less, beginning when the property was used or consumed; (3) is a unit of property that had an acquisition or production cost (as determined under section 263A) of $100 or less; or (4) is identified as a material and supply in future published guidance. In addition, the 2008 proposed regulations adopted the general rule that incidental materials and supplies (for which no inventories or records of consumption are maintained) are deductible in the year purchased and that non-incidental materials and supplies are not deductible until the year in which they are used or consumed in the taxpayer's operations.

The 2008 proposed regulations included a specific rule for the treatment of rotable or temporary spare parts that otherwise met the definition of materials and supplies. Because rotable and temporary spare parts are typically removed, repaired, and reused over a period of years, the 2008 proposed regulations treated rotable and temporary spare parts as used or consumed in the taxable year in which a taxpayer disposed of the rotable or temporary part.

The temporary regulations generally retain the framework set forth in the 2008 proposed regulations for materials and supplies. In response to practitioner and industry comments, however, the temporary regulations modify and expand the definition of materials and supplies, provide an alternative optional method of accounting for rotable and temporary spare parts, and provide an election to treat certain materials and supplies under the de minimis rule of § 1.263(a)–2T. In addition, consistent with the 2008 proposed regulations, the temporary regulations allow a taxpayer to elect to capitalize certain materials and supplies.

A. Definition of Materials and Supplies

The 2008 proposed regulations defined the first category of materials and supplies as tangible property used and consumed in the taxpayers operations, not constituting a unit of property under § 1.263(a)–3(d)(2), and not acquired as part of a single unit of property. Under this definition, many component parts acquired separately from an existing unit of property would not be treated as materials and supplies if they were treated as separate units of property under § 1.263(a)–3(d)(2). The IRS and the Treasury Department intended that these components generally qualify as materials and supplies. Therefore, the temporary regulations redefine the first category of materials and supplies by further describing the types of components that qualify and by eliminating the requirement that such property not be a unit of property under section § 1.263(a)–3T(d)(2). Under the temporary regulations, the first category of materials and supplies includes components that are acquired to maintain, repair, or improve a unit of tangible property owned, leased, or serviced by the taxpayer and that are not acquired as part of any single unit of property.

In addition, the temporary regulations provide a new category of materials and supplies. One commentator suggested that the IRS and the Treasury Department consider the treatment of certain property that does not fit clearly into any of the categories set out in the 2008 proposed regulations but that generally is not considered depreciable property or inventory property, such as fuel, water, or lubricants. The temporary regulations add a category of materials and supplies for fuel, lubricants, water, and similar items that are reasonably expected to be consumed in 12 months or less, beginning when used in the taxpayer's operations.

In addition, the IRS and the Treasury Department received several comments requesting that the definition of

materials and supplies raise the specified acquisition or production cost threshold from $100 or less to $500 or less and that this specified amount be indexed for inflation. The temporary regulations retain the $100 limitation to avoid possible inappropriate distortions of a taxpayer's income. The temporary regulations add language, however, that gives the IRS and the Treasury Department the flexibility to change the amount of the limitation by future published guidance. Moreover, a taxpayer with applicable financial statements will be permitted to deduct amounts paid for property up to higher thresholds if it complies with the requirements set out in the de minimis rule provided in § 1.263(a)–2T.

Finally, several commentators questioned the effect of proposed § 1.162–3 on certain safe harbor revenue procedures that permit taxpayers to treat certain property as materials and supplies. For example, Rev. Proc. 2002–12 (2002–1 CB 374) allows a taxpayer to treat smallwares as materials and supplies that are not incidental under § 1.162–3. Similarly, Rev. Proc. 2002–28 (2002–1 CB 815) allows a qualifying small business taxpayer to treat certain inventoriable items in the same manner as materials and supplies that are not incidental under § 1.162–3. The temporary regulations do not supersede, obsolete, or replace these revenue procedures to the extent they deem certain property to constitute materials and supplies under § 1.162–3. This designated property continues to qualify as materials and supplies under the temporary regulations because the property is identified in published guidance as materials and supplies.

B. Optional Method for Rotable or Temporary Spare Parts

The 2008 proposed regulations proposed to allow a deduction for amounts paid for rotable or temporary spare parts when the parts were discarded from the taxpayer's operations. Alternatively, a taxpayer could elect to capitalize and depreciate rotable spare parts over the parts' applicable recovery period.

The IRS and the Treasury Department received comments stating that the requirement to defer the deduction of rotable spare parts until the year of disposition is inconsistent with the method that many taxpayers currently use for rotable spare parts and would result in an administrative burden for those taxpayers. One commentator explained that, under this method, a taxpayer deducts an amount paid for a new rotable spare part in the taxable year in which it installs the rotable part in its equipment. The taxpayer includes in income and assigns a cost basis equal to the fair market value of the used, non-functioning part, and capitalizes the costs of repairing the part. If the repaired part is later used as a replacement part in the taxpayer's equipment, the taxpayer deducts the basis of the part in the taxable year it is re-installed. This cycle continues until disposition of the part.

The temporary regulations generally adopt the recommendations of the commentator and include the proposed method of accounting for rotable parts as an optional method. This optional method may be used as an alternative to treating the parts as used or consumed in the year of disposition or electing to treat the parts as depreciable assets. If a taxpayer chooses to use the optional method, the method must be used for all of the taxpayer's rotable and temporary spare parts in the same trade or business.

C. Election To Deduct Materials and Supplies Under the De Minimis Rule

The IRS and the Treasury Department received several comments requesting that the regulations clarify whether a taxpayer may apply the de minimis rule contained in § 1.263(a)–2 of the 2008 proposed regulations to units of property that were also treated as materials and supplies under § 1.162–3 of the proposed regulation. Under the proposed de minimis rule, a taxpayer was not required to capitalize amounts paid for the acquisition or production of a unit of property if the taxpayer met certain requirements set out in that regulation. The proposed de minimis rule provided a taxpayer with more favorable treatment (that is, deduction when an amount is paid or incurred) than the treatment of materials and supplies under the general rule of § 1.162–3 (that is, deduction when property is used or consumed). Commentators indicated that the requirement to differentiate and separately account for certain materials and supplies is impractical and presents an administrative burden that is inconsistent with the purpose of the de minimis rule. Thus, commentators requested that a taxpayer be permitted to apply the de minimis rule of § 1.263(a)–2, rather than the materials and supplies rules, to the costs of any unit of property that meets the definition of materials and supplies.

The temporary regulations adopt this recommendation and allow a taxpayer to elect to apply the de minimis rule of § 1.263(a)–2T(g) to the costs of acquiring or producing any type of material or supply defined in § 1.162–3T if such costs meet the requirements of the de minimis rule. Thus, a taxpayer may apply a single timing rule (that is, deduction when paid or incurred) to any unit of property, including materials and supplies, to the extent the aggregate amount paid for such property does not exceed the limit described in § 1.263(a)–2T(g)(1)(iv).

D. Election To Capitalize Materials and Supplies

The temporary regulations retain the rule from the 2008 proposed regulations that permits a taxpayer to elect to capitalize and depreciate amounts paid for certain materials and supplies. Several commentators questioned the effect of this provision and the other new rules under proposed § 1.162–3 on previous IRS pronouncements that distinguished certain depreciable property from materials and supplies. *See,* for example, Rev. Rul. 2003–37 (2003–1 CB 717) (permitting taxpayers to treat certain rotable spare parts used in a service business as depreciable assets); Rev. Rul. 81–185 (1981–2 CB 59) (concluding that major standby emergency spare parts are depreciable property); Rev. Rul. 69–201 (1969–1 CB 60) (holding that standby replacement parts used in pit mining business are items for which depreciation is allowable); Rev. Rul. 69–200 (1969–1 CB 60) (holding that flight equipment rotatable spare parts and assemblies are tangible property for which depreciation is allowable while expendable flight equipment spare parts are materials and supplies); Rev. Proc. 2007–48 (2007–2 CB 110) (providing a safe harbor method of accounting to treat certain rotable spare parts as depreciable assets).

Section 1.162–3T is applicable to all materials and supplies as defined under that provision, including certain types of property that were treated as depreciable property under previously published guidance. Thus, for example, the temporary regulations modify Rev. Rul. 2003–37, Rev. Rul. 81–185, Rev. Rul. 69–200, and Rev. Rul. 69–201 to the extent that the temporary regulations characterize certain tangible properties addressed in these rulings as materials and supplies. However, the temporary regulations permit taxpayers to elect to treat these properties as assets subject to the allowance for depreciation consistent with the holdings in these revenue rulings. In addition, the IRS and the Treasury Department recognize that Rev. Proc. 2007–48 may need to be revised to address the treatment of certain rotable spare parts defined as materials and supplies under the temporary regulations. Thus, comments

are requested on the application of the safe harbor method in this context.

III. Repairs Under § 1.162–4

The 2008 proposed regulations proposed to revise § 1.162–4 (the repairs regulation) to provide rules consistent with the improvement rules under § 1.263(a)–3 of the proposed regulations. The 2008 proposed regulations provided that amounts paid for repairs and maintenance to tangible property are deductible if the amounts paid are not required to be capitalized under § 1.263(a)–3. The IRS and Treasury Department received no comments on this proposed regulation. The temporary regulations retain the rule from the 2008 proposed regulations and clarify that a taxpayer is permitted to deduct amounts paid to repair and maintain tangible property provided such amounts are not required to be capitalized under section 263(a) or any other provision of the Code or regulations. See, for example, section 263A and the regulations thereunder.

IV. Rentals Under § 1.162–11 and Leased Property Under § 1.167(a)–4

The existing regulations under § 1.162–11 provide rules for the treatment of amounts paid (1) to acquire a leasehold and (2) for leasehold improvements by a lessee on a lessor's property. The temporary regulations do not amend the rule in § 1.162–11(a) that provides that a taxpayer may amortize the cost of acquiring a leasehold over the term of the lease. The temporary regulations make only minor revisions to the rule in § 1.162–11(b) that provides that the cost of erecting a building or making a permanent improvement to property leased by the taxpayer is a capital expenditure and is not deductible as a business expense.

Section 1.162–11(b) of the existing regulations also provides that a taxpayer lessee may amortize a leasehold improvement over the shorter of the estimated useful life of the improvement or the remaining period of the lease. A similar rule exists in § 1.167(a)–4. In that respect, the existing regulations do not reflect the amendments made to sections 168 and 178 by sections 201(a) and 201(d)(2)(A), respectively, of the Tax Reform Act of 1986, Public Law 99–514. See sections 168(i)(6) and (8), which require a lessee or lessor to depreciate or amortize leasehold improvements under the cost recovery provisions of the Code applicable to the improvements, without regard to the term of the lease. Accordingly, the temporary regulations both amend the rules in §§ 1.162–11(b) and 1.167(a)–4 to provide that a lessee or lessor must depreciate or amortize its leasehold improvements under the cost recovery provisions of the Internal Revenue Code applicable to the improvements, without regard to the term of the lease, and also remove the rules permitting amortization over the shorter of the estimated useful life or the term of the lease. For example, if the leasehold improvement is property to which section 168 applies, the leasehold improvement is depreciated under section 168. Section 1.162–11 of the temporary regulations also includes cross references to § 1.263(a)–3T(f)(1) (regarding improvements to leased property) and to § 1.167(a)–4T (regarding depreciation or amortization deductions for leasehold improvements).

V. Amounts Paid To Acquire or Produce Tangible Property Under § 1.263(a)–2T

The 2008 proposed regulations provided rules for the capitalization of amounts paid to acquire or produce units of tangible property. The temporary regulations retain most of these rules, including the general requirement to capitalize acquisition and production costs, and the requirement to capitalize amounts paid to defend and perfect title to property. In response to comments received, the temporary regulations clarify the application of the rules to moving and reinstallation costs; retain the rule for costs incurred prior to placing property into service; add and clarify certain rules with respect to transaction costs; and modify and refine the de minimis rule.

A. Moving and Reinstallation Costs

An example in the 2008 proposed regulations illustrated that a taxpayer generally is not required to capitalize the costs of moving tangible personal property already placed in service from one facility to another similar facility. Several commentators expressed concern, however, that the example in the 2008 proposed regulations omitted any discussion of the treatment of amounts paid to reinstall the unit of property in the new location. Amounts paid to move and reinstall a unit of property that has already been placed in service by the taxpayer generally are not amounts paid to acquire or produce a unit of property. Thus, these costs are not required to be capitalized under the rules for acquisition or production of property. But, if the costs of moving and reinstalling a unit of property directly benefit, or are incurred by reason of, an improvement to the unit of property that is moved and reinstalled, such costs are required to be capitalized. The temporary regulations address these types of moving and reinstallation costs in examples provided in § 1.263(a)–3T(h)(4), governing improvements to property.

B. Work Performed Prior To Placing Property Into Service

The 2008 proposed regulations provided that acquisition costs include costs for work performed on a unit of property prior to the date the unit of property is placed in service. Several commentators expressed concern that this rule would require a taxpayer to capitalize generally deductible costs, such as repair costs, if they were incurred prior to placing the unit of property in service. One commentator suggested that the regulations allow a taxpayer to rebut the presumption that these costs are acquisition costs.

Amounts paid for work performed on a unit of property prior to placing the property in service are related to the acquisition of the unit of property and, therefore, must be treated as an acquisition cost. The temporary regulations do not incorporate a rebuttable presumption in this rule because there are very few, if any, costs to which the presumption would apply. Moreover, a rebuttable presumption is more subjective and difficult to administer. Thus, the temporary regulations retain the bright-line rule that requires a taxpayer to capitalize costs that are incurred prior to the date a unit of property is placed in service.

C. Transaction Costs

The 2008 proposed regulations provided that a taxpayer must, in general, capitalize amounts paid to facilitate the acquisition or production of real or personal property. They included a rule that provided that costs relating to activities performed in the process of determining whether to acquire real property and which real property to acquire generally are deductible pre-decisional costs unless they are described in the regulations as inherently facilitative costs. The temporary regulations retain the general rule in the 2008 proposed regulations and the rules defining the costs that facilitate the acquisition or production of real or tangible property. The temporary regulations also clarify that a taxpayer may be required to allocate certain facilitative costs between personal property and real property acquired in a single transaction. Accordingly, the temporary regulations add a ''reasonable allocation'' rule to assist a taxpayer in making allocations of facilitative costs between personal

property and real property. In addition, the temporary regulations provide that a taxpayer may allocate inherently facilitative amounts to separate units of property that are considered, but not acquired, and recover such costs in accordance with applicable sections of the Code and regulations. The temporary regulations do not accommodate commentators' requests to extend the rule permitting deduction of certain pre-decisional costs of acquiring real property to personal property because such a rule could generate controversy over unduly small amounts.

D. De Minimis Rule

The 2008 proposed regulations provided that a taxpayer must capitalize amounts paid to acquire or produce a unit of real or personal property, including the related transaction costs. Under the proposed de minimis rule, however, a taxpayer was not required to capitalize amounts paid for the acquisition or production (including any amounts paid to facilitate the acquisition or production) of a unit of property if (1) the taxpayer had an applicable financial statement (AFS) as defined in the regulation; (2) the taxpayer had, at the beginning of the taxable year, written accounting procedures treating as an expense for non-tax purposes the amounts paid for property costing less than a certain dollar amount; (3) the taxpayer treated the amounts paid during the taxable year as an expense on its AFS in accordance with its written accounting procedures; and (4) the total aggregate of amounts paid and not capitalized for the taxable year under this provision did not distort the taxpayer's income for the taxable year (the ''no distortion requirement'').

The IRS and the Treasury Department included the no distortion requirement in the 2008 de minimis rule in an effort to limit the deduction to amounts that clearly reflected income under section 446. To ease the administrative burden of determining whether amounts expensed under the de minimis rule distorted taxable income, the 2008 proposed regulations included a safe harbor. Under this safe harbor, an amount deducted under the AFS-based de minimis rule for the taxable year would be deemed not to distort income if that amount (when added to the amounts deducted in the taxable year as materials and supplies for units of property costing $100 or less) was less than or equal to the lesser of 0.1 percent of the taxpayer's gross receipts for the taxable year or 2 percent of the taxpayer's total AFS depreciation and amortization for the taxable year. The preamble to the 2008 proposed regulations clarified that, depending on a taxpayer's particular facts and circumstances, an amount in excess of the safe harbor would not necessarily result in a distortion of income.

A number of commentators approved of the concept of an AFS-based de minimis rule but were critical of the inclusion of the no distortion requirement. The commentators expressed concern that the no distortion requirement would increase controversy, was burdensome, and was contrary to the regulation's goal of clarity and certainty. Some commentators asserted that the imposition of a financial conformity requirement on the use of a de minimis rule established its own safeguards with respect to the materiality of the deductions under the de minimis rule.

In addition, some commentators suggested that if the no distortion requirement were retained in the final regulations, the safe harbor limits should be set at a higher level. The IRS and the Treasury Department also received comment letters requesting that the de minimis rule be expanded to a taxpayer without an AFS by setting specific de minimis threshold amounts.

The de minimis rule under the temporary regulations retains the requirement that a taxpayer may deduct certain amounts paid for tangible property if the taxpayer has an AFS, has written accounting procedures for expensing amounts paid for such property under certain dollar amounts, and treats such amounts as expenses on its AFS in accordance with such written accounting procedures. However, the temporary regulations replace the no distortion requirement with an overall ceiling that generally limits the total expenses that a taxpayer may deduct under the de minimis rule. The new criteria mandates that the aggregate of amounts paid and not capitalized under the de minimis rule for the taxable year must be less than or equal to the greater of (1) 0.1 percent of the taxpayer's gross receipts for the taxable year as determined for Federal income tax purposes; or (2) 2.0 percent of the taxpayer's total depreciation and amortization expense for the taxable year as determined in its AFS.

The use of a ceiling provides an objective and administrable limit on a taxpayer's total de minimis expense deduction and does not require an independent analysis to determine whether the amount clearly reflects the taxpayer's income. While a taxpayer's treatment on its financial statements provides a reasonable foundation for determining a taxpayer's de minimis expenses, the application of certain limits, based on a percentage of gross receipts or percentage of depreciation expense, is supported by the case law and the clear reflection of income principle under section 446. *See,* for example, *Cincinnati, New Orleans & Tex. Pac. Ry. Co.* v. *United States,* 424 F.2d 563 (Ct. Cl. 1970); *Alacare Home Health Services, Inc.* v. *Commissioner,* T.C. Memo. 2001–149.

In response to several comment letters, the temporary regulations also add and modify several provisions governing the application of the de minimis rule. For example, temporary regulations eliminate the requirement in the 2008 proposed regulations that, in calculating whether a taxpayer's de minimis amount exceeds the ceiling, the taxpayer must also include the amounts deducted under proposed § 1.162–3 as materials and supplies costing $100 or less. Under the temporary regulations, amounts paid for materials and supplies are subject to the de minimis ceiling only if the taxpayer elects under § 1.162–3T to treat those materials or supplies under the de minimis rule of § 1.263(a)–2T. In addition, the temporary regulations eliminate the exceptions from the proposed de minimis rule for property acquired for repairs and property acquired for improvements. Thus, the de minimis rule may be applied to these amounts. However, the de minimis rule does not apply to amounts paid for labor and overhead incurred in repairing or improving property.

The IRS and the Treasury Department received one comment letter suggesting that that the temporary regulations clarify the application of the de minimis rule to a member of a consolidated group. In response, the temporary regulations add a provision that permits a member to utilize the written accounting procedures provided on the applicable financials statements of its affiliated group. The IRS and the Treasury Department intend to give further consideration to the application of the de minimis rule in a consolidated group setting. In this regard, the IRS and the Treasury Department request additional comments on the manner in which the de minimis rule, including the de minimis rule limitations, may be applied to, and based on, the tax and financial results of a consolidated group.

The de minimis rule in the temporary regulations is not intended to prevent a taxpayer from reaching an agreement with its IRS examining agents that, as an administrative matter, based on risk analysis or materiality, the IRS examining agents will not review

certain items. It is not intended that examining agents must now revise their materiality thresholds in accordance with the de minimis rule ceiling. Thus, if examining agents and a taxpayer agree that certain amounts in excess of the de minimis rule ceiling are immaterial and should not be subject to review, that agreement should be respected, notwithstanding the requirements of the de minimis rule in the temporary regulations. However, a taxpayer that seeks a deduction for amounts in excess of the amount allowed by this rule or by agreement with IRS examining agents will have the burden of showing that such treatment clearly reflects income.

Finally, the temporary regulations do not expand the de minimis rule to a taxpayer without an AFS or provide specific de minimis amounts deductible by a taxpayer in this context. A taxpayer without an AFS does not have a consistent, audited methodology for determining de minimis expenses, and as a result, the IRS would have little or no assurance that a taxpayer without an AFS was using a reasonable, consistent methodology that clearly reflects income. However, the temporary regulations provide some relief for a taxpayer without an AFS by providing a deduction under § 1.162–3T for materials and supplies that cost $100 or less. The IRS and the Treasury Department request comments addressing de minimis rule alternatives that would substantiate the use of a reasonable and consistent methodology and ensure clear reflection of income for determining de minimis expenses for a taxpayer without an AFS.

VI. Amounts To Improve Property Under § 1.263(a)–3T

A. Overview

The temporary regulations retain the basic framework of the 2008 proposed regulations for determining the unit of property and for determining whether there is an improvement to the unit of property. The temporary regulations also retain many of the simplifying conventions set out in the 2008 proposed regulations, including the routine maintenance safe harbor and the optional regulatory accounting method. As explained below, the temporary regulations also modify the 2008 proposed regulations in several areas.

A goal of both the 2006 and 2008 proposed regulations was to reduce controversy and provide clarity in determining whether an amount is paid for an improvement that must be capitalized under section 263(a). In several respects, however, the more objective rules provided in the 2008 proposed regulations limited the circumstances in which an amount paid would be capitalized as an improvement. First, the 2008 proposed regulations defined the unit of property for a building as the building and its structural components. Thus, work performed on a building would rise to the level of an improvement only if it resulted in a betterment or restoration (or a new or different use) when applied to the building and its structural components as a whole. Second, the restoration rules under the 2008 proposed regulations provided that a taxpayer did not have to capitalize, or treat as an improvement, amounts paid to replace a major component or substantial structural part of a unit of property unless those amounts were paid after the recovery period for the property, and either (1) the replacement cost comprised 50 percent or more of the replacement cost of the entire unit of property, or (2) the replacement parts comprised 50 percent or more of the physical structure of the unit of property (''the 50 percent thresholds''). Thus, capitalization under the major component rule applied only if the property was fully depreciated and either of the 50 percent thresholds were triggered.

These sections of the 2008 proposed regulations would have led to results that were contrary to long-standing case law (discussed below) and inconsistent with the way most taxpayers had treated these items for tax purposes. Although the preamble to the 2008 proposed regulations provided that a taxpayer should not rely on the proposed rules, many taxpayers applied to change their methods of accounting from capitalizing certain expenditures to deducting these expenditures as repairs based on the standards in the 2008 proposed regulations.

The 2008 proposed regulations limited capitalization and allowed more frequent deductions for work performed on tangible property, in part, to lessen the effects of depreciation and disposition rules under section 168 (MACRS). Under section 168(i)(6), a taxpayer is required to depreciate an amount paid for an improvement using the same recovery period and the same depreciation method as the underlying property, with the recovery period beginning when the improvement is placed in service. In addition, § 1.168–2(l)(1) of the proposed ACRS regulations (which have been generally applied to MACRS property) provides that a disposition does not include the retirement of a structural component of a building. Accordingly, § 1.168–6(b) of the proposed ACRS regulations provides that no loss shall be recognized upon the retirement of a structural component of a building. Thus, if a taxpayer replaced a structural component of a building during the recovery period of the building, the taxpayer could not immediately recover the basis allocable to the removed component, but rather had to continue to depreciate it as part of the building. If the taxpayer were required to capitalize the costs of the replacement component under section 263(a), then the taxpayer would be required to depreciate contemporaneously both the retired component and the replacement component.

To achieve results more consistent with existing law and to provide relief from the potential inequities that can result from the application of the depreciation and disposition rules, the temporary regulations revise and amend the 2008 proposed regulations in several respects. First, the temporary regulations retain the rule from the 2008 proposed regulations that the unit of property for a building consists of the building and its structural components. However, the temporary regulations revise the manner in which the improvement standards must be applied to the building and its structural components. In determining whether an amount paid is for an improvement to the building, the temporary regulations require a taxpayer to consider the effect of the expenditure on certain significant and specifically defined components of the building, rather than the building and its structural components as a whole. Second, the temporary regulations do not include the 50 percent thresholds and recovery period limitation for determining whether a replacement rises to the level of a major component or substantial structural part of a unit of property. Finally, the temporary regulations include new provisions under section 168 that expand the definition of dispositions to include the retirement of a structural component of a building. This change allows a taxpayer to recognize a loss on the disposition of a structural component of a building before the disposition of the entire building, so that a taxpayer will not have to continue to depreciate amounts allocable to structural components that are no longer in service. Thus, under the temporary regulations, a taxpayer is not required to capitalize and depreciate simultaneously amounts paid for both the removed and the replacement properties.

The IRS and the Treasury Department recognize that it may be difficult for taxpayers to determine specifically the

amount of the adjusted basis of the property that is allocable to the retired component. This difficulty may be particularly acute in industries where a taxpayer has capitalized a number of improvements as part of cyclical remodels or renovations. Comments are requested on computational methodologies or safe harbors that a taxpayer may use to simplify this determination.

In addition to these changes, the temporary regulations incorporate more detailed rules for determining the units of property for condominium, cooperatives, and leased property, for the treatment of leasehold improvements, and for additional costs incurred during an improvement, such as related repair and maintenance costs. The temporary regulations also clarify various examples and add new examples illustrating the treatment of items such as moving and reinstallation costs, retail remodeling costs, and the costs of replacing major components.

B. Determining the Unit of Property

1. Overview

The 2008 proposed regulations generally defined a unit of property as consisting of all the components of the unit of property that are functionally interdependent. The proposed regulations, however, provided special rules for determining the unit of property for buildings, plant property, and network assets. For property other than buildings, the 2008 proposed regulations further refined the units of property by treating a functionally interdependent component as a separate unit of property if the taxpayer initially assigned a different economic useful life to the component for financial statement or regulatory purposes or if the taxpayer assigned a different MACRS class or recovery method to the component. The temporary regulations retain most of these rules for determining units of property, with minor exceptions. In addition, the temporary regulations clarify the application of the improvement rules to the unit of property for buildings and set out more detailed rules for applying these rules to condominiums, cooperatives, and leased property. The temporary regulations also contain new and revised provisions addressing the treatment of, and the unit of property determination for, leasehold improvements.

2. Buildings and Structural Components

The 2008 proposed regulations retained the rule from the 2006 proposed regulations that the building (as defined in § 1.48–1(e)(1)) and its structural components (as defined in § 1.48–1(e)(2)) are a single unit of property. In response to the 2008 proposed regulations, the IRS and the Treasury Department did not receive any comments addressing the unit of property for buildings. After issuance of the 2008 proposed regulations, however, many taxpayers claimed that major work performed on buildings did not result in an improvement because the work affected only a small portion of the unit of property, that is, the entire building. Under this analysis, for example, taxpayers claimed that the costs of new roofs, replacements of entire heating and air conditioning systems, and major structural changes to building interiors were all deductible as repairs or maintenance. Moreover, taxpayers may have viewed the 50 percent thresholds and recovery period limitation exceptions to the major component and substantial structural part rule as consistent with the conclusion that these types of expenses should generally be treated as deductible repair or maintenance costs. Although the preamble to the 2008 proposed regulations explicitly stated that a taxpayer should not rely on the proposed rules, many taxpayers regarded these rules as the IRS's and the Treasury Department's interpretation of current law.

The temporary regulations revise the 2008 standards in several respects to achieve results that are more consistent with current law. The temporary regulations retain the general rule that the unit of property for a building is comprised of the building and its structural components. The temporary regulations, however, require that a taxpayer apply the improvement standards separately to the primary components of the building, that is, the building structure or any of the specifically defined building systems. Thus, a cost is treated as a capital expenditure if it results in an improvement to the building structure or to any of the specifically enumerated building systems. The temporary regulations define the building structure as the building (as defined in § 1.48–1(e)(1)) and its structural components (as defined in § 1.48–1(e)(2)) other than the components specifically enumerated as building systems. The temporary regulations define building systems to include (1) the heating, ventilation, and air conditioning systems (''HVAC''); (2) the plumbing systems; (3) the electrical systems; (4) all escalators; (5) all elevators; (6) the fire protection and alarm systems; (7) the security systems; (8) the gas distribution systems; and (9) any other systems identified in published guidance.

Accordingly, if an amount paid results in a restoration of a building structure, such as the replacement of an entire roof, then under the temporary regulations the expenditure constitutes an improvement to the building unit of property. Similarly, if an amount paid results in a betterment to a building system, such as an improvement to the HVAC system, then the expenditure also constitutes an improvement to the building unit of property. Compared to the approach provided in the 2008 proposed regulations, the approach contained in these temporary regulations produces results that are more consistent with current law. *See,* for example, *Smith* v. *Commissioner,* 300 F.3d 1023 (9th Cir. 2002) (holding that costs to replace a substantial portion of floor were capital expenditures); *Tsakopoulous* v. *Commissioner,* T.C. Memo. 2002–8 (holding that costs to replace the roof on a portion of the suites of a shopping center were capital expenditures); *Hill* v. *Commissioner,* T.C. Memo. 1983–112 (holding that costs to replace the water heater and furnace in rental property were capital expenditures); *Stewart Supply Co.* v. *Commissioner,* T.C. Memo. 1963–62 (holding that costs to replace the front wall of a building and make electrical connections to that wall were capital expenditures); *First Nat'l Bank* v. *Commissioner,* 30 B.T.A. 632 (1934) (holding that costs of replacing the electrical system in a bank building were capital expenditures); *Georgia Car and Locomotive Co.,* 2 B.T.A. 986 (1925) (holding that costs of a new roof on a building were capital expenditures). The approach for buildings is conceptually similar to the plant property rule discussed below, which segregates plant property into units of property that perform discrete and major functions within the plant.

a. Condominiums and Cooperatives

The 2008 proposed regulations provided that the unit of property for a condominium was the individual unit owned by the taxpayer and that the unit of property for a cooperative was the individual unit possessed by the taxpayer. The temporary regulations provide additional detail defining the unit of property for condominiums and cooperatives and provide additional guidance for applying the improvement rules to these units of property. The temporary regulations provide that for the owner of a condominium, the unit of property is the individual unit owned by the taxpayer and the structural

components that are part of the condominium unit. Similarly, for a taxpayer that has an ownership interest in a cooperative housing corporation, the unit of property is the portion of the building in which the taxpayer has possessory rights and the structural components that are part of the portion of the building subject to the taxpayer's possessory rights. For both condominiums and cooperatives, however, the temporary regulations provide that an amount is paid for an improvement to these units of property if the amount results in an improvement to the building structure that is part of the condominium or cooperative unit or to the portion of any building system that is part of the condominium or cooperative unit.

b. Leased Buildings (Taxpayer as Lessee)

The 2008 proposed regulations did not address the unit of property for leased property. The IRS and the Treasury Department received several comments requesting that the regulations include more detailed rules regarding the unit of property for leased property and the unit of property for leasehold improvements. The temporary regulations define the unit of property for leased buildings and provide that if a taxpayer is a lessee of all or a portion of one or more buildings (such as an office, floor, or certain square footage), the unit of property is each building and its structural components or the portion of each building subject to the lease and the structural components associated with the leased portion. The temporary regulations also provide that an amount is paid for an improvement to a leased building or a leased portion of a building if the amount paid results in an improvement to the leased building structure (or the portion thereof subject to the lease) or any of the leased building systems (or the portion thereof subject to the lease).

3. Property Other Than Buildings

The 2008 proposed regulations generally defined the unit of property for real and personal property other than buildings to include all functionally interdependent components. Components were defined as functionally interdependent if placing one component in service depends on placing the other component in service. Special rules were provided for plant property and network assets.

The temporary regulations retain the functional interdependence test as the general rule for determining the unit of property for real and personal property other than buildings. The temporary regulations also continue to provide special rules for plant property and network assets. However, the temporary regulations remove the rule requiring taxpayers to treat a functionally interdependent component as a separate unit of property if the taxpayer initially assigned a different economic useful life to the component for financial statement or regulatory purposes. In addition, the temporary regulations include a rule for determining the unit of property for leased property other than buildings.

a. Plant Property

Under the 2008 proposed regulations, a unit of property for plant property generally was comprised of each component (or group of components) within the plant that performs a discrete and major function or operation within functionally interdependent machinery or equipment. The discrete and major function rule provides a reasonable and administrable limitation on the functional interdependence standard, which otherwise could be overly broad in its application to industrial equipment. Accordingly, the temporary regulations retain the plant property rule as it was proposed in the 2008 proposed regulations.

b. Network Assets

The 2008 proposed regulations generally defined network assets as railroad track, oil and gas pipelines, water and sewage pipelines, power transmission and distribution lines, and telephone and cable lines but reserved defining the unit of property for network assets in specific industries. The preamble to the 2008 proposed regulations invited industries with network assets to request guidance under the Industry Issue Resolution (''IIR'') program. Although several commentators requested that the regulations provide guidance on the units of property for network assets, given the detailed factual issues underpinning the proper treatment of such assets, the units of property for network assets are more appropriately determined through guidance tailored to individual industries under the IIR program. The IRS and the Treasury Department have accepted IIR requests from several industries to develop industry specific guidance in this area and encourage other industries with network assets to request guidance under the IIR procedures.

The temporary regulations retain the definition of network assets provided in the 2008 proposed regulations and add an operative rule providing that in the case of network assets, the unit of property is determined by the taxpayer's particular facts and circumstances except as otherwise provided in guidance published in the **Federal Register** or the Internal Revenue Bulletin. The functional interdependence standard, by itself, could lead to unit of property definitions for network assets that are overly broad. Thus, functional interdependence is not determinative for network assets. Finally, the temporary regulations do not alter or invalidate previously published guidance addressing the treatment of network assets for particular industries, such as Rev. Proc. 2011–43 (2011–37 IRB 326) (safe harbor method for electric utility transmission and distribution property); Rev. Proc. 2011–28 (2011–18 IRB 743) (network asset maintenance allowance or units of property method for wireless telecommunication network assets); Rev. Proc. 2011–27 (2011–18 IRB 740) (network asset maintenance allowance or units of property method for wireline telecommunication network assets); Rev. Proc. 2002–65 (2002–2 CB 700) (track maintenance allowance method for Class II and III railroads); or Rev. Proc. 2001–46 (2001–2 CB 263) (track maintenance allowance method for Class I railroads).

c. Leased Property Other Than Leased Buildings

The IRS and the Treasury Department received several comments requesting that the proposed regulations include more detailed rules regarding the unit of property for leased personal property. The temporary regulations provide that a lessee's unit of property for leased real or personal property other than building property is determined under the general rules for property other than buildings, including the functional interdependence test and the plant property rule (as applicable), except that, after applying those applicable rules, the unit of property may not be larger than the unit of leased property.

4. Unit of Property for Improvements

The 2008 proposed regulations provided that an improvement to a unit of property, other than a leasehold improvement, is not a unit of property separate from the unit of property improved. The 2008 proposed regulations provided that a leasehold improvement made by a lessee that is section 1250 property is treated as a separate unit of property. The temporary regulations retain the general rule that an improvement is generally not a unit of property separate from the unit of property improved but clarify the rule for leasehold improvements. As

explained below, the temporary regulations provide that only a ''lessee improvement,'' rather than a ''leasehold improvement,'' is a unit of property separate from the unit of property improved. Moreover, this rule has been moved to a separate subsection governing the unit of property for improvements.

5. Unit of Property for Leasehold Improvements

Current law provides that if a lessee makes a leasehold improvement that is not a substitute for rent, the lessee is generally required to capitalize the cost of the improvement under section 263(a) and §§ 1.162–11(b) and 1.167(a)–4 and, if the leasehold improvement is property to which section 168 applies, depreciate the improvement under section 168. *See* section 168(i)(8)(A). Current law, however, does not clearly address the unit of property for leasehold improvements.

The 2008 proposed regulations provided that, in the case of a leasehold improvement made by a lessee that is section 1250 property, the leasehold improvement is a separate unit of property. The 2008 proposed regulations did not address leased section 1245 property or discuss the unit of property for improvements made by a lessor. The IRS and the Treasury Department received several comments requesting that the regulations provide additional guidance on the unit of property for improvements to leased section 1250 property and address the unit of property for improvements to leased section 1245 property. In addition, commentators suggested that revised regulations provide operative rules for determining when there has been an improvement to leased property. In response to the comments, the temporary regulations address whether amounts paid by a lessee or lessor are for the improvement of a unit of leased property, requiring capital treatment. The temporary regulations also define the unit of property for purposes of determining whether amounts paid subsequent to an initial leasehold improvement must be capitalized.

The temporary regulations for lessee improvements are consistent with the rule in the 2008 proposed regulations but provide further elaboration and are extended to section 1245 property. The temporary regulations provide that an amount initially capitalized as a lessee improvement is treated as a cost of acquiring or producing a unit of property, and constitutes a unit of property separate from the leased property being improved. However, the cost of improving a lessee improvement is not a unit of property separate from the lessee improvement being improved.

Treating the lessee's initial improvement as a separate unit of property is based on the premise that, when making a leasehold improvement, the lessee should be treated as if it has acquired or produced new property. This new property interest is separate and distinguishable from the lessee's interest in the underlying property. Also, this approach is consistent with the depreciation rules under sections 168(i)(6) and (i)(8)(A), which treat the leasehold improvement as a separate asset for purposes of section 168. Finally, treatment of a lessee's subsequent improvement as part of the lessee's initial leasehold improvement is consistent with the rule governing the unit of property determination for improvements to owned property, which generally treats the improvement and the property improved as a single unit of property.

The temporary regulations also provide a rule for determining the unit of property for a lessor improvement. The temporary regulations provide that an amount capitalized as a lessor improvement is not a unit of property separate from the unit of property improved. This rule is based on the premise that the lessor of property generally should be treated in the same manner as any other owner of property when it makes an improvement to its property. Thus, in accordance with the general rule for property owners, a lessor improvement to a unit of property is not a unit of property separate from the property being improved.

6. Additional Rules for Determining Units of Property

The 2008 proposed regulations included two additional rules that, if applicable, would more narrowly define the unit of property for property other than buildings. The 2008 proposed regulations provided that a component must be treated as a separate unit of property if, at the time the unit of property is placed in service by the taxpayer, the taxpayer has recorded on its books and records for financial or regulatory accounting purposes an economic useful life for the component that is different from the economic useful life of the unit of property of which the component is a part (the ''book life consistency rule''). The 2008 proposed regulations also provided that a component must be treated as a separate unit of property if the taxpayer has properly treated the component as being within a different MACRS class than the class of the unit of property of which the component is a part, or depreciated the component using a section 167 or section 168 depreciation method different from the depreciation method for the unit property of which the component is a part (the ''depreciation consistency rule'').

The IRS and the Treasury Department received several comments requesting that the book life consistency rule be removed from the final regulation. Commentators noted that tax and financial accounting have different goals and that a taxpayer generally has non-tax reasons for classifying property differently for financial accounting purposes. For these reasons, the temporary regulations do not adopt the book life consistency rule contained in the 2008 proposed regulations.

The temporary regulations retain the depreciation consistency rule that applies to property, other than buildings, in the taxable year the property is initially placed in service. The temporary regulations add a second depreciation consistency rule that applies if a taxpayer or the IRS properly changes the MACRS class or depreciation method for any type of property (for example, as a result of a cost segregation study or a change in the use of the property) in a taxable year after the year the property was initially placed in service. Under this rule, the taxpayer must change the unit of property determination for the effected property to be consistent with the change in treatment for depreciation purposes. Thus, for example, if a taxpayer performs a cost segregation study and changes the classification of components in a building from section 1250 property to section 1245 property, the taxpayer must use the same classifications to define the unit of property for capitalization purposes.

C. Special Rules for Improvements

1. Improvements to Leased Property

The 2008 proposed regulations provided that a taxpayer must capitalize amounts paid to acquire or produce a unit of real or personal property, including leasehold improvement property. The 2008 proposed regulations also noted that a taxpayer must capitalize amounts paid to improve a unit of property whether the taxpayer is the owner or lessee of the unit of property. However, the 2008 proposed regulations did not provide operative rules for determining whether there was an improvement to leased property (''leasehold improvement'') and did not clarify how a leasehold improvement must be treated under the regulations.

a. Application of Intangible Regulation Under § 1.263(a)–4 to Leasehold Improvements

The IRS and the Treasury Department received several informal questions and comments regarding whether lessee improvements should be capitalized under the 2008 proposed regulations or under § 1.263(a)–4 (''intangibles regulations''), which governs the capitalization of costs related to intangible property. Section 1.263(a)–4(d)(8), which is titled ''Certain benefits arising from the provision, production, or improvement of real property,'' provides, in part, that a taxpayer must capitalize amounts paid to produce or improve real property owned by another if the real property can reasonably be expected to produce significant economic benefits for the taxpayer. Examples of amounts capitalized under this section include amounts contributed by a taxpayer to a city to defray the cost of constructing a publicly owned bridge capable of accommodating the taxpayer's trucks and amounts contributed by a taxpayer to a port authority to build a breakwater that will make it easier for the taxpayer to unload its vessels.

Section 1.263(a)–4(d)(8) of the regulations was not intended to apply to leasehold improvements or to situations in which the taxpayer pays to acquire or produce tangible property that clearly benefits the taxpayer and not other parties. The examples provided under the intangibles regulations involve improvements to public assets where there is an intangible economic benefit to the taxpayer, not a direct tangible interest in property, such as a leasehold interest. In contrast to the examples under the intangibles regulations, a leasehold improvement involves an interest in tangible property for which basis recovery is permitted through depreciation. *See,* for example, section 168(i)(8)(A) (treatment of leasehold improvements that are subject to section 168).

The temporary regulations provide that § 1.263(a)–4 does not apply to amounts paid for improvements to units of leased property or to amounts paid for the acquisition or production of leasehold improvement property. In addition, the temporary regulations provide operative rules for the definition and treatment of leasehold improvements by lessees and lessors and clarify that these rules are the exclusive guidance for determining whether amounts paid by a taxpayer are for an improvement to a unit of leased property.

b. Operative Rules for Leasehold Improvements

The IRS and the Treasury Department received several comments requesting that the regulations provide guidance regarding the application of the improvement rules to leased section 1250 property (generally real property) and leased section 1245 property (generally personal property). The temporary regulations apply to both leased real property and leased personal property and provide operative rules for both lessees and lessors that make improvements to a leased unit of property.

i. Lessee Improvements

Under the temporary regulations, a taxpayer lessee must capitalize the aggregate of related amounts that it pays to improve a unit of leased property, except to the extent that section 110 applies to a construction allowance received by the lessee for the purpose of such improvement or where the improvement constitutes a substitute for rent. A taxpayer lessee must also capitalize the aggregate of related amounts paid by the lessor to improve a unit of leased property if the lessee owns the improvement for federal income tax purposes, except to the extent that section 110 applies to a construction allowance received by the lessee for the purpose of such improvement. An amount paid for a lessee improvement under the temporary regulations is treated as an amount paid to acquire or produce a unit of real or personal property under § 1.263(a)–2T(d)(1)(i).

Because a lessee improvement involves the acquisition or production of a new and distinct interest in property and this property interest is often different from the underlying leased property, amounts paid for a lessee improvement are treated as the acquisition or production of a new unit of property (that is, a unit of property separate from the leased unit of property), rather than an improvement to the underlying property. This treatment is consistent with the depreciation requirements under section 168(i)(8)(A), which do not allow a taxpayer to depreciate leasehold improvements over the term of the underlying lease, but rather require that a taxpayer depreciate the leasehold improvement over the applicable recovery period under MACRS for the type of property acquired or produced.

ii. Lessor Improvements

The temporary regulations provide that a taxpayer lessor must capitalize the aggregate of related amounts that it pays directly, or indirectly through a construction allowance to the lessee, to improve a unit of leased property where the lessor is the owner of the improvement or to the extent that section 110 applies to the construction allowance. In addition, a lessor must also capitalize the aggregate of related amounts paid by the lessee to improve a unit of leased property where the lessee's improvement constitutes a substitute for rent. Finally, amounts capitalized by the lessor under this paragraph may not be capitalized by the lessee.

The rules provided in the temporary regulations for lessor improvements are corollaries to the rules provided for lessee improvements. In general, a lessor must capitalize amounts paid for leasehold improvements where the lessor is the owner of the leasehold improvement, where section 110 applies, or where the lessee's improvement is a substitute for rent. However, in contrast with a lessee, the lessor is the owner of the underlying property. As such, a lessor improvement is treated in the same manner as any other owner improvement to a unit of property. Therefore, a lessor improvement is treated as an improvement to the underlying property under § 1.263(a)–3T and is not treated as the acquisition or production of a new unit of property.

2. Certain Costs Incurred During an Improvement

The 2008 proposed regulations did not prescribe a plan of rehabilitation doctrine as traditionally described in the case law. That judicially-created doctrine provides that a taxpayer must capitalize otherwise deductible repair or maintenance costs if they are incurred as part of a general plan of rehabilitation, modernization, and improvement to the property. *See Moss* v. *Commissioner,* 831 F.2d 833 (9th Cir. 1987); *United States* v. *Wehrli,* 400 F.2d 686 (10th Cir. 1968); *Norwest Corp.* v. *Commissioner,* 108 T.C. 265 (1997). Instead, the 2008 proposed regulations incorporated the section 263A rules for the treatment of repairs and maintenance performed during an improvement. Specifically, the 2008 proposed regulations provided that a taxpayer must capitalize all the direct costs of an improvement and all the indirect costs (including otherwise deductible repair costs) that directly benefit or are incurred by reason of an improvement in accordance with the rules under section 263A. *See* § 1.263A–1(e). Thus, the 2008 proposed regulations concluded that repairs and

maintenance that do not directly benefit and that are not incurred by reason of an improvement are not required to be capitalized under section 263(a), regardless of whether the repairs and maintenance are performed at the same time as an improvement. The 2008 proposed regulations also included an exception for an individual residence, which permitted an individual taxpayer to capitalize repair and maintenance costs incurred at the time of a substantial remodel of its residence.

The temporary regulations retain the general rule from the 2008 proposed regulations for otherwise deductible indirect costs incurred during an improvement but clarify that all indirect costs, including repair and removal costs, are subject to the section 263A standard. The temporary regulations also retain the exception for substantial improvements to individual residences.

The rules provided in section 263A and § 1.263A–1(e) regarding the capitalization of indirect costs require the capitalization of indirect costs that directly benefit or are incurred by reason of an improvement to property. By adopting the § 1.263A–1(e) standard for purposes of section 263(a), the temporary regulations set out a clearly articulated standard that provides appropriate parameters for determining when otherwise deductible indirect costs must be capitalized as part of an improvement to property. Accordingly, the temporary regulations obsolete the plan of rehabilitation doctrine to the extent the court created doctrine provided different standards for determining whether an otherwise deductible indirect cost must be capitalized as part of an improvement.

3. Removal Costs

The 2008 proposed regulations did not address the treatment of amounts paid to remove a unit of property, asset, or a component of a unit of property. Examples in the 2008 proposed regulations, however, suggested that if a taxpayer removes a component in order to facilitate a replacement and the costs of the replacement component constitute an improvement to the unit of property, then the costs of removing the old component must be treated a part of the improvement.

No comments were received addressing the treatment of removal costs, and the temporary regulations do not include a specific rule for such costs. But the costs of removing a component of a unit of property should be analyzed in the same manner as any other indirect cost incurred during an improvement to property. Thus, similar to the treatment of otherwise deductible repair and maintenance costs incurred during an improvement, the costs of removing a component of a unit of property must be capitalized if they directly benefit or are incurred by reason of an improvement to a unit of property. *See,* for example, *Towanda Coke Corp.* v. *Commissioner,* 95 T.C. 124 (1990) (holding that costs of removing piping damaged in a fire and installing new pipe were capital expenditures); *Phillips Easton Supply Co.* v. *Commissioner,* 20 T.C. 455 (1953) (holding that costs of removing a cement floor in a building and replacing it with a concrete floor were capital expenditures to improve the property); Rev. Rul. 2000–7 (2000–1 CB 712) (providing that the costs of removing a component of a depreciable asset are either capitalized or deducted based on whether the replacement of the component constitutes an improvement or a repair). As with other costs incurred during an improvement, a taxpayer may deduct the costs of removing a component if the taxpayer can demonstrate that such costs relate only to the disposition of the removed property and that the costs do not have the requisite relationship to any improvement.

In addition, the temporary regulations do not affect the holding of Rev. Rul. 2000–7 as it applies to the costs of removing an entire unit of property. Under Rev. Rul. 2000–7, a taxpayer is not required to capitalize the cost of removing a retired depreciable asset under section 263(a) or section 263A, even where the retirement and removal occurred in connection with the installation of a replacement asset. Historically, the costs of removing a depreciable asset generally have been allocable to the removed asset and, thus, generally have been deductible when the asset is retired. *See* § 1.165–3(b); § 1.167(a)–1(c); § 1.167(a)–11(d)(3)(x); Rev. Rul. 74–455 (1974–2 CB 63); Rev. Rul. 75–150 (1975–1 CB 73). Because the costs of removing a retired asset typically relate to the depreciable asset being removed and are not allocable to the improvements, § 1.263(a)–3T generally is not applicable to such removal costs. Moreover, the temporary regulations do not change the treatment of any amounts addressed under section 280B, which governs amounts expended and losses sustained for the demolition of structures.

D. Safe Harbor for Routine Maintenance

The 2008 proposed regulations provided a safe harbor from capitalization for the costs of performing certain routine maintenance activities. Under the safe harbor, an amount paid was deemed not to improve the unit of property if it was for the ongoing activities that a taxpayer (or a lessor) expected to perform as a result of the taxpayer's (or the lessee's) use of the unit of property to keep the unit of property in its ordinarily efficient operating condition. The activities were routine only if, at the time the unit of property was placed in service, the taxpayer reasonably expected to perform the activities more than once during the class life of the unit of property (that is, the recovery period prescribed under sections 168(g)(2) and 168(g)(3), regardless of whether the property was depreciated under section 168(g)).

The IRS and the Treasury Department received comments criticizing the safe harbor's use of defined class life as the testing period. Instead, the comments suggested that the safe harbor should utilize the economic useful life of the unit of property as the appropriate testing period. The temporary regulations retain the requirement that a taxpayer must expect to perform routine maintenance more than once during the defined class life of the unit of property. The class life based standard is more objective, is more consistent among taxpayers, and is more administrable than a standard based on the economic useful life of the property. Notably, during the consideration of the 2006 proposed regulations, many commentators expressed concern that the economic useful life of property is not an accurate determinant of its actual useful life and that reliance on this standard would create disparate treatment among taxpayers in characterizing similar costs.

The IRS and the Treasury Department also received comments regarding the application of the routine maintenance safe harbor to buildings. Because buildings typically have a long class life (for example, 39.5 years for nonresidential real property), many remodeling projects arguably could be deducted under the safe harbor, regardless of the nature or extent of the work involved. For example, if a taxpayer expected to replace a major component, such as a roof, an HVAC system, or an electrical system, more than once during the long class life of the building, then the costs of such replacements generally would have been deductible under the safe harbor. Allowing a deduction for costs attributable to these types of projects is inconsistent with much of the case law addressing building improvements. Generally, the courts have held that amounts paid for replacements of major components or substantial structural parts of buildings and their structural

components are capital expenditures. *See,* for example, *Tsakopoulous* v. *Commissioner,* T.C. Memo 2002–8 (holding that costs to replace the roof on a portion of the suites of a shopping center were capital expenditures); *Hill* v. *Commissioner,* T.C. Memo 1983–112 (holding that costs to replace the water heater and the furnace in rental property were capital expenditures); *Stewart Supply Co.* v. *Commissioner,* T.C. Memo 1963–62 (holding that costs to replace the front wall of a building and make electrical connections to that wall were capital expenditures); *First Nat'l Bank* v. *Commissioner,* 30 B.T.A. 632 (1934) (holding that costs of replacing the electrical system in a bank building were capital expenditures); *Georgia Car and Locomotive Co.,* 2 B.T.A. 986 (1925) (holding that costs of a new roof on a building were capital expenditures).

Accordingly, the routine maintenance safe harbor is not appropriate for work performed on buildings. Rather, the proper analysis requires the application of the general rules for improvements, including the rules for determining whether the costs are incurred for a betterment or restoration to the building or the building systems, or to adapt the building or any of its systems to a new or different use. The temporary regulations revise the routine maintenance safe harbor to apply only to property other than buildings. In addition, the temporary regulations include new rules clarifying the application of the improvement standards to a building and provide new examples illustrating the application of these rules.

E. Betterments

The 2008 proposed regulations provided that an amount paid results in a betterment, and accordingly, an improvement, if it ameliorates a material condition or material defect that existed prior to the acquisition of the property or arose during the production of the property; results in a material addition to the unit of property (including a physical enlargement, expansion, or extension); or results in a material increase in the capacity, productivity, efficiency, strength, or quality of the unit of property or its output. The temporary regulations retain all of these criteria, as well as the 2008 proposed rules that detail how the betterment standards are applied.

The IRS and the Treasury Department received several comment letters recommending that the drafters modify the betterment rules in several areas, create exceptions for particular situations, and clarify or modify some of the examples. One commentator expressed concern that the 2008 proposed regulations' definition of betterments would require a taxpayer to capitalize costs that do not extend the useful life of the unit of property as a whole and suggested that the MACRS rules be modified so that betterments would be assigned a recovery period based on the remaining recovery period of the unit of property. Such a revision to the MACRS regulations would be contrary to section 168(i)(6), which generally requires that the depreciation deduction for an addition or improvement be computed in the same manner as the depreciation deduction for the underlying property would be computed if the underlying property had been placed in service at the same time as the addition or improvement.

1. Amounts Paid to Ameliorate Material Conditions and Defects

a. Knowledge of Defect

Several commentators suggested changes to the 2008 proposed rule that defined a betterment as an amount paid to ameliorate a material condition or defect that existed prior to acquisition or arose during the production of the unit of property, whether or not the taxpayer was aware of the defect at the time of acquisition or production. One commentator suggested that a taxpayer should be required to capitalize the costs of ameliorating a defect only if the taxpayer was aware of or should have been aware of the defect at the time of acquisition. Another commentator suggested that a taxpayer should be required to capitalize these costs only if they were incurred within two years of the acquisition of the property.

The temporary regulations do not revise the rule to require that a taxpayer's knowledge be taken into account in determining whether expenditures to ameliorate a preexisting condition or defect must be capitalized. The rule provided in the 2008 proposed regulations is consistent with established case law, which requires a taxpayer to capitalize these costs whether or not the taxpayer was aware of the defect at the time of acquisition. *See United Dairy Farmers, Inc.* v. *United States,* 267 F.3d 510 (6th Cir. 2001); *Dominion Resources, Inc.* v. *United States,* 219 F.3d 359 (4th Cir. 2000); *La France Wine Co.* v. *Commissioner,* T.C. Memo 1974–254. In addition, a rule that would require a subjective inquiry as to the taxpayer's knowledge at the time of acquisition or production would be difficult for the IRS to administer and to enforce.

Finally, the IRS and the Treasury Department did not adopt the suggestion to add a two-year limitation on the application of the rule because such a limitation might encourage a taxpayer simply to postpone its expenditures to avoid treatment as an improvement.

b. Environmental Cleanup of Reacquired Property

As mentioned above, the 2008 proposed regulations required a taxpayer to capitalize an amount paid to ameliorate a material condition or defect that existed at the time the taxpayer acquired or produced the property. The rule follows the general principle that a taxpayer must capitalize costs incurred to correct a pre-existing defect in acquired property regardless of whether the taxpayer was aware of the defect at the time of acquisition. *See United Dairy Farmers, Inc.* v. *United States,* 267 F.3d 510 (6th Cir. 2001). The preamble to the 2008 proposed regulations stated that under this rule a taxpayer would be required to capitalize environmental remediation costs in the situation in which the taxpayer contaminated property in the course of its business operations, disposed of the property (for example, by sale), and later reacquired property to clean up the contamination. The preamble requested comments regarding the appropriate treatment of environmental remediation costs in these situations, including how to determine whether the taxpayer's own use, or a prior owner's use, caused the contamination.

Several commentators recommended that the regulations allow a deduction for clean-up costs under certain circumstances after a taxpayer acquires, or reacquires, property that the taxpayer had previously contaminated. The commentators generally asserted that a taxpayer that acquires or reacquires property that it had previously contaminated should be treated no differently than a taxpayer that continuously owns the property and contaminated the property through the course of its operations. See Rev. Rul. 94–38 (1994–1 CB 35), in which a taxpayer was permitted to deduct the costs of remediating property that it continuously owned and contaminated in the course of its operations because the taxpayer restored the property to the condition it was in prior to the circumstances necessitating the expenditure. One commentator addressed the situation in which a taxpayer contaminates property as a lessee of property and later acquires the property in an effort to minimize disputes with the lessor over clean-up obligations. The commentator recommended an exception to

capitalization for amounts incurred to clean up contamination that existed at the time a taxpayer acquires property provided (1) the taxpayer is legally liable for the cost of cleaning up the property prior to its acquisition by the taxpayer, and (2) the taxpayer's sole purpose for acquiring the property is to minimize the cost of clean-up. The commentator also indicated that a taxpayer that acquires contaminated property for an amount that is at least equal to the remediated fair market value of the property should be treated no differently than a taxpayer that continuously owned the property.

The IRS and the Treasury Department recognize that a taxpayer that acquires, or reacquires, contaminated property for an amount at least equal to the remediated fair market value of the property may be in a position similar to that of a taxpayer that had continuously owned the property. However, the IRS and the Treasury Department are reluctant to create a rule that would hinge on the taxpayer's purpose for acquiring the property and a subjective determination of the remediated fair market value of the property. Moreover, Congress specifically provides a deduction under section 198 for taxpayers that incur certain environmental remediation expenditures that are otherwise required to be capitalized under section 263(a), including costs incurred by taxpayers conducting remediation on reacquired property. Taxpayers that elect to deduct these remediation costs under section 198 must comply with the requirements of that provision.

The IRS and the Treasury Department recognize, however, that a taxpayer may encounter an unusual situation for which section 198 does not provide relief or to which the rationale underlying the temporary regulations does not apply. The IRS and the Treasury Department believe that these situations are better addressed through subject-specific guidance outside the regulations. Any taxpayer with a specific concern regarding the treatment of these types of costs should consider submitting a request for a private letter ruling under Rev. Proc. 2011–1 (2011–1 IRB 1) (or its successor).

2. Material Increase in Capacity, Productivity, Efficiency, Strength, or Quality

The 2008 proposed regulations defined betterments to include expenditures that result in a material increase in the capacity, productivity, efficiency, strength, or quality of the unit of property or its output. One commentator expressed concern about the subjective nature of determining any increase in ''quality'' of a unit of property. The temporary regulations do not change this standard but revise the examples from the 2008 proposed regulations and add a number of new examples to help illustrate and clarify the application of the increase in quality standard to particular facts and circumstances.

Another commentator requested an example that permitted a deduction for the costs of earthquake retrofitting. The temporary regulations do not include an example allowing a deduction for earthquake retrofitting. Earthquake retrofitting encompasses various factual scenarios and could involve substantial structural additions that strengthen the unit of property and that may constitute betterments under the temporary regulations. Also, the temporary regulations retain an example from the 2008 proposed regulations that illustrates that certain amounts paid to strengthen a building to make it safer in the event of an earthquake may constitute a betterment to the unit of property. The temporary regulations illustrate that a taxpayer's treatment of amounts paid for earthquake retrofitting depends on the taxpayer's particular facts and circumstances.

3. Refreshing and Remodeling Buildings

The 2008 proposed regulations provided an example that addressed whether amounts paid to update or remodel a building resulted in a betterment because they materially increased the capacity, productivity, efficiency, strength, or quality of the unit of property. In *Example 6* of § 1.263(a)–3(f)(3) of the 2008 proposed regulations, a taxpayer was not required to capitalize as betterments the amounts paid to change periodically the layout and appearance of its retail stores. The IRS and the Treasury Department received several comments suggesting that additional examples be added to the regulations to clarify the types of refresh or remodel expenses that would not result in a betterment. One commentator suggested the addition of an example illustrating that a remodel expense intended to increase sales should not, by itself, be evidence of a material increase in the quality of the unit of property under the betterment standards. Another commentator recommended revising the betterment standards to clarify that minor costs incurred as part of regularly recurring store updates are treated as currently deductible selling or marketing expenses.

The betterment standards in the temporary regulations have not been revised to create an exception for minor and recurring store refresh or remodel costs. The analysis of whether store refresh or remodel costs result in a betterment requires an examination of all the facts and circumstances. The application of a per se exception to capitalization for all costs incurred as part of a recurring store refresh or remodel would be inappropriate, for example, in situations where a taxpayer performs major structural work on the building during a refresh or remodel.

To provide additional guidance in this area, however, the temporary regulations expand upon the facts and analysis provided in *Example 6* and set out additional examples addressing the refreshing and remodeling of retail buildings. The additional examples demonstrate a range of outcomes based on the amount and type of work performed on the building and its structural components. The examples in the temporary regulations illustrate a refresh of retail buildings that merely keeps the buildings in ordinarily efficient operating condition; a refresh of retail buildings that also includes an improvement to a building system; and finally, a large scale refresh and remodel of retail buildings that involve an improvement to the buildings. These examples also illustrate the application of the rule governing the treatment of indirect costs incurred during an improvement of property.

F. Restorations

The 2008 proposed regulations provided that an amount is paid to restore, and therefore improve, a unit of property if it (1) is for the replacement of a component of a unit of property and the taxpayer has properly deducted a loss for that component (other than a casualty loss under § 1.165–7); (2) is for the replacement of a component of a unit of property and the taxpayer had properly taken into account the adjusted basis of the component in realizing gain or loss resulting from the sale or exchange of the component; (3) is for the repair of damage to a unit of property for which the taxpayer has properly taken a basis adjustment as a result of a casualty loss under section 165, or relating to a casualty event described in section 165; (4) returns the unit of property to its ordinarily efficient operating condition if the property has deteriorated to a state of disrepair and was no longer functional for its intended use; (5) results in the rebuilding of the unit of property to a like-new condition after the end of its economic useful life; or (6) is for the replacement of a major component or a

substantial structural part of the unit of property.

The IRS and the Treasury Department received many comments regarding the 2008 proposed restoration rules. The temporary regulations generally retain the restoration standards set forth in the 2008 proposed regulations but have revised certain definitions as well as the operation and the application of some of the rules. The comments, the revisions, and the reasons for these changes are discussed below.

1. Casualty Loss

The 2008 proposed regulations provided that an amount is paid to restore a unit of property if it is for the repair of damage to the unit of property for which the taxpayer had properly taken a basis adjustment as a result of a casualty loss under section 165, or relating to a casualty event described in section 165 (''casualty loss rule''). The IRS and the Treasury Department received comments from several practitioners and industry groups requesting that the drafters remove the proposed casualty loss rule from the regulation. These commentators requested that the regulations confirm and acknowledge that a taxpayer that is engaged in a trade or business is entitled to claim a casualty loss deduction, adjust basis in the property, and claim an ordinary and necessary business expense deduction to repair the property damaged in the casualty event.

The temporary regulations retain the casualty loss rule because the rule is consistent with the fundamental principle that a taxpayer must capitalize the cost of acquiring new property. The casualty loss rule is also consistent with the restoration rules in the temporary regulations that require a taxpayer to capitalize the cost of a replacement component where it has properly deducted a loss for the component or taken into account the adjusted basis of the component in realizing gain or loss. In these situations, a taxpayer deducts the amount of the loss, reduces basis in the unit of property by the amount of loss, and then incurs costs to acquire a replacement component. Thus, the replacement is treated like the acquisition of new property (that is, the replacement of the reduced or eliminated basis), and the amounts paid for the replacement is treated as a capital expenditure. The replacement of property damaged in a casualty may involve the replacement or restoration of the entire property or components of that property. In either event, the damaged part of the property is treated as retired, the basis attributable to the damaged part is removed, and the damaged part is restored or replaced. Thus, costs to restore or replace the portion of property for which basis has been recovered are analogous to the costs of acquiring new property and must be treated as capital expenditures.

In response to the casualty loss rule in the 2008 proposed regulations, commentators contended that the casualty loss and the repair expense do not create a double deduction for the same item because they arise out of separate tax events. Specifically, the commentators argued that the casualty loss permitted under section 165(c) compensates the taxpayer for the unanticipated diminution in value of the taxpayer's property, while the repair expense deduction permitted under section 162 compensates the taxpayer for its out-of-pocket expenditures necessary to restore its property to working condition. The commentators emphasized that sections 165 and 162 confer separate benefits with separate regulatory requirements.

The IRS and the Treasury Department recognize that the section 165 loss and the section 162 business expense deduction do not create a double deduction for the same item and do confer different benefits to a taxpayer engaged in a trade or business. The section 165 loss permits recognition for a property loss suffered (in this case due to a casualty), and the section 162 deduction allows a taxpayer to take current deductions for the ordinary and necessary expenses of carrying on a trade or business, unless such deductions are prohibited under section 263(a). Where a casualty event occurs, however, the application of the section 165 loss provisions to a unit of property, specifically the reduction of basis that is required, creates a situation where the principles of section 263(a) should apply to the restoration event to prohibit a section 162 deduction. As discussed, in this situation, the amounts paid to restore property are analogous to the costs of acquiring new property and are properly capitalized, in this case through the addition of basis to the restored underlying property.

Commentators also asserted that the casualty loss rule in the 2008 proposed regulations negated the benefit of the casualty loss deduction specifically permitted under section 165(c) and § 1.165–7(a)(1) to a taxpayer engaged in a trade or business where there is partial damage to property, rather than full destruction. The commentators claimed that the casualty loss rule results in especially harsh treatment to a business taxpayer because this taxpayer must capitalize its restoration costs and recover them over the full recovery period assigned to the underlying property starting in the year the improvement is placed in service.

By retaining the casualty loss rule, however, the temporary regulations are not eliminating the benefit provided to trade and businesses by the allowance of a casualty loss. Rather, the temporary regulations are disallowing the acceleration of deductions for both the casualty loss and the costs of restoring the property. The casualty loss rule does not limit a taxpayer's ability to accelerate the recovery of the basis attributable to such property through the section 165 loss provisions. Rather, it requires a taxpayer to capitalize the costs of restoring the property, with recovery of such costs permitted through depreciation over the proper recovery period.

One commentator asserted that it was Congress' intent in enacting section 165(c) and the Treasury Department's intent in applying section 165(c) to business taxpayers (which, the commentator contends, is imputed to Congress through legislative enactment) to confer a benefit on all taxpayers by allowing them a casualty loss in situations where such loss would not otherwise be deductible (that is, where there is only partial damage to the property). The commentator further explains that a requirement to capitalize otherwise deductible section 162 expenses following a casualty undercuts Congress' intent in allowing a current deduction for the loss in value of the property. The problem with this analysis, however, is that an individual not engaged in a trade or business or in a for-profit transaction (an individual) is not entitled to an additional deduction under section 162 or any other provision for amounts paid to repair the damaged property. Thus, Congress could not have intended to provide an additional benefit to all taxpayers (in the form of a section 162 deduction) through legislative reenactment, where that benefit was not available to an individual who had suffered partial damage from a casualty. In general, an individual takes the loss deduction, reduces its basis in the damaged property, and capitalizes the costs of restoring the damaged property. In contrast, under the commentator's preferred approach, a business taxpayer would take the loss deduction, reduce the basis of the damaged property, and then claim an immediate deduction for the restoration costs. Thus, the commentator's approach would result in disparate results between individual and business taxpayers.

The casualty loss rule is consistent with current law. Although

commentators pointed to cases that specifically permit taxpayers to take business expense deductions for the costs of restoring property damaged in a casualty event, those same cases often imply that a repair expense and a loss deduction are of opposite character and may be mutually exclusive. *See,* for example, *Trinity Meadows Raceway* v. *Commissioner,* 187 F.3d 638 (6th Cir. 1999) (unpublished decision) (disallowing both a casualty loss and a related section 162 deduction for property damaged by a flood because the taxpayer did not maintain adequate records but stating that a taxpayer may deduct the repairs under section 162 or take the loss in value under section 165); *Hubinger* v. *Commissioner,* 36 F.2d 724 (2nd Cir. 1929) (holding taxpayer could not deduct the costs of reconditioning property after a fire as ordinary and necessary expenses because such items were more in the nature of casualty losses, but taxpayer was not entitled to casualty loss because there was no proof of loss); *R. R. Hensler, Inc.* v. *Commissioner,* 73 T.C. 168 (1979), *acq.,* (1980–2 CB 1) (allowing a business expense deduction for taxpayer's cost of recovering, repairing, and replacing equipment ''displaced and damaged'' by flood and distinguishing such property from property that is ''lost, destroyed, or abandoned'' and which ''gives rise to a loss under section 165''); *Atlantic Greyhound Corp.* v. *United States,* 111 F. Supp. 953 (Ct. Cl. 1953) (disallowing casualty losses for the expenses of repairing buses occasioned by accidents because such damage was ''expected, normal, and inevitable'' and the costs of repairing such damage was ordinary and necessary). In addition, where this question has been raised, the courts have not opined on whether the taxpayer may take a casualty loss and a business expense deduction with regard to a single casualty. *See R.R. Hensler,* 73 T.C. at 176 n. 9; *Louisville & Nashville R.R. Co.* v. *Commissioner,* T.C. Memo 1987–616, n. 24.

The IRS and the Treasury Department are aware that the property damaged in a casualty event might have remaining basis that is insignificant compared to the costs necessary to restore the property. Focusing on this possibility, commentators requested that if the casualty loss rule contained in the 2008 proposed regulations were retained, consideration should be given to allowing taxpayers to forgo claiming a section 165 loss in order to qualify for a section 162 deduction. The temporary regulations address this concern and provide for such a result. Specifically, the temporary regulations revise the rules of accounting for property to which section 168 applies (MACRS property) and also for determining gain or loss upon the disposition of MACRS property. These rules, discussed in more detail in section VII of this preamble, provide that a taxpayer electing to use a general asset account under temporary regulation § 1.168(i)–1T may forgo recognizing a casualty loss (without reducing basis) and may claim a repair deduction under section 162 for the replacement property, provided the replacement cost is not treated as a capital expenditure under a different provision of the temporary regulations.

2. Rebuilding to Like-New Condition

The 2008 proposed regulations provided that if an amount paid results in the rebuilding of a unit of property to a like-new condition after the end of its economic useful life, the amount must be capitalized as a restoration of the unit of property. However, an exception provided that if the amount is paid after the economic useful life of the property but during the recovery period (as prescribed in section 168(c)), the amount is not required to be capitalized. The temporary regulations revise the rule to apply only to amounts paid to rebuild the unit of property after the end of the class life of the unit of property as defined under sections 168(g)(2) and (3). The temporary regulations also remove the recovery period exception so that a taxpayer must look only to the class life of the property in determining the application of this rule. The use of defined class life rather than economic useful life provides a more objective standard for determining whether the rebuilding rule applies and is consistent with the standard that applies in determining whether amounts qualify for the routine maintenance safe harbor. This more objective standard is designed to avoid disputes that might otherwise arise in determining the economic useful life of property and to provide for consistent application among taxpayers that hold the same type of property.

3. Replacement of Major Component or Substantial Structural Part

The 2008 proposed regulations provided that an amount paid for the replacement of a major component or a substantial structural part of a unit of property is an amount paid to restore (and therefore improve) the unit of property. The 2008 proposed regulations defined ''major component or substantial structural part'' as a part or a combination of parts of the unit of property, the cost of which comprises 50 percent or more of the replacement cost of the unit of property or the replacement of which comprises 50 percent or more of the physical structure of the unit of property (''the 50 percent thresholds''). Furthermore, the 2008 proposed regulations provided that an amount was not required to be capitalized as a replacement of a major component or substantial structural part if it was paid during the recovery period prescribed in section 168(c) (''recovery period limitation'').

The IRS and the Treasury Department received two comments on this provision. One commentator suggested that the regulation should provide guidance establishing reasonable methods for substantiating replacement costs. This commentator also recommended that the drafters eliminate the 50 percent thresholds because physical structure is too difficult to measure. Another commentator suggested that the 50 percent thresholds should be abandoned arguing that they have no basis in law and will lead to unexpected complications in application.

The 50 percent thresholds and the recovery period limitation were first introduced in the 2008 proposed regulations. The exceptions were intended to provide a more objective standard for capitalization in this area and to counter the effect of the disposition and depreciation rules for buildings that generally require a taxpayer to capitalize and depreciate multiple replacements of the same structural component while continuing to recover the cost of the original structural component as part of the asset (for example, a taxpayer could not take a retirement loss on the disposition of a structural component of a building).

The 50 percent thresholds and the recovery period limitation in the 2008 proposed regulations provided an objective, bright-line alternative to the highly factual analysis applied by the courts and the IRS in determining whether a replacement part is a major component or substantial structural part of property and must therefore be capitalized, or is a relatively minor portion of the physical structure of the property or of any of its major parts and may therefore be deducted as a repair. Neither the courts nor the IRS, however, have previously adopted or applied the 50 percent thresholds or the recovery period limitation in determining whether a taxpayer must capitalize the cost of replacement parts or components. *See,* for example, *Buckland* v. *United States,* 66 F. Supp. 681 (D. Conn. 1946) (holding that costs to replace window sills in a factory

building were deductible); Rev. Rul. 2001–4, 2001–1 CB 295 (holding, in part, that costs of certain heavy maintenance on aircraft airframe were deductible); *Smith* v. *Commissioner,* 300 F.3d 1023, 1032 (9th Cir. 2002) (holding that costs of relining aluminum smelting cells were capital expenditures even though they amounted to only 22.21 percent of the costs of replacing an entire cell); *Denver & Rio Grande Western R.R. Co.* v. *Commissioner,* 279 F.2d 368 (10th Cir. 1960) (holding that costs to replace the floor planks and stringers of a viaduct were capital expenditures); *P. Dougherty Co.* v. *Commissioner,* 159 F.2d 272 (4th Cir. 1946) (holding that costs of replacing the stern section of a barge were capital expenditures); *Tsakopoulous* v. *Commissioner,* T.C. Memo 2002–8 (holding that costs to replace the roof on a portion of the suites of a shopping center were capital expenditures); *Stewart Supply Co.* v. *Commissioner,* T.C. Memo 1963–62 (holding that costs to replace a front wall of a building and make electrical connections to that wall were capital expenditures).

The IRS and the Treasury Department are concerned that the 50 percent thresholds and the recovery period limitation, although objective, will lead to results that are drastically different from the results reached in the case law and rulings in this area. The 50 percent thresholds and the recovery period limitation would, in many cases, allow the replacement of a major component or substantial structural part to be treated as deductible repair rather than a capital expenditure, in effect reversing most of the existing authorities.

The temporary regulations therefore retain the standard that requires capitalization of an amount paid for the replacement of a major component or substantial structural part of the unit of property but revise the standard to more closely follow the facts and circumstances approach used by the courts. Under the temporary regulations, in determining whether an amount is paid for the replacement of a part or a combination of parts that comprise a major component or a substantial structural part of the unit of property, the taxpayer must consider all the facts and circumstances, including the quantitative or qualitative significance of the part or combination of parts in relation to the unit of property or, in the case of a building, in relation to the building structure or the relevant building system. The temporary regulations also define a major component or substantial structural part to include a part or combination of parts that comprise a large portion of the physical structure of the unit of property or that perform a discrete and critical function in the operation of the unit of property. The replacement of a minor component of the unit of property, even though such component may affect the function of the unit of property, will not generally by itself constitute a major component or substantial structural part under the temporary regulations. The temporary regulations add a number of examples to illustrate the application of the revised standards in a variety of situations, including its application to a building structure and building systems.

In addition, the temporary regulations revise the disposition and depreciation rules to minimize the harsh result that occurs when an original part and any subsequent replacements of the same part are required to be capitalized and recovered simultaneously. As mentioned, in the case of buildings, taxpayers are currently required to capitalize and depreciate the costs to replace a structural component and to continue to recover the cost of the original structural component (for example, a taxpayer could not take a retirement loss on the disposition of a structural component of a building). For example, if a taxpayer were required to capitalize the costs of replacing an entire roof, it could not recover its basis in the original roof that was removed. Rather, the taxpayer would have to continue depreciating the removed roof, and at the same time, capitalize and depreciate the replacement roof over the same recovery period as the building. The temporary regulations revise the definition of disposition so that a taxpayer may treat the retirement of a structural component of a building as a disposition of property. Furthermore, the temporary regulations clarify that a taxpayer may recognize a loss on a component of a unit of property that is section 1245 property if the taxpayer consistently treats the component as a separate asset for disposition purposes. As a result, the 50 percent thresholds and the recovery period limitation are not necessary to prevent contemporaneous depreciation of both the retired component and the replacement component and, therefore, are not included in the temporary regulations as exceptions to the major component and substantial structural part rule.

VII. Accounting and Disposition Rules for MACRS Property

The temporary regulations revise the rules for accounting for assets to which section 168 applies (MACRS property) and the rules for determining gain or loss upon the disposition of MACRS property.

Currently, a taxpayer may account for its MACRS property by accounting for an asset individually in a single asset account, by combining two or more assets in a multiple asset account (or pool), or by electing to include the asset in a general asset account. The temporary regulations continue to allow these types of accounts. However, the rules under § 1.167(a)–7 for the different types of multiple asset accounts (specifically group account, classified account, and composite account) are based on a taxpayer being permitted to depreciate assets in the account over their useful lives or average useful lives (less salvage value). Since the enactment of the Accelerated Cost Recovery System (ACRS) in 1981, a taxpayer is required to depreciate assets over their recovery periods instead of their useful lives. Consequently, the temporary regulations eliminate group accounts, classified accounts, and composite accounts. Instead, the temporary regulations provide that each multiple asset account must include, in most cases, assets that have the same depreciation method, recovery period, and convention, and that are placed in service in the same taxable year.

Section 1.168–6 of the proposed ACRS regulations provides the rules for determining gain or loss upon the disposition of ACRS property. These rules generally have been applied to MACRS property. The temporary regulations provide rules for determining gain or loss upon the disposition of MACRS property that are consistent with the disposition rules under § 1.168–6 of the proposed ACRS regulations. However, as previously mentioned, the temporary regulations expand the definition of disposition for MACRS property to include the retirement of a structural component of a building and, accordingly, the temporary regulations allow the recognition of a loss upon such retirement. The temporary regulations also clarify that, if an asset is disposed of by physical abandonment and that asset is subject to nonrecourse indebtedness, the asset is treated in the same manner as an asset disposed of by sale. In addition, the temporary regulations provide rules for determining the asset disposed of and identifying which multiple asset account includes the asset disposed of.

The temporary regulations also amend the rules for general asset accounts under § 1.168(i)–1. Section 1.168(i)–1(e)(2) provides that, in general, no loss is recognized upon the disposition of an asset from a general asset account.

However, § 1.168–1(e)(3)(iii) provides that a taxpayer may elect to recognize gain or loss upon the disposition of an asset in a general asset account if there is a qualifying disposition. A qualifying disposition is defined to include a casualty loss, a charitable contribution, termination of a business or income producing activity, and certain types of transactions. The temporary regulations amend the general asset account rules by expanding the definition of disposition to include the retirement of a structural component of a building and by expanding the definition of a qualifying disposition to allow the recognition of gain or loss upon most dispositions of assets in general asset accounts. Thus, by electing general asset account treatment, a taxpayer will have the option of recognizing gain or loss on an expanded list of qualifying dispositions, which are not all treated as qualifying dispositions under the current general asset account rules. In addition, the temporary regulations modify the rules for establishing general asset accounts and clarify the computation of depreciation for a general asset account when the assets in the account are eligible for the additional first year depreciation deduction.

A. Accounting for MACRS property

The existing regulations under § 1.167(a)–7 allow a taxpayer to account for its depreciable assets by treating each asset as a single asset account or by combining two or more assets in a multiple asset account (or pool). A taxpayer may establish as many accounts for depreciable assets as the taxpayer wants and may group the assets in multiple asset accounts in different ways. When depreciation was determined using the useful lives of assets and average useful lives were permitted for an account, the common multiple asset accounts were a group account (assets similar in kind with approximately the same useful lives), a classified account (assets based on use without regard to useful life), and a composite account (assets in the same account without regard to their character or useful lives). The temporary regulations amend § 1.167(a)–7 to provide generally that those rules (which were originally issued in 1956) apply only to property subject to section 167 and not to MACRS property (generally property placed in service after 1986) or ACRS property (generally property placed in service after 1980 and before 1987).

The temporary regulations will, consistent with the rules under § 1.167(a)–7, continue to provide flexibility to a taxpayer in establishing its depreciable accounts for MACRS property. The temporary regulations under § 1.168(i)–7T allow a taxpayer to account for its MACRS property by treating each asset as a single asset account or by combining two or more assets in a multiple asset account. A taxpayer also may establish as many accounts for assets as the taxpayer wants. If a taxpayer chooses to account for its assets in multiple asset accounts, the temporary regulations provide that each multiple asset account must include assets that have the same depreciation method, recovery period, and convention, and are placed in service in the same taxable year. For example, in one multiple asset account, a taxpayer in the wholesale distribution business may account for most of its items of 5-year property that are placed in service in 2012 and have the same depreciation method, recovery period, and convention even though the assets may have different uses (for example, copiers, forklifts, and equipment in the distribution warehouse). Alternatively, the taxpayer may choose to account for the items of 5-year property in more than one multiple asset account, each as a single asset account, or in a combination of single and multiple asset accounts.

Even if assets have the same depreciation method, recovery period, and convention, depreciation for the assets may be computed differently. For example, depreciation may be limited for passenger automobiles subject to section 280F(a), or some assets may be eligible for the additional first year depreciation while others are not. As a result, the temporary regulations provide additional rules for establishing multiple asset accounts. For example, assets subject to the mid-month convention may be grouped in a multiple asset account only with assets placed in service in the same month. Similarly, assets eligible for the additional first year depreciation deduction cannot be grouped with assets ineligible for the additional first year depreciation deduction. Also, assets eligible for the additional first year depreciation deduction may be grouped only with assets eligible for the same percentage of the additional first year depreciation.

In limited circumstances, the temporary regulations require the use of a single asset account. A taxpayer must account for an asset in a single asset account if the taxpayer uses the asset both for business use and personal use, or the taxpayer places the asset in service and disposes of it in the same taxable year. A single asset account is also required for an asset that was included in a general asset account but general asset account treatment for the asset was terminated under the rules in § 1.168(i)–1T. Section 1.168(i)–7T does not apply to assets while they are included in general asset accounts subject to § 1.168(i)–1T.

B. Dispositions of MACRS Property

Section 168(i)(6) provides that an improvement or addition to property is depreciated under section 168 by using the depreciation method, recovery period, and convention that would be applicable to the underlying property if the underlying property is placed in service at the same time as the improvement or addition. If an improvement or addition to the underlying property is placed in service after the taxpayer placed the underlying property in service, the recovery period for the improvement or addition begins on the placed-in-service date of the improvement or addition. In effect, that improvement or addition is treated as a separate asset for purposes of section 168.

If a lessor made an improvement for a lessee and that improvement is irrevocably disposed of or abandoned by the lessor at the termination of the lease, section 168(i)(8)(B) allows the lessor to recognize gain or loss upon the disposition of that improvement. This rule applies to improvements that are structural components of a building. Similarly, if a lessee of a leased building makes an improvement that is a structural component of that building, the lessee may recognize gain or loss upon its disposition of that improvement.

However, § 1.168–2(l)(1) of the proposed ACRS regulations (which have been generally applied to MACRS property) provides that a disposition does not include the retirement of a structural component of a building. Consequently, § 1.168–6(b) of the proposed ACRS regulations provides that no loss is recognized upon the retirement of a structural component of a building.

As previously mentioned, the temporary regulations for determining whether there is an improvement to the unit of property take an approach different from the 2008 proposed regulations in order to achieve results more consistent with existing case law and to avoid the potential inequities resulting from the depreciation and disposition rules. As explained below, the temporary regulations expand the definition of disposition to include retirements of structural components of buildings and clarify that, in some

cases, components of section 1245 property may be treated as the asset disposed of. These changes will allow taxpayers, for example, to claim a retirement loss for worn or damaged components that are discarded from the taxpayer's operations. On the other hand, a taxpayer that has elected general asset account treatment may choose not to claim a retirement loss for property that has been disposed of, and would accordingly continue to depreciate the basis in the property.

1. Definition of Disposition

Under the temporary regulations under § 1.168(i)–8T, a disposition occurs when ownership of the asset is transferred or when the asset is permanently withdrawn from use either in the taxpayer's trade or business or in the production of income. A disposition includes the sale, exchange, retirement, physical abandonment, or destruction of an asset. A disposition also includes the retirement of a structural component of a building. Finally, a disposition also occurs when an asset is transferred to a supplies, scrap, or similar account.

Prior to the enactment of ACRS in 1981, a taxpayer was permitted to depreciate the cost of property over its useful life (less salvage value), which was based on the taxpayer's subjective determination of the period over which the asset would be useful to the taxpayer in its trade or business or in the production of its income. Some taxpayers utilized component depreciation under this system in determining the useful life of buildings. Under component depreciation, a taxpayer allocates the cost of a building to its component parts and then assigns a separate useful life to each of these components. Each of the component parts is then depreciated as a separate asset. The ACRS rules prohibited the use of component depreciation and required composite depreciation for buildings. Composite depreciation was also required when the ACRS rules were modified in 1986 (generally referred to as ''MACRS,'' the modified rules generally applied to property placed in service after 1986). Under composite depreciation, a taxpayer depreciates a building and its structural components using the same recovery period and depreciation method. The temporary regulations do not change the requirement to use composite depreciation. Under section 168, a taxpayer must depreciate a building and all of its structural components using the same recovery period, depreciation method, and convention, even though under the temporary regulations each of the structural components is a separate asset.

2. Gain or Loss

The temporary regulations provide rules for determining gain or loss upon the disposition of MACRS property that are consistent with the disposition rules under § 1.167(a)–8 and § 1.168–6 of the proposed ACRS regulations. If an asset is disposed of by sale, exchange, or involuntary conversion, gain or loss is recognized under the applicable provisions of the Internal Revenue Code. If an asset is disposed of by physical abandonment, loss is recognized in the amount of the asset's adjusted depreciable basis at the time of the abandonment. However, if the abandoned asset is subject to nonrecourse indebtedness, the temporary regulations clarify that the asset is treated in the same manner as an asset disposed of by sale. If an asset is disposed of by conversion to personal use, no gain or loss is recognized. *See* § 1.168(i)–4(c). If an asset is disposed of other than by sale, exchange, involuntary conversion, physical abandonment, or conversion to personal use (for example, when the asset is transferred to a supplies or scrap account), gain is not recognized but loss is recognized in the amount of the excess of the asset's adjusted depreciable basis over its fair market value at the time of disposition. The temporary regulations also provide that the manner of disposition (for example, abnormal retirement or normal retirement) is not taken into consideration in determining whether a disposition occurs or gain or loss is recognized.

3. Determining the Appropriate Asset Disposed of

The temporary regulations provide that the facts and circumstances of each disposition are considered in determining the appropriate asset disposed of. In general, the asset for disposition purposes cannot be larger than the unit of property as determined under § 1.263(a)–3T(e)(2), (e)(3), and (e)(5) or as otherwise provided in published guidance in the **Federal Register** or in the Internal Revenue Bulletin (see, for example, Rev. Proc. 2011–28 (2011–18 IRB 743) providing units of property for wireless network assets). However, each disposed of building is the asset except if more than one building is treated as the asset under § 1.1250–1(a)(2)(ii). If the building includes two or more condominium or cooperative units, then each condominium or cooperative unit (instead of the building) is the asset. Consistent with the expansion of the definition of a disposition to include a retirement of a structural component of a building, the temporary regulations provide that each structural component of a building, condominium unit, or cooperative unit is the asset for disposition purposes. Further, if a taxpayer properly includes an item in one of the asset classes 00.11 through 00.4 of Rev. Proc. 87–56 (1987–2 CB 674) or classifies an item in one of the categories under section 168(e)(3) (other than a category that includes buildings or structural components; for example, retail motor fuels outlet and qualified leasehold improvement property), each item is the asset provided it is not larger than the unit of property as determined under § 1.263(a)–3T(e)(3) or (e)(5). For example, each desk is the asset, each computer is the asset, and each qualified smart electric meter is the asset (assuming these assets are not larger than the unit of property as determined under § 1.263(a)–3T(e)(3) or (e)(5)). Consistent with section 168(i)(6), the temporary regulations also provide that if the taxpayer places in service an improvement or addition to an asset after the taxpayer placed the asset in service, the improvement or addition is a separate asset for depreciation purposes. The temporary regulations also provide that a taxpayer generally may use any reasonable, consistent method to treat each of an asset's components as the asset for disposition purposes.

The temporary regulations provide rules for determining the placed-in-service year of the asset disposed of. In general, a taxpayer must use the specific identification method. Under this method, the taxpayer can determine when the asset disposed of was placed in service. If a taxpayer accounts for assets in multiple asset accounts, the IRS and the Treasury Department recognize that it may be impracticable to determine from the taxpayer's records when the asset disposed of was placed in service. Accordingly, the temporary regulations allow the taxpayer to use a first-in, first-out (FIFO) method under which the taxpayer treats the asset disposed of as being from the multiple asset account with the earliest placed-in-service year that has assets with the same recovery period as the asset disposed of. However, if the taxpayer can readily determine from its records the unadjusted depreciable basis of the asset disposed of, the temporary regulations allow the taxpayer to use a modified FIFO method under which the taxpayer treats the asset disposed of as being from the multiple asset account

with the earliest placed-in-service year that has assets with the same recovery period as the asset disposed of and with the same unadjusted depreciable basis of the asset disposed of. If the asset disposed of is a mass asset in a multiple asset account, the temporary regulations also allow the taxpayer to use a mortality dispersion table to identify when the asset was placed in service. Finally, the temporary regulations allow a taxpayer to use any other method designated by the Secretary. The IRS and the Treasury Department invite taxpayers to submit comments on reasonable methods to be considered for this purpose. However, the IRS and the Treasury Department do not consider a last-in, last-out (LIFO) method to be a reasonable method. Under the LIFO method, the taxpayer treats the asset disposed of as being from the multiple asset account with the most recent placed-in-service year that has assets with the same recovery period as the asset disposed of.

4. Accounting for Assets Disposed of

The IRS and the Treasury Department recognize that it may be impracticable for a taxpayer that accounts for assets in multiple asset accounts to determine from the taxpayer's records the unadjusted depreciable basis of the asset disposed of. Accordingly, the temporary regulations provide that the taxpayer may use any reasonable, consistent method to make that determination. Similar rules are provided if the asset disposed of is a component of a larger asset.

When an asset is disposed of, the temporary regulations provide that depreciation ends for that asset. *See* § 1.167(a)–10(b). Accordingly, if the asset disposed of is in a single asset account, the temporary regulations provide that the single asset account terminates as of the date of disposition (taking into account the applicable convention of the asset disposed of). Also, if the asset disposed of is in a multiple asset account, the temporary regulations provide that the asset is removed from that account and the unadjusted depreciable basis and depreciation reserve of the account are adjusted. Similar rules are provided if the asset disposed of is a component of a larger asset.

The temporary regulations also provide that the § 1.167(a)–8 rules apply to property subject to section 167 and not to MACRS property (generally property placed in service after 1986) or ACRS property (generally property placed in service after 1980 and before 1987).

C. General Asset Accounts

Section 168(i)(4) provides that under regulations, a taxpayer may maintain one or more general asset accounts for any MACRS property. Except as provided in regulations, all proceeds realized on any disposition of property in a general asset account shall be included in income as ordinary income.

The existing rules for general asset accounts are provided under § 1.168(i)–1. The provisions of § 1.168(i)–1 apply only to assets for which the taxpayer has made an election to account for the assets in general asset accounts. The temporary regulations for general asset accounts under § 1.168(i)–1T retain this rule. Under the existing rules and temporary regulations, each general asset account is effectively treated as the asset.

1. Establishing General Asset Accounts

Consistent with the existing general asset account rules under § 1.168(i)–1(c), the temporary regulations provide that assets may be grouped into one or more general asset accounts. The temporary regulations, however, expand the assets that may be included in each general asset account. The temporary regulations eliminate the existing rule that each general asset account must include only assets that have the same asset class. Thus, under the temporary regulations, each general asset account must include only assets that have the same depreciation method, recovery period, and convention, and are placed in service in the same taxable year.

The existing general asset account rules also provide special rules for establishing general asset accounts. These rules are necessary because even though assets have the same depreciation method, recovery period, and convention, depreciation for the assets may be computed differently. As a result, the temporary regulations do not change the existing rules, but they add new rules to be consistent with the temporary regulations for establishing multiple asset accounts for MACRS property. For example, assets eligible for the additional first year depreciation deduction cannot be grouped with assets ineligible for the additional first year depreciation deduction. Also, assets eligible for the additional first year depreciation deduction may be grouped only with assets eligible for the same percentage of the additional first year depreciation.

2. Depreciation of General Asset Account

Section 1.168(i)–1(d) provides the rules for determining the depreciation for each general asset account. However, these rules do not reflect the additional first year depreciation provisions added to section 168 since the promulgation of § 1.168(i)–1 in 1994. Accordingly, the temporary regulations provide rules for determining the depreciation for a general asset account where all the assets in the account are eligible for the additional first year depreciation deduction and where all the assets in the account are not eligible for that deduction.

3. Disposition of an Asset From a General Asset Account

Consistent with the expansion of the definition of disposition of MACRS property, the temporary regulations expand the definition of disposition under § 1.168(i)–1(e)(1) to include a retirement of a structural component of a building.

Immediately before any disposition of an asset in a general asset account, the existing rules treat the asset as having an adjusted depreciable basis of zero for purposes of section 1011. Therefore, no loss is realized upon the disposition of the asset. The existing rules also provide that any amount realized on a disposition generally is recognized as ordinary income. Further, the existing rules provide that the unadjusted depreciable basis and depreciation reserve of the general asset account are not affected by the disposition. Accordingly, a taxpayer continues to depreciate the general asset account, including the asset disposed of, as though no disposition occurred. The temporary regulations do not change any of these rules.

The existing rules also allow a taxpayer to terminate general asset account treatment upon certain dispositions. Under the existing rules, the taxpayer may elect to recognize gain or loss for a general asset account when the taxpayer disposes of all of the assets, or the last asset, in the account. The temporary regulations retain this rule.

The existing rules further allow a taxpayer to elect to terminate general asset account treatment for an asset in a general asset account when the taxpayer disposes of the asset in a qualifying disposition. Under the existing rules, a qualifying disposition generally is a casualty or extraordinary event. The temporary regulations expand a qualifying disposition to include generally any disposition. If a taxpayer elects to terminate general asset account treatment for an asset disposed of in a qualifying disposition, the temporary regulations do not change the existing rules that require the taxpayer to remove the asset disposed of

from the general asset account and adjust the unadjusted depreciable basis and depreciation reserve of the account.

The temporary regulations also do not change the existing rules that require a taxpayer to terminate general asset account treatment for assets in a general asset account that are disposed of in transactions subject to section 167(i)(7)(B), section 1031, or section 1033, or in an abusive transaction described under the existing rules. In addition, the temporary regulations require a partnership to terminate its general asset accounts upon the technical termination of the partnership under section 708(b)(1)(B).

4. Other Transactions

The temporary regulations require a taxpayer to terminate general asset account treatment for an asset that the taxpayer uses for both business use and personal use. If there is a redetermination of basis of an asset in a general asset account (for example, due to contingent purchase price or discharge of indebtedness), the temporary regulations provide that the election for the asset also applies to the increase or decrease in basis and require the taxpayer to establish a new general asset account for that increase or decrease in basis.

5. Identification of Disposed of or Converted Asset

Because the general asset account is the asset, the existing rules provide that a taxpayer may use any reasonable method that is consistently applied to all of its general asset accounts for determining the unadjusted depreciable basis of an asset for which general asset account treatment is terminated. The temporary regulations retain this rule but provide what methods are reasonable for identifying the placed-in-service year of the asset disposed of. These methods are the same as those discussed above for identifying the placed-in-service year of an asset disposed of in a multiple asset account: the specific identification method, the FIFO method, the modified FIFO method, a mortality dispersion table if the asset disposed of is a mass asset grouped in a general asset account with other mass assets, or any method designated by the Secretary. The LIFO method is not permitted.

The temporary regulations also amend §§ 1.165–2 and 1.1016–3 to include cross-references to §§ 1.168(i)–1T and 1.168(i)–8T.

VIII. Effective Dates and Changes in Methods of Accounting

The preamble to the 2008 proposed regulations provided that a change to conform to the proposed regulations upon finalization will be considered a change in method of accounting under section 446(e). The 2008 proposed regulations, however, were not effective until issued as final regulations and thus did not provide specific procedures for changes in method of accounting.

The IRS and the Treasury Department received several comments regarding the procedures that a taxpayer should utilize to change its method of accounting to comply with the regulations. Several commentators favored the use of a cut-off method, primarily for reasons of administrative convenience. However, other commentators asserted that any change in method of accounting must include a section 481(a) adjustment.

The temporary regulations under § 1.162–3T are generally effective for amounts paid or incurred (to acquire or produce property) in taxable years beginning on or after January 1, 2012, except for § 1.162–3T(e), which is effective for taxable years beginning on or after January 1, 2012. The temporary regulations under §§ 1.167(a)–4, 1.167(a)–7T, 1.167(a)–8T, 1.168(i)–1T, 1.168(i)–7T, 1.168(i)–8T, 1.263(a)–1T, 1.263(a)–2T, 1.263(a)–3T, 1.263(a)–6T, and 1.1016–3T are generally effective for taxable years beginning on or after January 1, 2012, except for §§ 1.263(a)–2T(f)(2)(iii), (f)(2)(iv), (f)(3)(ii), and (g), which are effective for amounts paid or incurred (to acquire or produce property) in taxable years beginning on or after January 1, 2012. In addition, the temporary regulations under § 1.263A–1T are effective for amounts paid or incurred (to acquire or produce property) in taxable years beginning on or after January 1, 2012.

As stated in the preamble to the 2008 proposed regulations, a change to conform to these regulations will be a change in method of accounting under section 446(e). In general, a taxpayer seeking a change in method of accounting to comply with these temporary regulations must take into account an adjustment under section 481(a). Procedures will be provided under which taxpayers may obtain automatic consent for a taxable year beginning on or after Jan 1, 2012 to change to a method of accounting provided in the temporary regulations.

The imposition of a section 481(a) adjustment for a change in method of accounting to conform to the temporary regulations provides for a uniform and consistent rule for all taxpayers and ultimately reduces the administrative burdens on taxpayers and the IRS in enforcing the requirements of section 263(a). Although the IRS and the Treasury Department recognize that requiring a section 481(a) adjustment may place a burden on taxpayers to calculate reasonable adjustments, taxpayers have shown a willingness and ability to make these calculations in requesting method changes after the publication of the 2008 proposed regulations. In addition, taxpayers and the IRS routinely reach agreements on calculation methodologies and amounts. Moreover, by utilizing a section 481(a) adjustment to make the change, a taxpayer is put on the same method of accounting for all amounts or costs incurred both prior to and after the effective date of these regulations. Furthermore, a section 481(a) adjustment results in similar treatment for all taxpayers, including those that changed their method of accounting in response to the 2008 proposed regulations. Finally, requiring a section 481(a) adjustment reduces the burden for taxpayers and the IRS during examinations that include years both before and after the effective date of these regulations because the parties will need to apply only the temporary regulations, and will not need to apply the rules in effect prior to the effective date of the temporary regulation.

Comments and Public Hearing

The text of these temporary regulations also serves as the text of the proposed regulations set forth in a notice of proposed rulemaking on this subject appearing elsewhere in this issue of the **Federal Register**. Please see the ''Comments and Public Hearing'' section of the notice of proposed rulemaking for the procedures to follow for submitting comments and requesting to speak at the public hearing on the proposed regulations on this subject.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866, as supplemented by Executive Order 13563. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and, because the regulation does not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f), these temporary

regulations will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

Drafting Information

The principal authors of these regulations are Merrill D. Feldstein and Kathleen Reed, Office of the Associate Chief Counsel (Income Tax and Accounting). Other personnel from the IRS and the Treasury Department have participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 is amended by adding an entry in numerical order to read as follows:

Authority: 26 U.S.C. 7805 * * *
Section 1.168(i)–1T also issued under 26 U.S.C. 168(i)(4). * * *

■ **Par. 2.** Section 1.162–3 is revised to read as follows:

§ 1.162–3 Materials and Supplies.

(a) through (j) [Reserved]. For further guidance, see § 1.162–3T(a) through (j).

■ **Par. 3.** Section 1.162–3T is added to read as follows:

§ 1.162–3T Materials and supplies (temporary).

(a) *In general*—(1) *Non-incidental materials and supplies.* Amounts paid to acquire or produce materials and supplies are deductible in the taxable year in which the materials and supplies are used or consumed in the taxpayer's operations.

(2) *Incidental materials and supplies.* Amounts paid to acquire or produce incidental materials and supplies that are carried on hand and for which no record of consumption is kept or of which physical inventories at the beginning and end of the taxable year are not taken, are deductible in the taxable year in which these amounts are paid, provided taxable income is clearly reflected.

(3) *Use or consumption of rotable and temporary spare parts.* Except as provided in paragraphs (d), (e), and (f) of this section, for purposes of paragraph (a)(1) of this section, rotable and temporary spare parts (defined under paragraph (c)(2) of this section) are used or consumed in the taxpayer's operations in the taxable year in which the taxpayer disposes of the parts.

(b) *Coordination with other provisions of the Internal Revenue Code.* Nothing in this section changes the treatment of any amount that is specifically provided for under any provision of the Internal Revenue Code or regulations other than section 162(a) or section 212 and the regulations under those sections. For example, see section § 1.263(a)–3T, which requires taxpayers to capitalize amounts paid to improve tangible property and section 263A and the regulations under section 263A, which require taxpayers to capitalize the direct and allocable indirect costs, including the cost of materials and supplies, to property produced or to property acquired for resale. See also § 1.471–1, which requires taxpayers to include in inventory certain materials and supplies.

(c) *Definitions*—(1) *Materials and supplies.* For purposes of this section, *materials and supplies* means tangible property that is used or consumed in the taxpayer's operations that is not inventory and that—

(i) Is a component acquired to maintain, repair, or improve a unit of tangible property (as determined under § 1.263(a)–3T(e)) owned, leased, or serviced by the taxpayer and that is not acquired as part of any single unit of tangible property;

(ii) Consists of fuel, lubricants, water, and similar items, that are reasonably expected to be consumed in 12 months or less, beginning when used in taxpayer's operations;

(iii) Is a unit of property as determined under § 1.263(a)–3T(e) that has an economic useful life of 12 months or less, beginning when the property is used or consumed in the taxpayer's operations;

(iv) Is a unit of property as determined under § 1.263(a)-3T(e) that has an acquisition cost or production cost (as determined under section 263A) of $100 or less (or other amount as identified in published guidance in the **Federal Register** or in the Internal Revenue Bulletin (see § 601.601(d)(2)(ii)(*b*) of this chapter)); or

(v) Is identified in published guidance in the **Federal Register** or in the Internal Revenue Bulletin (see § 601.601(d)(2)(ii)(*b*) of this chapter) as materials and supplies for which treatment is permitted under this section.

(2) *Rotable and temporary spare parts.* For purposes of this section, rotable spare parts are materials and supplies under paragraph (c)(1)(i) of this section that are acquired for installation on a unit of property, removable from that unit of property, generally repaired or improved, and either reinstalled on the same or other property or stored for later installation. Temporary spare parts are materials and supplies under paragraph (c)(1)(i) of this section that are used temporarily until a new or repaired part can be installed and then are removed and stored for later (emergency or temporary) installation.

(3) *Economic useful life*—(i) *General rule.* The economic useful life of a unit of property is not necessarily the useful life inherent in the property but is the period over which the property may reasonably be expected to be useful to the taxpayer or, if the taxpayer is engaged in a trade or business or an activity for the production of income, the period over which the property may reasonably be expected to be useful to the taxpayer in its trade or business or for the production of income, as applicable. See § 1.167(a)–1(b) for the factors to be considered in determining this period.

(ii) *Taxpayers with an applicable financial statement.* For taxpayers with an applicable financial statement (as defined in paragraph (c)(3)(iii) of this section), the economic useful life of a unit of property, solely for the purposes of applying the provisions of paragraph (c)(1)(iii) of this section, is the useful life initially used by the taxpayer for purposes of determining depreciation in its applicable financial statement, regardless of any salvage value of the property. If a taxpayer does not have an applicable financial statement for the taxable year in which a unit of property was originally acquired or produced, the economic useful life of the unit of property must be determined under paragraph (c)(3)(i) of this section. Further, if a taxpayer treats amounts paid for a unit of property as an expense in its applicable financial statement on a basis other than the useful life of the property or if a taxpayer does not depreciate the unit of property on its applicable financial statement, the economic useful life of the unit of property must be determined under paragraph (c)(3)(i) of this section. For example, if a taxpayer has a policy of treating as an expense on its applicable financial statement amounts paid for a unit of property costing less than a certain dollar amount, notwithstanding that the unit of property has a useful life of more than one year, the economic useful life of the unit of property must be determined under paragraph (c)(3)(i) of this section.

(iii) *Definition of applicable financial statement.* The taxpayer's applicable financial statement is the taxpayer's financial statement listed in paragraphs (c)(3)(iii)(A) through (C) of this section that has the highest priority (including

within paragraph (c)(3)(iii)(B) of this section). The financial statements are, in descending priority—

(A) A financial statement required to be filed with the Securities and Exchange Commission (SEC) (the 10–K or the Annual Statement to Shareholders);

(B) A certified audited financial statement that is accompanied by the report of an independent CPA (or in the case of a foreign entity, by the report of a similarly qualified independent professional), that is used for—

(*1*) Credit purposes;

(*2*) Reporting to shareholders, partners, or similar persons; or

(*3*) Any other substantial non-tax purpose; or

(C) A financial statement (other than a tax return) required to be provided to the Federal or a state government or any Federal or state agencies (other than the SEC or the Internal Revenue Service).

(4) *Amount paid.* For purposes of this section, in the case of a taxpayer using an accrual method of accounting, the terms *amount paid* and *payment* mean a liability incurred (within the meaning of § 1.446–1(c)(1)(ii)). A liability may not be taken into account under this section prior to the taxable year during which the liability is incurred.

(5) *Produce.* For purposes of this section, *produce* means construct, build, install, manufacture, develop, create, raise, or grow. This definition is intended to have the same meaning as the definition used for purposes of section 263A(g)(1) and § 1.263A–2(a)(1)(i), except that improvements are excluded from the definition in this paragraph (c)(5) and are separately defined and addressed in § 1.263(a)–3T. Amounts paid to produce materials and supplies are subject to section 263A.

(d) *Election to capitalize and depreciate*—(1) *In general.* A taxpayer may elect to treat as a capital expenditure and to treat as an asset subject to the allowance for depreciation the cost of any material or supply as defined in paragraph (c)(1) of this section. Except as specified in paragraph (d)(2) of this section, an election made under this paragraph (d) applies to amounts paid during the taxable year to acquire or produce any material or supply to which paragraph (a) of this section would apply (but for the election under this paragraph (d)). Any asset for which this election is made shall not be treated as a material or a supply.

(2) *Exceptions.* A taxpayer may not elect to capitalize and depreciate under paragraph (d) of this section—

(i) Any amount paid to acquire or produce a material or supply described in paragraph (c)(1)(i) of this section if—

(A) The material or supply is intended to be used as a component of a unit of property that is a material or supply under paragraph (c)(1)(iii), (iv), or (v) of this section; and

(B) The taxpayer has not elected to capitalize and depreciate that unit of property under this paragraph (d); or

(ii) Any amount paid to acquire or produce a rotable or temporary spare part if the taxpayer has applied the optional method of accounting for rotable and temporary spare parts under paragraph (e) of this section.

(3) *Manner of electing.* A taxpayer makes the election under paragraph (d) of this section by capitalizing the amounts paid to acquire or produce a material or supply in the taxable year the amounts are paid and by beginning to recover the costs when the asset is placed in service by the taxpayer for the purposes of determining depreciation under the applicable provisions of Internal Revenue Code and regulations thereunder. A taxpayer must make this election in its timely filed original Federal income tax return (including extensions) for the taxable year the asset is placed in service by the taxpayer for purposes of determining depreciation. See § 1.263(a)–2 for the treatment of amounts paid to acquire or produce real or personal tangible property. In the case of a pass-through entity, the election is made by the pass-through entity, and not by the shareholders or partners. A taxpayer may make an election for each material or supply that qualifies for the election under this paragraph (d). A taxpayer may revoke an election made under this paragraph (d) with respect to a material or supply only by filing a request for a private letter ruling and obtaining the Commissioner's consent to revoke the election. The Commissioner may grant a request to revoke this election if the taxpayer can demonstrate good cause for the revocation. An election may not be made or revoked through the filing of an application for change in accounting method or, before obtaining the Commissioner's consent to make the late election or to revoke the election, by filing an amended Federal income tax return.

(e) *Optional method of accounting for rotable and temporary spare parts*—(1) *In general.* This paragraph (e) provides an optional method of accounting for rotable and temporary spare parts (the optional method for rotables). A taxpayer may use the optional method for rotables, instead of the general rule under paragraph (a)(3) of this section, to account for its rotable and temporary spare parts as defined in paragraph (c)(2) of this section. A taxpayer that uses the optional method for rotables must use this method for all of its rotable and temporary spare parts in the same trade or business. The optional method for rotables is a method of accounting under section 446(a). Under the optional method for rotables, the taxpayer must apply the rules in this paragraph (e) to each rotable or temporary spare part (part) upon the taxpayer's initial installation, removal, repair, maintenance or improvement, reinstallation, and disposal of each part.

(2) *Description of optional method for rotables*—(i) *Initial installation.* The taxpayer must deduct the amount paid to acquire or produce the part in the taxable year that the part is first installed on a unit of property for use in the taxpayer's operations.

(ii) *Removal from unit of property.* In each taxable year in which the part is removed from a unit of property to which it was initially or subsequently installed, the taxpayer must—

(A) Include in gross income the fair market value of the part; and

(B) Include in the basis of the part the fair market value of the part included in income under paragraph (e)(2)(ii)(A) of this section and the amount paid to remove the part from the unit of property.

(iii) *Repair, maintenance, or improvement of part.* The taxpayer may not currently deduct and must include in the basis of the part any amounts paid to maintain, repair, or improve the part in the taxable year these amounts are paid.

(iv) *Reinstallation of part.* The taxpayer must deduct the amounts paid to reinstall the part and those amounts included in the basis of the part under paragraphs (e)(2)(ii)(B) and (e)(2)(iii) of this section, to the extent that those amounts have not been previously deducted under this paragraph (e)(2)(iv), in the taxable year that the part is reinstalled on a unit of property.

(v) *Disposal of the part.* The taxpayer must deduct the amounts included in the basis of the part under paragraphs (e)(2)(ii)(B) and (e)(2)(iii) of this section, to the extent that those amounts have not been previously deducted under paragraph (e)(2)(iv) of this section, in the taxable year in which the part is disposed of by the taxpayer.

(f) *Election to apply de minimis rule*—(1) *In general.* A taxpayer may elect to apply the de minimis rule under § 1.263(a)–2T(g) to any material or supply defined in paragraph (c)(1) this section. Any material or supply to which the taxpayer elects to apply the

de minimis rule under § 1.263(a)–2T(g) is not treated as a material or supply under this section. *See* § 1.263(a)–2T(g)(5).

(2) *Manner of electing.* A taxpayer makes the election by deducting the amounts paid to acquire or produce a material or supply in the taxable year that the amounts are paid and by complying with the requirements set out in § 1.263(a)–2T(g). A taxpayer must make this election in its timely filed original Federal income tax return (including extensions) for the taxable year that amounts are paid for the material or supply. In the case of a pass-through entity, the election is made by the pass-through entity and not by the shareholders or partners. A taxpayer may make an election for each material or supply that qualifies for the election under paragraph (f) of this section. A taxpayer may revoke an election made under paragraph (f) of this section with respect to a material or supply only by filing a request for a private letter ruling and obtaining the Commissioner's consent to revoke the election. The Commissioner may grant a request to revoke this election if the taxpayer can demonstrate good cause for the revocation. An election may not be made or revoked through the filing of an application for change in accounting method or, before obtaining the Commissioner's consent to make the late election or to revoke the election, by filing an amended Federal income tax return.

(g) *Sale or disposition of materials and supplies.* Upon sale or other disposition, materials and supplies as defined in this section are not treated as a capital asset under section 1221 or as property used in the trade or business under section 1231. Any asset for which the taxpayer makes the election to capitalize and depreciate under paragraph (d) of this section shall not be treated as a material or supply.

(h) *Examples.* The rules of this section are illustrated by the following examples, in which it is assumed (unless otherwise stated) that the property is not an incidental material or supply, that the taxpayer is a calendar year, accrual method taxpayer, and that the taxpayer has not elected to capitalize under paragraph (d) of this section or to apply the de minimis rule under paragraph (f) of this section.

Example 1. Non-rotable components. X owns a fleet of aircraft that it operates in its business. In Year 1, X purchases a stock of spare parts, which it uses to maintain and repair its aircraft. X keeps a record of consumption of these spare parts. In Year 2, X uses the spare parts for the repair and maintenance of one of its aircraft. Assume each aircraft is a unit of property under § 1.263(a)–3T(e) and that spare parts are not rotable or temporary spare parts under paragraph (c)(2) of this section. Assume these repair and maintenance activities do not improve the aircraft under § 1.263(a)–3T. These parts are materials and supplies under paragraph (c)(1)(i) of this section because they are components acquired and used to maintain and repair X's aircraft. Under paragraph (a)(1) of this section, the amounts that X paid for the spare parts in Year 1 are deductible in Year 2, the taxable year in which the spare parts are used to repair and maintain the aircraft.

Example 2. Rotable spare parts. X operates a fleet of specialized vehicles that it uses in its service business. Assume that each vehicle is a unit of property under § 1.263(a)–3T(e). At the time that it acquires a new type of vehicle, X also acquires a substantial number of rotable spare parts that it will keep on hand to quickly replace similar parts in X's vehicles as those parts break down or wear out. These rotable parts are removable from the vehicles and are repaired so that they can be reinstalled on the same or similar vehicles. X does not use the optional method of accounting for rotable and temporary spare parts provided in paragraph (e) of this section. In Year 1, X acquires several vehicles and a number of rotable spare parts to be used as replacement parts in these vehicles. In Year 2, X repairs several vehicles by using these rotable spare parts to replace worn or damaged parts. In Year 3, X removes these rotable spare parts from its vehicles, repairs the parts, and reinstalls them on other similar vehicles. In Year 5, X can no longer use the rotable parts it acquired in Year 1 and disposes of them as scrap. Under paragraph (c)(1)(i) of this section, the rotable spare parts acquired in Year 1 are materials and supplies. Under paragraph (a)(3) of this section, rotable spare parts are generally used or consumed in the taxable year in which the taxpayer disposes of the parts. Therefore, under paragraph (a)(1) of this section, the amounts that X paid for the rotable spare parts in Year 1 are deductible in Year 5, the taxable year in which X disposes of the parts.

Example 3. Rotable spare parts; application of optional method of accounting. Assume the same facts as in *Example 2,* except X uses the optional method of accounting for all its rotable and temporary spare parts under paragraph (e) of this section. In Year 1, X acquires several vehicles and a number of rotable spare parts (the ''Year 1 rotables'') to be used as replacement parts in these vehicles. In Year 2, X repairs several vehicles and uses the Year 1 rotables to replace worn or damaged parts. In Year 3, X pays amounts to remove these Year 1 rotables from its vehicles. In Year 4, X pays amounts to maintain, repair, or improve the Year 1 rotables. In Year 5, X pays amounts to reinstall the Year 1 rotables on other similar vehicles. In Year 8, X removes the Year 1 rotables from these vehicles and stores these parts for possible later use. In Year 9, X disposes of the Year 1 rotables. Under paragraph (e) of this section, X must deduct the amounts paid to acquire and install the Year 1 rotables in Year 2, the taxable year in which the rotable spare parts are first installed by X in X's vehicles. In Year 3, when X removes the Year 1 rotables from its vehicles, X must include in its gross income the fair market value of each part. Also, in Year 3, X must include in the basis of each Year 1 rotable the fair market value of the rotable and the amount paid to remove the rotable from the vehicle. In Year 4, X must include in the basis of each Year 1 rotable the amounts paid to maintain, repair, or improve each rotable. In Year 5, the year that X reinstalls the Year 1 rotables (as repaired or improved) in other vehicles, X must deduct the reinstallation costs and the amounts previously included in the basis of each part. In Year 8, the year that X removes the Year 1 rotables from the vehicles, X must include in income the fair market value of each rotable part removed. In addition, in Year 8, X must include in the basis of each part the fair market value of that part and the amount paid to remove the each rotable from the vehicle. In Year 9, the year that X disposes of the Year 1 rotables, X may deduct the amounts remaining in the basis of each rotable.

Example 4.' Rotable part acquired as part of a single unit of property; not material or supply. X operates a fleet of aircraft. In Year 1, X acquires a new aircraft, which includes two new aircraft engines. The aircraft costs $500,000 and has an economic useful life of more than 12 months, beginning when it is placed in service. In Year 5, after the aircraft is operated for several years in X's business, X removes the engines from the aircraft, repairs or improves the engines, and either reinstalls the engines on a similar aircraft or stores the engines for later reinstallation. Assume the aircraft purchased in Year 1, including its two engines, is a unit of property under § 1.263(a)–3T(e). Because the engines were acquired as part of the aircraft, a single unit of property, the engines are not materials or supplies under paragraph (c)(1)(i) of this section nor rotable or temporary spare parts under paragraph (c)(2) of this section. Accordingly, X may not apply the rules of this section to the aircraft engines upon the original acquisition of the aircraft nor after the removal of the engines from the aircraft for use in the same or similar aircraft. Rather, X must apply the rules under §§ 1.263(a)–2T and 1.263(a)–3T to the aircraft, including its engines, to determine the treatment of amounts paid to acquire, produce, or improve the unit of property.

Example 5. Components of real property. X owns an apartment building that it leases in its business operation and discovers that a window in one of the apartments is broken. Assume that the building, including its windows, is a unit of property under § 1.263(a)–3T(e) and the window is not a rotable or temporary spare part under paragraph (c)(2) of this section. X pays for the acquisition and delivery of a new window to replace the broken window. In the same taxable year, the new window is installed. Assume that the replacement of the window does not improve the property under § 1.263(a)–3T and that X does not recognize gain or loss on the disposition of the broken window. The new window is a material or supply under paragraph (c)(1)(i) of this section because it is a component acquired

and used to repair a unit of property owned by X and used in X's operations. Under paragraph (a)(1) of this section, the amounts X paid for the acquisition and delivery of the window are deductible in the taxable year in which the window is installed in the apartment building. See § 1.168(i)–8T for the treatment of the disposition of the broken window.

Example 6. Consumable property. X operates a fleet of aircraft that carries freight for its customers. X has several storage tanks on its premises, which hold jet fuel for its aircraft. Assume that once the jet fuel is placed in X's aircraft, the jet fuel is reasonably expected to be consumed within 12 months or less. On December 31, Year 1, X purchases a two-year supply of jet fuel. In Year 2, X uses a portion of the jet fuel purchased on December 31, Year 1, to fuel the aircraft used in its business. The jet fuel that X purchased in Year 1 is a material or supply under paragraph (c)(1)(ii) of this section because it is reasonably expected to be consumed within 12 months or less from the time it is placed in X's aircraft. Under paragraph (a)(1) of this section, X may deduct in Year 2 the amounts paid for the portion of jet fuel used in the operation of X's aircraft in Year 2.

Example 7. Unit of property that costs $100 or less. X operates a business that rents out a variety of small individual items to customers (rental items). X maintains a supply of rental items on hand. In Year 1, X purchases a large quantity of rental items to use in its rental business. Assume that each rental item is a unit of property under § 1.263(a)–3T(e) and costs $100 or less. In Year 2, X begins using all the rental items purchased in Year 1 by providing them to customers of its rental business. X does not sell or exchange these items on established retail markets at any time after the items are used in the rental business. The rental items are materials and supplies under paragraph (c)(1)(iv) of this section. Under paragraph (a)(1) of this section, the amounts that X paid for the rental items in Year 1 are deductible in Year 2, the taxable year in which the rental items are used in X's business.

Example 8. Unit of property that costs $100 or less. X provides billing services to its customers. In Year 1, X pays amounts to purchase 50 facsimile machines to be used by its employees. Assume each facsimile machine is a unit of property under § 1.263(a)–3T(e) and costs less than $100. In Year 1, X's employees begin using 35 of the facsimile machines, and X stores the remaining 15 machines for use in a later taxable year. The facsimile machines are materials and supplies under paragraph (c)(1)(iv) of this section. Under paragraph (a)(1) of this section, the amounts X paid for 35 of the facsimile machines are deductible in Year 1, the taxable year in which X uses those machines. The amounts that X paid for each of the remaining 15 machines are deductible in the taxable year in which each machine is used.

Example 9. Materials and supplies used in improvements; coordination with § 1.263(a)–3T. X owns various machines that are used in its business. Assume that each machine is a unit of property under § 1.263(a)–3T(e). In Year 1, X purchases a supply of spare parts for its machines. X acquired the parts to use in the repair or maintenance of the machines under § 1.162–4T or in the improvement of the machines under § 1.263(a)–3T. The spare parts are not rotable or temporary spare parts under paragraph (c)(2) of this section. In Year 2, X uses all of these spare parts in an activity that improves a machine under § 1.263(a)–3T. Under paragraph (c)(1)(i) of this section, the spare parts purchased by X in Year 1 are materials and supplies. Under paragraph (a)(1) of this section, the amounts paid for the spare parts are otherwise deductible as materials and supplies in Year 2, the taxable year in which X uses those parts. However, because these materials and supplies are used to improve X's machine, X is required to capitalize the amounts paid for those spare parts under § 1.263(a)–3T. See also section 263A for the requirement to capitalize the direct and allocable indirect costs of property produced or property acquired for resale.

Example 10. Cost of producing materials and supplies; coordination with section 263A. X is a manufacturer that produces liquid waste as part of its operations. X determines that its current liquid waste disposal process is inadequate. To remedy the problem, in Year 1, X constructs a leaching pit to provide a draining area for the liquid waste. Assume the leaching pit is a unit of property under § 1.263(a)–3T(e) and has an economic useful life 12 months or less, starting on the date that X begins to use the leaching pit as a draining area. At the end of this period, X's factory will be connected to the local sewer system. In Year 2, X starts using the leaching pit in its operations. The amounts paid to construct the leaching pit (including the direct and allocable indirect costs of property produced under section 263A) are amounts paid for a material or supply under paragraph (c)(1)(iii) of this section. Under paragraph (a)(1) of this section, the amounts paid for the leaching pit are otherwise deductible as materials and supplies in Year 2, the taxable year in which X uses the leaching pit. However, because the amounts paid to construct the leaching pit directly benefit or are incurred by reason of X's manufacturing operations, X must capitalize those costs under section 263A to the property produced. *See* § 1.263A–1(e)(3)(ii)(E).

Example 11. Costs of acquiring materials and supplies for production of property; coordination with section 263A. In Year 1, X purchases jigs, dies, molds, and patterns for use in the manufacture of X's products. Assume each jig, die, mold, and pattern is a unit of property under § 1.263(a)–3T(e). The economic useful life of each jig, die, mold, and pattern is 12 months or less, beginning when each item is used in the manufacturing process. The jigs, dies, molds, and patterns are not components acquired to maintain, repair, or improve any of X's equipment under paragraph (c)(1)(i) of this section. X begins using the jigs, dies, molds and patterns in Year 2 to manufacture its products. These items are materials and supplies under paragraph (c)(1)(iii) of this section. Under paragraph (a)(1) of this section, the amounts paid for the items are otherwise deductible in Year 2, the taxable year in which X uses those items. However, because the amounts paid for these materials and supplies directly benefit or are incurred by reason of X's manufacturing operations, X must capitalize the costs under section 263A to the property produced. *See* § 1.263A–1(e)(3)(ii)(E).

Example 12. Election to capitalize and depreciate. X operates a rental business that rents out a variety of items (rental items) to its customers. Assume each rental item is a separate unit of property as determined under § 1.263(a)–3T(e). X does not sell or exchange these items on established retail markets at any time after the items are used in the rental business. X purchases various rental items, each of which costs less than $100 or has an economic useful life of 12 months or less, beginning when the items are used or consumed. The rental items are materials and supplies under paragraph (c)(1)(iii) or (c)(1)(iv) of this section. Under paragraph (a)(1) of this section, the amount paid for each rental item is deductible in the taxable year in which the item is used in the rental business. However, X would prefer to treat the cost of each rental item as a capital expenditure subject to depreciation. Under paragraph (d) of this section, X may elect not to apply the rule contained in paragraph (a)(1) of this section to the rental items. X makes this election by capitalizing the amounts paid for each rental item in the taxable year that X purchases the item and by beginning to recover the costs of each item on its timely filed Federal income tax return for the taxable year that X places the item in service for purposes of determining depreciation under the applicable provisions of the Internal Revenue Code and the regulations thereunder. See § 1.263(a)–2T(h) for the treatment of capital expenditures.

Example 13. Election to capitalize and depreciate. X is an electric utility. X acquires certain temporary spare parts, which it keeps on hand to avoid operational time loss in the event it must make emergency repairs to a unit of property that is subject to depreciation. These parts are not used to improve property under § 1.263(a)–3T(d). These temporary spare parts are used until a new or repaired part can be installed and then are removed and stored for later emergency installation. X does not use the optional method of accounting for rotable and temporary spare parts in paragraph (e) of this section for any of its rotable or temporary spare parts. The temporary spare parts are materials and supplies under paragraph (c)(1)(i) of this section. Under paragraphs (a)(1) and (a)(3) of this section, the amounts paid for the temporary spare parts are deductible in the taxable year in which they are disposed of by the taxpayer. However, because it is unlikely that the temporary spare parts will be disposed of in the near future, X would prefer to treat the amounts paid for the spare parts as capital expenditures subject to depreciation. X may elect under paragraph (d) of this section not to apply the rule contained in paragraph (a)(1) of this section to each of its temporary spare parts. X makes this election by capitalizing the amounts paid for each spare part in the taxable year that X acquires the spare parts and by beginning to recover the

costs of each part on its timely filed Federal income tax return for the taxable year in which the part is placed in service for purposes of determining depreciation under the applicable provisions of the Internal Revenue Code and the regulations thereunder. See § 1.263(a)–2T(h) for the treatment of capital expenditures and section 263A for the requirement to capitalize the direct and allocable indirect costs of property produced or property acquired for resale.

Example 14. Election to apply de minimis rule. X provides consulting services to its customers. X purchases 50 office chairs to be used by its employees. Each office chair is a unit of property that costs $80. Also in the same taxable year, X pays amounts to purchase 50 customized briefcases. Assume each briefcase is a unit of property under § 1.263(a)–3T(e), costs $120, and has an economic useful life of 12 months or less, beginning when used and consumed. X has an applicable financial statement (as defined in § 1.263(a)–2T(g)(6)), and X has a written policy at the beginning of the taxable year to expense amounts paid for units of property costing less than $300. The briefcases and the office chairs are materials and supplies under paragraph (c)(1)(iii) and (c)(1)(iv), respectively, of this section. Under paragraph (a)(1) of this section, the amounts paid for the office chairs and briefcases are deductible in the taxable year in which they are used or consumed. However, assuming X meets all the requirements of § 1.263(a)–2T(g), X may elect under paragraph (f) of this section to apply the de minimis rule under § 1.263(a)–2T(g) to amounts paid for the office chairs and briefcases, rather than treat these amounts as the costs of materials and supplies under § 1.162–3T.

(h) *Accounting method changes.* Except as otherwise provided in this section, a change to comply with this section is a change in method of accounting to which the provisions of sections 446 and 481, and the regulations thereunder, apply. A taxpayer seeking to change to a method of accounting permitted in this section must secure the consent of the Commissioner in accordance with § 1.446–1(e) and follow the administrative procedures issued under § 1.446–1(e)(3)(ii) for obtaining the Commissioner's consent to change its accounting method.

(i) *Effective/applicability date.* This section generally applies to amounts paid or incurred (to acquire or produce property) in taxable years beginning on or after January 1, 2012. However, a taxpayer may apply § 1.162–3(e) (the optional method of accounting for rotable and temporary spare parts) to taxable years beginning on or after January 1, 2012. For the applicability of regulations to taxable years beginning before January 1, 2012, see § 1.162–3 in effect prior to January 1, 2012 (§ 1.162–3 as contained in 26 CFR part 1 edition revised as of April 1, 2011).

(j) *Expiration date.* The applicability of this section expires on December 23, 2014.

■ **Par. 4.** Section 1.162–4 is revised to read as follows:

§ 1.162–4 Repairs.

(a) through (d) [Reserved]. For further guidance, see § 1.162–4T(a) through (d).

■ **Par. 5.** Section 1.162–4T is added to read as follows:

§ 1.162–4T Repairs (temporary).

(a) *In general.* A taxpayer may deduct amounts paid for repairs and maintenance to tangible property if the amounts paid are not otherwise required to be capitalized.

(b) *Accounting method changes.* Except as otherwise provided in this section, a change to comply with this section is a change in method of accounting to which the provisions of sections 446 and 481, and the regulations thereunder, apply. A taxpayer seeking to change to a method of accounting permitted in this section must secure the consent of the Commissioner in accordance with § 1.446–1(e) and follow the administrative procedures issued under § 1.446–1(e)(3)(ii) for obtaining the Commissioner's consent to change its accounting method.

(c) *Effective/applicability date.* This section applies to taxable years beginning on or after January 1, 2012. For the applicability of regulations to taxable years beginning before January 1, 2012, see § 1.162–4 in effect prior to January 1, 2012 (§ 1.162–4 as contained in 26 CFR part 1 edition revised as of April 1, 2011).

(d) *Expiration date.* The applicability of this section expires on December 23, 2014

§ 1.162–6 [Removed]

■ **Par. 6.** Section 1.162–6 is removed.

■ **Par. 7.** Section 1.162–11 is amended by revising paragraph (b), and adding paragraphs (c) and (d) to read as follows:

§ 1.162–11 Rentals.

* * * * *

(b) [Reserved]. For further guidance, see § 1.162–11T(b).

(c) [Reserved]. For further guidance, see § 1.162–11T(c).

(d) [Reserved]. For further guidance, see § 1.162–11T(d).

■ **Par. 8.** Section 1.162–11T is added to read as follows:

§ 1.162–11T Rentals (temporary).

(a) [Reserved]. For further guidance, see § 1.162–11(a).

(b) *Improvements by lessee on lessor's property.* The cost to a taxpayer of erecting buildings or making permanent improvements on property of which the taxpayer is a lessee is a capital expenditure and is not deductible as a business expense. For the rules regarding improvements to leased property where the improvements are tangible property, see § 1.263(a)–3T(f)(1). For the rules regarding depreciation or amortization deductions for leasehold improvements, see § 1.167(a)–4T.

(c) *Effective/applicability date.* This section applies to taxable years beginning on or after January 1, 2012. For the applicability of regulations to taxable years beginning before January 1, 2012, see § 1.162–11 in effect prior to January 1, 2012 (§ 1.162–11 as contained in 26 CFR part 1 edition revised as of April 1, 2011).

(d) *Expiration date.* The applicability of this section expires on December 23, 2014.

■ **Par. 9.** Section 1.165–2 is amended by revising paragraph (c) and adding paragraphs (d) and (e) to read as follows:

§ 1.165–2 Obsolescence of nondepreciable property.

* * * * *

(c) *Cross references.* [Reserved]. For further guidance, see § 1.165–2T(c).

(d) *Effective/applicability date.* [Reserved]. For further guidance, see § 1.165–2T(d).

(e) *Expiration date.* [Reserved]. For further guidance, see § 1.165–2T(e).

■ **Par. 10.** Section 1.165–2T is added to read as follows:

§ 1.165–2T Obsolescence of nondepreciable property (temporary).

(a) and (b) [Reserved]. For further guidance, see § 1.165–2(a) and (b).

(c) *Cross references.* For the allowance under section 165(a) of losses arising from the permanent withdrawal of depreciable property from use in the trade or business or in the production of income, see § 1.167(a)–8T, § 1.168(i)–1T, or § 1.168(i)–8T, as applicable. For provisions respecting the obsolescence of depreciable property for which depreciation is determined under section 167 (but not under section 168, section 1400I, section 1400L(c), section 168 prior to its amendment by the Tax Reform Act of 1986 (100 Stat. 2121), or under an additional first year depreciation deduction provision of the Internal Revenue Code (for example, section 168(k) through (n), 1400L(b), or 1400N(d))), see § 1.167(a)–9. For the allowance of casualty losses, see § 1.165–7.

(d) *Effective/applicability date.* This section applies to taxable years

beginning on or after January 1, 2012. For the applicability of regulations to taxable years beginning before January 1, 2012, see § 1.165–2 in effect prior to January 1, 2012 (§ 1.165–2 as contained in 26 CFR part 1 edition revised as of April 1, 2011).

(e) *Expiration date.* The applicability of this section expires on December 23, 2014.

■ **Par. 11.** Section 1.167(a)–4 is revised to read as follows:

§ 1.167(a)–4 Leased property.

(a) *In general.* [Reserved]. For further guidance, see § 1.167(a)–4T(a).

(b) *Effective/applicability date.* [Reserved]. For further guidance, see § 1.167(a)–4T(b).

■ **Par. 12.** Section 1.167(a)–4T is added to read as follows:

§ 1.167(a)–4T Leased property (temporary).

(a) *In general.* Capital expenditures made by either a lessee or lessor for the erection of a building or for other permanent improvements on leased property are recovered by the lessee or lessor under the provisions of the Internal Revenue Code applicable to the cost recovery of the building or improvements, if subject to depreciation or amortization, without regard to the period of the lease. For example, if the building or improvement is property to which section 168 applies, the lessee or lessor determines the depreciation deduction for the building or improvement under section 168. *See* section 168(i)(8)(A). If the improvement is property to which section 167 or section 197 applies, the lessee or lessor determines the depreciation or amortization deduction for the improvement under section 167 or section 197, as applicable.

(b) *Effective/applicability date*—(1) *In general.* Except as provided in paragraphs (b)(2) and (b)(3) of this section, this section applies to taxable years beginning on or after January 1, 2012.

(2) *Application of this section to leasehold improvements placed in service after December 31, 1986, in taxable years beginning before January 1, 2012.* For leasehold improvements placed in service after December 31, 1986, in taxable years beginning before January 1, 2012, a taxpayer may—

(i) Apply the provisions of this section; or

(ii) Depreciate any leasehold improvement to which section 168 applies under the provisions of section 168 and depreciate or amortize any leasehold improvement to which section 168 does not apply under the provisions of the Internal Revenue Code that are applicable to the cost recovery of that leasehold improvement, without regard to the period of the lease.

(3) *Application of this section to leasehold improvements placed in service before January 1, 1987.* For leasehold improvements placed in service before January 1, 1987, see § 1.167(a)–4 in effect prior to January 1, 2012 (§ 1.167(a)–4 as contained in 26 CFR part 1 edition revised as of April 1, 2011).

(4) *Change in method of accounting.* Except as provided in § 1.446–1(e)(2)(ii)(*d*)(*3*)(*i*), a change to comply with this section for depreciable assets placed in service in a taxable year ending on or after December 30, 2003, is a change in method of accounting to which the provisions of section 446(e) and the regulations under section 446(e) apply. Except as provided in § 1.446–1(e)(2)(ii)(*d*)(*3*)(*i*), a taxpayer also may treat a change to comply with this section for depreciable assets placed in service in a taxable year ending before December 30, 2003, as a change in method of accounting to which the provisions of section 446(e) and the regulations under section 446(e) apply.

(5) *Expiration date.* The applicability of this section expires on December 23, 2014.

■ **Par. 13.** Section 1.167(a)–7 is amended by adding paragraphs (e), (f), and (g) to read as follows:

§ 1.167(a)–7 Accounting for depreciable property.

* * * * *

(e) *Applicability.* [Reserved]. For further guidance, see § 1.167(a)–7T(e).

(f) *Effective/applicability date.* [Reserved]. For further guidance, see § 1.167(a)–7T(f).

(g) *Expiration date.* [Reserved]. For further guidance, see § 1.167(a)–7T(g).

■ **Par. 14.** Section 1.167(a)–7T is added to read as follows:

§ 1.167(a)–7T Accounting for depreciable property (temporary).

(a) through (d) [Reserved]. For further guidance, see § 1.167(a)–7(a) through (d).

(e) *Applicability.* Paragraphs (a), (b), and (d) of this section apply to property for which depreciation is determined under section 167 (but not under section 168, section 1400I, section 1400L(c), section 168 prior to its amendment by the Tax Reform Act of 1986 (100 Stat. 2121), or under an additional first year depreciation deduction provision of the Internal Revenue Code (for example, section 168(k) through (n), 1400L(b), or 1400N(d))). Paragraph (c) of this section does not apply to general asset accounts as provided by section 168(i)(4) and § 1.168(i)–1T.

(f) *Effective/applicability date.* This section applies to taxable years beginning on or after January 1, 2012. For the applicability of regulations to taxable years beginning before January 1, 2012, see § 1.167(a)–7 in effect prior to January 1, 2012 (§ 1.167(a)–7 as contained in 26 CFR part 1 edition revised as of April 1, 2011).

(g) *Expiration date.* The applicability of this section expires on December 23, 2014.

■ **Par. 15.** Section 1.167(a)–8 is amended by adding paragraphs (g), (h), and (i) to read as follows:

§ 1.167(a)–8 Retirements.

* * * * *

(g) *Applicability.* [Reserved]. For further guidance, see § 1.167(a)–8T(g).

(h) *Effective/applicability date.* [Reserved]. For further guidance, see § 1.167(a)–8T(h).

(i) [Reserved]. For further guidance, see § 1.167(a)–8T(i).

■ **Par. 16.** Section 1.167(a)–8T is added to read as follows:

§ 1.167(a)–8T Retirements (temporary).

(a) through (f) [Reserved]. For further guidance, see § 1.167(a)–8(a) through (f).

(g) *Applicability.* This section applies to property for which depreciation is determined under section 167 (but not under section 168, section 1400I, section 1400L(c), section 168 prior to its amendment by the Tax Reform Act of 1986 (100 Stat. 2121), or under an additional first year depreciation deduction provision of the Internal Revenue Code (for example, section 168(k) through (n), 1400L(b), or 1400N(d))).

(h) *Effective/applicability date.* This section applies to taxable years beginning on or after January 1, 2012. For the applicability of regulations to taxable years beginning before January 1, 2012, see § 1.167(a)–8 in effect prior to January 1, 2012 (§ 1.167(a)–8 as contained in 26 CFR part 1 edition revised as of April 1, 2011).

(i) *Expiration date.* The applicability of this section expires on December 23, 2014.

■ **Par. 17.** Section 1.168(i)–0 is amended by:

■ 1. Adding entries for paragraphs (b)(5) and (b)(6).

■ 2. Adding entry for paragraph (c)(3).

■ 3. Redesignating the entry for paragraph (d)(2) as (d)(4) and adding new entries for paragraphs (d)(2) and (d)(3).

■ 4. Redesignating the entry for paragraph (e)(2)(v) as the entry for paragraph (e)(2)(ix).

■ 5. Adding entries for paragraphs (e)(2)(v), (vi), (vii), (viii).

■ 6. Redesignating paragraph (e)(3)(vi) as (e)(3)(vii) and adding a new paragraph (e)(3)(vi).

■ 7. Redesignating the entry for paragraph (h)(2) as (h)(3), and adding a new paragraph (h)(2).

■ 8. Redesignating the entry for paragraph (i) as (j) and adding a new paragraph (i).

■ 9. Redesignating the entry for paragraph (j) as (k).

■ 10. Redesignating the entries for paragraphs (k), (k)(1), (k)(2), and (k)(3) as (l), (l)(1), (l)(2), and (l)(3) respectively and

■ 11. Redesignating paragraph (l) as paragraph (m).

§ 1.168(i)–0 Table of contents for the general asset account rules.

* * * * *

§ 1.168(i)–1 General asset accounts.

* * * * *

(b) * * *

(5) and (6) [Reserved]. For further guidance, see the entries for § 1.168(i)–1T(b)(5) and (6).

(c) * * *

(3) [Reserved]. For further guidance, see the entry for § 1.168(i)–1T(c)(3).

* * * * *

(d)(2) and (3) [Reserved]. For further guidance, see the entries for § 1.168(i)–1T(d)(2) and (3).

* * * * *

(e)(2) * * *

(v) through (viii) [Reserved]. For further guidance, see the entries for § 1.168(i)–1T(e)(2)(v) through (viii).

* * * * *

(e)(3) * * *

(vi) [Reserved]. For further guidance, see the entry for § 1.168(i)–1T(e)(3)(vi).

* * * * *

(h) * * *

(2) [Reserved]. For further guidance, see the entry for § 1.168(i)–1T(h)(2).

* * * * *

(i) [Reserved]. For further guidance, see the entry for § 1.168(i)–1T(i).

* * * * *

(m) [Reserved]. For further guidance, see the entry for § 1.168(i)–1T(m).

■ **Par. 18.** Section 1.168(i)–0T is added to read as follows:

§ 1.168(i)–0T Table of contents for the general asset account rules (temporary).

This section lists the major paragraphs contained in § 1.168(i)–1T.

§ 1.168(i)–1T General asset accounts (temporary).

(a) through (b)(4) [Reserved]. For further guidance, see the entries for § 1.168(i)–1(a) through (b)(4).

(5) Mass assets.

(6) Remaining adjusted depreciable basis of the general asset account.

(c)(1) through (c)(2) [Reserved]. For further guidance, see the entries for § 1.168(i)–1(c)(1) through (c)(2).

(3) Examples.

(d)(1) [Reserved]. For further guidance, see the entry for § 1.168(i)–1(d)(1).

(d)(2) Assets in general asset account are eligible for additional first year depreciation deduction.

(d)(3) No assets in general asset account are eligible for additional first year depreciation deduction.

(d)(4) through (e)(2)(iv) [Reserved]. For further guidance, see the entries for § 1.168(i)–1(d)(4) through (e)(2)(iv).

(v) Manner of disposition.

(vi) Disposition by transfer to a supplies account.

(vii) Leasehold improvements.

(viii) Determination of asset disposed of.

(e)(2)(ix) through (e)(3)(v) [Reserved]. For further guidance, see the entries for § 1.168(i)–1(e)(2)(ix) through (e)(3)(v).

(vi) Technical termination of a partnership.

(e)(3)(vii) through (h)(1) [Reserved]. For further guidance, see the entries for § 1.168(i)–1(e)(3)(vii) through (h)(1).

(h)(2) Business or income-producing use percentage changes.

(h)(3) [Reserved]. For further guidance, see the entry for § 1.168(i)–1(h)(3).

(i) Redetermination of basis.

(j) through (l) [Reserved]. For further guidance, see the entries for § 1.168(i)–1(j) through (l).

(m) Effective/applicability date.

■ **Par. 19.** Section 1.168(i)–1 is amended by:

■ 1. Revising paragraphs (a) through (l)(1); and

■ 2. Adding paragraph (m).

The revisions and additions read as follows:

§ 1.168(i)–1 General asset accounts.

(a) through (l)(1) [Reserved]. For further guidance, see § 1.168(i)–1T(a) through (l)(1).

* * * * *

(m) [Reserved]. For further guidance, see § 1.168(i)–1T(m).

■ **Par. 20.** Section 1.168(i)–1T is added to read as follows:

§ 1.168(i)–1T General asset accounts (temporary).

(a) *Scope.* This section provides rules for general asset accounts under section 168(i)(4). The provisions of this section apply only to assets for which an election has been made under paragraph (l) of this section.

(b) *Definitions.* For purposes of this section, the following definitions apply:

(1) *Unadjusted depreciable basis* has the same meaning given such term in § 1.168(b)–1(a)(3).

(2) *Unadjusted depreciable basis of the general asset account* is the sum of the unadjusted depreciable bases of all assets included in the general asset account.

(3) *Adjusted depreciable basis of the general asset account* is the unadjusted depreciable basis of the general asset account less the adjustments to basis described in section 1016(a)(2) and (3).

(4) *Expensed cost* is the amount of any allowable credit or deduction treated as a deduction allowable for depreciation or amortization for purposes of section 1245 (for example, a credit allowable under section 30 or a deduction allowable under section 179, 179A, or 190). Expensed cost does not include any additional first year depreciation deduction.

(5) *Mass assets* is a mass or group of individual items of depreciable assets—

(i) That are not necessarily homogenous;

(ii) Each of which is minor in value relative to the total value of the mass or group;

(iii) Numerous in quantity;

(iv) Usually accounted for only on a total dollar or quantity basis;

(v) With respect to which separate identification is impracticable; and

(vi) Placed in service in the same taxable year.

(6) *Remaining adjusted depreciable basis of the general asset account* is the unadjusted depreciable basis of the general asset account less the amount of the additional first year depreciation deduction allowed or allowable, whichever is greater, for the general asset account.

(c) *Establishment of general asset accounts*—(1) *Assets eligible for general asset accounts*—(i) *General rules.* Assets that are subject to either the general depreciation system of section 168(a) or the alternative depreciation system of section 168(g) may be accounted for in one or more general asset accounts. An asset is included in a general asset account only to the extent of the asset's unadjusted depreciable basis. However, an asset is not to be included in a general asset account if the asset is used both in a trade or business (or for the production of income) and in a personal activity at any time during the taxable year in which the asset is placed in service by the taxpayer or if the asset is

placed in service and disposed of during the same taxable year.

(ii) *Special rules for assets generating foreign source income.* (A) Assets that generate foreign source income, both United States and foreign source income, or combined gross income of a FSC (as defined in former section 922), DISC (as defined in section 992(a)), or possessions corporation (as defined in section 936) and its related supplier, may be included in a general asset account if the requirements of paragraph (c)(2)(i) of this section are satisfied. If, however, the inclusion of these assets in a general asset account results in a substantial distortion of income, the Commissioner may disregard the general asset account election and make any reallocations of income or expense necessary to clearly reflect income.

(B) A general asset account shall be treated as a single asset for purposes of applying the rules in § 1.861–9T(g)(3) (relating to allocation and apportionment of interest expense under the asset method). A general asset account that generates income in more than one grouping of income (statutory and residual) is a multiple category asset (as defined in § 1.861–9T(g)(3)(ii)), and the income yield from the general asset account must be determined by applying the rules for multiple category assets as if the general asset account were a single asset.

(2) *Grouping assets in general asset accounts*—(i) *General rules.* If a taxpayer makes the election under paragraph (l) of this section, assets that are subject to the election are grouped into one or more general asset accounts. Assets that are eligible to be grouped into a single general asset account may be divided into more than one general asset account. Each general asset account must include only assets that—

(A) Have the same applicable depreciation method;

(B) Have the same applicable recovery period;

(C) Have the same applicable convention; and

(D) Are placed in service by the taxpayer in the same taxable year.

(ii) *Special rules.* In addition to the general rules in paragraph (c)(2)(i) of this section, the following rules apply when establishing general asset accounts—

(A) Assets subject to the mid-quarter convention may only be grouped into a general asset account with assets that are placed in service in the same quarter of the taxable year;

(B) Assets subject to the mid-month convention may only be grouped into a general asset account with assets that are placed in service in the same month of the taxable year;

(C) Passenger automobiles for which the depreciation allowance is limited under section 280F(a) must be grouped into a separate general asset account;

(D) Assets not eligible for any additional first year depreciation deduction (including assets for which the taxpayer elected not to deduct the additional first year depreciation) provided by, for example, section 168(k) through (n), 1400L(b), or 1400N(d), must be grouped into a separate general asset account;

(E) Assets eligible for the additional first year depreciation deduction may only be grouped into a general asset account with assets for which the taxpayer claimed the same percentage of the additional first year depreciation (for example, 30 percent, 50 percent, or 100 percent);

(F) Except for passenger automobiles described in paragraph (c)(2)(ii)(C) of this section, listed property (as defined in section 280F(d)(4)) must be grouped into a separate general asset account;

(G) Assets for which the depreciation allowance for the placed-in-service year is not determined by using an optional depreciation table (for further guidance, see section 8 of Rev. Proc. 87–57, 1987–2 CB 687, 693 (see § 601.601(d)(2) of this chapter)) must be grouped into a separate general asset account;

(H) Mass assets that are or will be subject to paragraph (j)(2)(iii) of this section (disposed of or converted mass asset is identified by a mortality dispersion table) must be grouped into a separate general asset account; and

(I) Assets subject to paragraph (h)(3)(iii)(A) of this section (change in use results in a shorter recovery period or a more accelerated depreciation method) for which the depreciation allowance for the year of change (as defined in § 1.168(i)–4(a)) is not determined by using an optional depreciation table must be grouped into a separate general asset account.

(3) *Examples.* The following examples illustrate the application of this paragraph (c):

Example 1. In 2012, J, a proprietorship with a calendar year-end, purchases and places in service one item of equipment that costs $550,000. This equipment is section 179 property and also is 5-year property under section 168(e). On its Federal income tax return for 2012, J makes an election under section 179 to expense $500,000 of the equipment's cost and makes an election under paragraph (l) of this section to include the equipment in a general asset account. As a result, the unadjusted depreciable basis of the equipment is $50,000. In accordance with paragraph (c)(1) of this section, J must include only $50,000 of the equipment's cost in the general asset account.

Example 2. The facts are the same as in *Example 1,* except that J also places in service 99 other items of equipment in 2012. On its Federal income tax return for 2012, J does not make an election under section 179 to expense the cost of any of the 100 items of equipment and does make an election under paragraph (l) of this section to include the 100 items of equipment in a general asset account. All of the 100 items of equipment placed in service in 2012 are 5-year property under section 168(e), are not listed property, and are not eligible for any additional first year depreciation deduction. J depreciates its 5-year property placed in service in 2012 using the optional depreciation table that corresponds with the general depreciation system, the 200-percent declining balance method, a 5-year recovery period, and the half-year convention. In accordance with paragraph (c)(2) of this section, J includes all of the 100 items of equipment in one general asset account.

Example 3. The facts are the same as in *Example 2,* except that J decides not to include all of the 100 items of equipment in one general asset account. Instead and in accordance with paragraph (c)(2) of this section, J establishes 100 general asset accounts and includes one item of equipment in each general asset account.

Example 4. K, a calendar-year corporation, is a wholesale distributer. In 2012, K places in service the following properties for use in its wholesale distribution business: computers, automobiles, and forklifts. On its federal income tax return for 2012, K does not make an election under section 179 to expense the cost of any of these items of equipment and does make an election under paragraph (l) of this section to include all of these items of equipment in a general asset account. All of these items are 5-year property under section 168(e) and are not eligible for any additional first year depreciation deduction. The computers are listed property, and the automobiles are listed property and are subject to section 280F(a). K depreciates its 5-year property placed in service in 2012 using the optional depreciation table that corresponds with the general depreciation system, the 200-percent declining balance method, a 5-year recovery period, and the half-year convention. Although the computers, automobiles, and forklifts are 5-year property, K cannot include all of them in one general asset account because the computers and automobiles are listed property. Further, even though the computers and automobiles are listed property, K cannot include them in one general asset account because the automobiles also are subject to section 280F(a). In accordance with paragraph (c)(2) of this section, K establishes three general asset accounts: One for the computers, one for the automobiles, and one for the forklifts.

Example 5. L, a fiscal-year corporation with a taxable year ending June 30, purchases and places in service ten items of new equipment in October 2011, and purchases and places in service five other items of new equipment in February 2012. On its federal income tax return for the taxable year ending

June 30, 2012, L does not make an election under section 179 to expense the cost of any of these items of equipment and does make an election under paragraph (l) of this section to include all of these items of equipment in a general asset account. All of these items of equipment are 7-year property under section 168(e), are not listed property, and are not property described in section 168(k)(2)(B) or (C). All of the ten items of equipment placed in service in October 2011 are eligible for the 100-percent additional first year depreciation deduction provided by section 168(k)(5). All of the five items of equipment placed in service in February 2012 are eligible for the 50-percent additional first year depreciation deduction provided by section 168(k)(1). L depreciates its 7-year property placed in service for the taxable year ending June 30, 2012, using the optional depreciation table that corresponds with the general depreciation system, the 200-percent declining balance method, a 7-year recovery period, and the half-year convention. Although the 15 items of equipment are depreciated using the same depreciation method, recovery period, and convention, L cannot include all of them in one general asset account because they are eligible for different percentages of the additional first year depreciation deduction. In accordance with paragraph (c)(2) of this section, L establishes two general asset accounts: one for the ten items of equipment eligible for the 100-percent additional first year depreciation deduction, and one for the five items of equipment eligible for the 50-percent additional first year depreciation deduction.

(d) *Determination of depreciation allowance*—(1) *In general.* Depreciation allowances are determined for each general asset account. The depreciation allowances must be recorded in a depreciation reserve account for each general asset account. The allowance for depreciation under this section constitutes the amount of depreciation allowable under section 167(a).

(2) *Assets in general asset account are eligible for additional first year depreciation deduction.* If all the assets in a general asset account are eligible for the additional first year depreciation deduction, the taxpayer first must determine the allowable additional first year depreciation deduction for the general asset account for the placed-in-service year and then must determine the amount otherwise allowable as a depreciation deduction for the general asset account for the placed-in-service year and any subsequent taxable year. The allowable additional first year depreciation deduction for the general asset account for the placed-in-service year is determined by multiplying the unadjusted depreciable basis of the general asset account by the additional first year depreciation deduction percentage applicable to the assets in the account (for example, 30 percent, 50 percent, or 100 percent). The remaining adjusted depreciable basis of the general asset account then is depreciated using the applicable depreciation method, recovery period, and convention for the assets in the account.

(3) *No assets in general asset account are eligible for additional first year depreciation deduction.* If none of the assets in a general asset account are eligible for the additional first year depreciation deduction, the taxpayer must determine the allowable depreciation deduction for the general asset account for the placed-in-service year and any subsequent taxable year by using the applicable depreciation method, recovery period, and convention for the assets in the account.

(4) *Special rule for passenger automobiles.* For purposes of applying section 280F(a), the depreciation allowance for a general asset account established for passenger automobiles is limited for each taxable year to the amount prescribed in section 280F(a) multiplied by the excess of the number of automobiles originally included in the account over the number of automobiles disposed of during the taxable year or in any prior taxable year in a transaction described in paragraphs (e)(3)(iii) (disposition of an asset in a qualifying disposition), (e)(3)(iv) (transactions subject to section 168(i)(7)), (e)(3)(v) (transactions subject to section 1031 or 1033), (e)(3)(vi) (technical termination of a partnership), (e)(3)(vii) (anti-abuse rule), (g) (assets subject to recapture), (h)(1) (conversion to personal use), or (h)(2) (business or income-producing use percentage changes) of this section.

(e) *Disposition of an asset from a general asset account*—(1) *Scope.* This paragraph (e) provides rules applicable to dispositions of assets included in a general asset account. For purposes of this paragraph (e), an asset in a general asset account is disposed of when ownership of the asset is transferred or when the asset is permanently withdrawn from use either in the taxpayer's trade or business or in the production of income. A disposition includes the sale, exchange, retirement, physical abandonment, or destruction of an asset. A disposition also occurs when an asset is transferred to a supplies, scrap, or similar account. A disposition also includes the retirement of a structural component (as defined in § 1.48–1(e)(2)) of a building (as defined in § 1.48–1(e)(1)).

(2) *General rules for a disposition*—(i) *No immediate recovery of basis.* Except as provided in paragraph (e)(3) of this section, immediately before a disposition of any asset in a general asset account, the asset is treated as having an adjusted depreciable basis (as defined in § 1.168(b)–1(a)(4)) of zero for purposes of section 1011. Therefore, no loss is realized upon the disposition of an asset from the general asset account. Similarly, where an asset is disposed of by transfer to a supplies, scrap, or similar account, the basis of the asset in the supplies, scrap, or similar account will be zero.

(ii) *Treatment of amount realized.* Any amount realized on a disposition is recognized as ordinary income (notwithstanding any other provision of subtitle A of the Internal Revenue Code) to the extent the sum of the unadjusted depreciable basis of the general asset account and any expensed cost (as defined in paragraph (b)(4) of this section) for assets in the account exceeds any amounts previously recognized as ordinary income upon the disposition of other assets in the account. The recognition and character of any excess amount realized are determined under other applicable provisions of the Internal Revenue Code (other than sections 1245 and 1250 or provisions of the Internal Revenue Code that treat gain on a disposition as subject to section 1245 or 1250).

(iii) *Effect of disposition on a general asset account.* The unadjusted depreciable basis and the depreciation reserve of the general asset account are not affected as a result of a disposition of an asset from the general asset account.

(iv) *Coordination with nonrecognition provisions.* For purposes of determining the basis of an asset acquired in a transaction, other than a transaction described in paragraphs (e)(3)(iv) (pertaining to transactions subject to section 168(i)(7)), (e)(3)(v) (pertaining to transactions subject to section 1031 or 1033), and (e)(3)(vi) (pertaining to technical terminations of partnerships) of this section, to which a nonrecognition section of the Internal Revenue Code applies (determined without regard to this section), the amount of ordinary income recognized under this paragraph (e)(2) is treated as the amount of gain recognized on the disposition.

(v) *Manner of disposition.* The manner of disposition of an asset in a general asset account (for example, normal retirement, abnormal retirement, ordinary retirement, or extraordinary retirement) is not taken into account in determining whether a disposition occurs or gain or loss is recognized.

(vi) *Disposition by transfer to a supplies account.* If a taxpayer made an election under § 1.162–3T(d) to treat the cost of any material and supply as a capital expenditure subject to the

allowance for depreciation and also made an election under paragraph (l) of this section to include that material and supply in a general asset account, the taxpayer can dispose of the material and supply by transferring it to a supplies account only if the taxpayer has obtained the consent of the Commissioner to revoke the § 1.162–3T(d) election. See § 1.162–3T(d)(3) for the procedures for revoking a § 1.162–3T(d) election.

(vii) *Leasehold improvements.* The rules of paragraph (e) of this section also apply to—

(A) A lessor of leased property that made an improvement to that property for the lessee of the property, has a depreciable basis in the improvement, made an election under paragraph (l) of this section to include the improvement in a general asset account, and disposes of the improvement before or upon the termination of the lease with the lessee. *See* section 168(i)(8)(B); and

(B) A lessee of leased property that made an improvement to that property, has a depreciable basis in the improvement, made an election under paragraph (l) of this section to include the improvement in a general asset account, and disposes of the improvement before or upon the termination of the lease.

(viii) *Determination of asset disposed of*—(A) *In general.* For purposes of applying paragraph (e) of this section to the disposition of an asset in a general asset account (instead of the disposition of the general asset account), the facts and circumstances of each disposition are considered in determining what is the appropriate asset disposed of. Except as provided in paragraph (e)(2)(viii)(B) of this section, the asset cannot be larger than the unit of property as determined under § 1.263(a)–3T(e)(2), (e)(3), and (e)(5) or as otherwise determined in published guidance in the **Federal Register** or in the Internal Revenue Bulletin (see, for example, Rev. Proc. 2011–38, 2011–18 IRB 743, for units of property for wireless network assets (see § 601.601(d)(2)(ii)(*b*) of this chapter)).

(B) *Exceptions.* For purposes of applying paragraph (e) of this section to the disposition of an asset in a general asset account (instead of the disposition of the general asset account):

(*1*) Each building (not including its structural components) is the asset except as provided in § 1.1250–1(a)(2)(ii) or in paragraph (e)(2)(viii)(B)(*2*) or (*5*) of this section.

(*2*) If a building has two or more condominium or cooperative units, each condominium or cooperative unit (not including its structural components) is the asset except as provided in § 1.1250–1(a)(2)(ii) or in paragraph (e)(2)(viii)(B)(*5*) of this section.

(*3*) Each structural component (including all components thereof) of a building, condominium unit, or cooperative unit is the asset.

(*4*) If a taxpayer properly includes an item in one of the asset classes 00.11 through 00.4 of Rev. Proc. 87–56 (1987–2 CB 674) (see § 601.601(d)(2)(ii)(*b*) of this chapter) or properly classifies an item in one of the categories under section 168(e)(3) (except for a category that includes buildings or structural components; for example, retail motor fuels outlet, qualified leasehold improvement property, qualified restaurant property, and qualified retail improvement property), each item is the asset provided it is not larger than the unit of property as determined under § 1.263(a)–3T(e)(3) or (e)(5) or as otherwise determined in published guidance in the **Federal Register** or in the Internal Revenue Bulletin (see § 601.601(d)(2)(ii)(*b*) of this chapter), or provided paragraph (e)(2)(viii)(B)(*5*) of this section does not apply to the item. For example, each desk is the asset, each computer is the asset, and each qualified smart electric meter is the asset (assuming these assets are not larger than the unit of property as determined under § 1.263(a)–3T(e)(3) or (e)(5) or as otherwise determined in published guidance in the **Federal Register** or in the Internal Revenue Bulletin (see § 601.601(d)(2)(ii)(*b*) of this chapter)).

(*5*) If the taxpayer places in service an improvement or addition to an asset after the taxpayer placed the asset in service, the improvement or addition is a separate asset provided it is not larger than the unit of property as determined under § 1.263(a)–3T(e)(3) or (e)(5) or as otherwise determined in published guidance in the **Federal Register** or in the Internal Revenue Bulletin (see § 601.601(d)(2)(ii)(*b*) of this chapter).

(*6*) If an asset is not described in one of the asset classes 00.11 through 00.4 of Rev. Proc. 87–56 (1987–2 CB 674) (see § 601.601(d)(2)(ii)(*b*) of this chapter) or in one of the categories under section 168(e)(3), a taxpayer also may use any reasonable, consistent method to treat each of the asset's components as the asset.

(ix) *Examples.* The following examples illustrate the application of this paragraph (e)(2):

Example 1. A, a calendar-year partnership, maintains one general asset account for one office building that cost $10 million. A discovers a leak in the roof of this building and, after consulting with a contractor, decides to replace the entire roof. The retirement of the roof, which is a structural component of the building, is a disposition under paragraph (e)(1) of this section. However, this roof has an unadjusted depreciable basis of zero pursuant to paragraph (e)(2)(i) of this section. Accordingly, A does not recognize any loss upon the retirement of the roof. Instead, the unadjusted depreciable basis of the general asset account for the office building is not affected by the retirement of the roof and, as a result, A continues to depreciate the $10 million cost of this general asset account.

Example 2. B, a calendar-year commercial airline company, maintains one general asset account for five aircrafts that cost a total of $500 million. B replaces the existing engines on one of the aircrafts with new engines and treats each engine of an aircraft as a major component of the aircraft. Assume each aircraft is a unit of property as determined under § 1.263(a)–3T(e)(3). However, for disposition purposes of general asset accounts, B consistently treats each major component of an aircraft as the asset. Thus, the retirement of these replaced engines is a disposition under paragraph (e)(1) of this section. However, the engines have an unadjusted depreciable basis of zero pursuant to paragraph (e)(2)(i) of this section. Accordingly, B does not recognize any loss upon the retirement of the engines. Instead, the unadjusted depreciable basis of the general asset account for the five aircrafts is not affected by the retirement of the engines and, as a result, B continues to depreciate the $500 million cost of this general asset account.

Example 3. (i) R, a calendar-year corporation, maintains one general asset account for ten machines. The machines cost a total of $10,000 and are placed in service in June 2012. Of the ten machines, one machine costs $8,200 and nine machines cost a total of $1,800. Assume R depreciates this general asset account using the optional depreciation table that corresponds with the general depreciation system, the 200-percent declining balance method, a 5-year recovery period, and a half-year convention. R does not make a section 179 election for any of the machines, and all of the machines are not eligible for any additional first year depreciation deduction. As of January 1, 2013, the depreciation reserve of the account is $2,000 [$10,000 x 20 percent].

(ii) On February 8, 2013, R sells the machine that cost $8,200 to an unrelated party for $9,000. Under paragraph (e)(2)(i) of this section, this machine has an adjusted depreciable basis of zero.

(iii) On its 2013 tax return, R recognizes the amount realized of $9,000 as ordinary income because such amount does not exceed the unadjusted depreciable basis of the general asset account ($10,000), plus any expensed cost for assets in the account ($0), less amounts previously recognized as ordinary income ($0). Moreover, the unadjusted depreciable basis and depreciation reserve of the account are not affected by the disposition of the machine. Thus, the depreciation allowance for the account in 2013 is $3,200 ($10,000 x 32 percent).

Example 4. (i) The facts are the same as in *Example 3.* In addition, on June 4, 2014, R sells seven machines to an unrelated party for a total of $1,100. In accordance with paragraph (e)(2)(i) of this section, these machines have an adjusted depreciable basis of zero.

(ii) On its 2014 tax return, R recognizes $1,000 as ordinary income (the unadjusted depreciable basis of $10,000, plus the expensed cost of $0, less the amount of $9,000 previously recognized as ordinary income). The recognition and character of the excess amount realized of $100 ($1,100 − $1,000) are determined under applicable provisions of the Internal Revenue Code other than section 1245 (such as section 1231). Moreover, the unadjusted depreciable basis and depreciation reserve of the account are not affected by the disposition of the machines. Thus, the depreciation allowance for the account in 2014 is $1,920 ($10,000 x 19.2 percent).

(3) *Special rules*—(i) *In general.* This paragraph (e)(3) provides the rules for terminating general asset account treatment upon certain dispositions. While the rules under paragraphs (e)(3)(ii) and (iii) of this section are optional rules, the rules under paragraphs (e)(3)(iv), (v), (vi), and (vii) of this section are mandatory rules. A taxpayer elects to apply paragraph (e)(3)(ii) or (iii) of this section by reporting the gain, loss, or other deduction on the taxpayer's timely filed original Federal income tax return (including extensions) for the taxable year in which the disposition occurs. A taxpayer may revoke the election to apply paragraph (e)(3)(ii) or (iii) of this section only by filing a request for a private letter ruling and obtaining the Commissioner's consent to revoke the election. The Commissioner may grant a request to revoke this election if the taxpayer can demonstrate good cause for the revocation. The election to apply paragraph (e)(3)(ii) or (iii) of this section may not be made or revoked through the filing of an application for change in accounting method. For purposes of applying paragraph (e)(3)(iii) through (vii) of this section, see paragraph (j) of this section for identifying an asset disposed of and its unadjusted depreciable basis.

(ii) *Disposition of all assets remaining in a general asset account*—(A) *Optional termination of a general asset account.* Upon the disposition of all of the assets, or the last asset, in a general asset account, a taxpayer may apply this paragraph (e)(3)(ii) to recover the adjusted depreciable basis of the general asset account (rather than having paragraph (e)(2) of this section apply). Under this paragraph (e)(3)(ii), the general asset account terminates and the amount of gain or loss for the general asset account is determined under section 1001(a) by taking into account the adjusted depreciable basis of the general asset account at the time of the disposition (as determined under the applicable convention for the general asset account). The recognition and character of the gain or loss are determined under other applicable provisions of the Internal Revenue Code, except that the amount of gain subject to section 1245 (or section 1250) is limited to the excess of the depreciation allowed or allowable for the general asset account, including any expensed cost (or the excess of the additional depreciation allowed or allowable for the general asset account), over any amounts previously recognized as ordinary income under paragraph (e)(2) of this section.

(B) *Examples.* The following examples illustrate the application of this paragraph (e)(3)(ii):

Example 1. (i) T, a calendar-year corporation, maintains a general asset account for 1,000 calculators. The calculators cost a total of $60,000 and are placed in service in 2012. Assume T depreciates this general asset account using the optional depreciation table that corresponds with the general depreciation system, the 200-percent declining balance method, a 5-year recovery period, and a half-year convention. T does not make a section 179 election for any of the calculators, and all of the calculators are not eligible for any additional first year depreciation deduction. In 2013, T sells 200 of the calculators to an unrelated party for a total of $10,000 and recognizes the $10,000 as ordinary income in accordance with paragraph (e)(2) of this section.

(ii) On March 26, 2014, T sells the remaining calculators in the general asset account to an unrelated party for $35,000. T elects to apply paragraph (e)(3)(ii) of this section. As a result, the account terminates and gain or loss is determined for the account.

(iii) On the date of disposition, the adjusted depreciable basis of the account is $23,040 (unadjusted depreciable basis of $60,000 less the depreciation allowed or allowable of $36,960). Thus, in 2014, T recognizes gain of $11,960 (amount realized of $35,000 less the adjusted depreciable basis of $23,040). The gain of $11,960 is subject to section 1245 to the extent of the depreciation allowed or allowable for the account (plus the expensed cost for assets in the account) less the amounts previously recognized as ordinary income ($36,960 + $0 − $10,000 = $26,960). As a result, the entire gain of $11,960 is subject to section 1245.

Example 2. (i) J, a calendar-year corporation, maintains a general asset account for one item of equipment. This equipment costs $2,000 and is placed in service in 2012. Assume J depreciates this general asset account using the optional depreciation table that corresponds with the general depreciation system, the 200-percent declining balance method, a 5-year recovery period, and a half-year convention. J does not make a section 179 election for the equipment, and it is not eligible for any additional first year depreciation deduction. In June 2014, J sells the equipment to an unrelated party for $1,000. J elects to apply paragraph (e)(3)(ii) of this section. As a result, the account terminates and gain or loss is determined for the account.

(iii) On the date of disposition, the adjusted depreciable basis of the account is $768 (unadjusted depreciable basis of $2,000 less the depreciation allowed or allowable of $1,232). Thus, in 2014, J recognizes gain of $232 (amount realized of $1,000 less the adjusted depreciable basis of $768). The gain of $232 is subject to section 1245 to the extent of the depreciation allowed or allowable for the account (plus the expensed cost for assets in the account) less the amounts previously recognized as ordinary income ($1,232 + $0 − $0 = $1,232). As a result, the entire gain of $232 is subject to section 1245.

(iii) *Disposition of an asset in a qualifying disposition*—(A) *Optional determination of the amount of gain, loss, or other deduction.* In the case of a qualifying disposition of an asset (described in paragraph (e)(3)(iii)(B) of this section), a taxpayer may elect to apply this paragraph (e)(3)(iii) (rather than having paragraph (e)(2) of this section apply). Under this paragraph (e)(3)(iii), general asset account treatment for the asset terminates as of the first day of the taxable year in which the qualifying disposition occurs, and the amount of gain, loss, or other deduction for the asset is determined under § 1.168(i)–8T by taking into account the asset's adjusted depreciable basis at the time of the disposition. The adjusted depreciable basis of the asset at the time of the disposition (as determined under the applicable convention for the general asset account in which the asset was included) equals the unadjusted depreciable basis of the asset less the depreciation allowed or allowable for the asset, computed by using the depreciation method, recovery period, and convention applicable to the general asset account in which the asset was included and by including the portion of the additional first year depreciation deduction claimed for the general asset account that is attributable to the asset disposed of. The recognition and character of the gain, loss, or other deduction are determined under other applicable provisions of the Internal Revenue Code, except that the amount of gain subject to section 1245 (or section 1250) is limited to the lesser of—

(*1*) The depreciation allowed or allowable for the asset, including any expensed cost (or the additional depreciation allowed or allowable for the asset); or

(*2*) The excess of—

(*i*) The original unadjusted depreciable basis of the general asset account plus, in the case of section 1245 property originally included in the general asset account, any expensed cost; over

(*ii*) The cumulative amounts of gain previously recognized as ordinary income under either paragraph (e)(2) of this section or section 1245 (or section 1250).

(B) *Qualifying dispositions.* A *qualifying disposition* is a disposition that does not involve all the assets, or the last asset, remaining in a general asset account and that is not described in paragraphs (e)(3)(iv) (pertaining to transactions subject to section 168(i)(7)), (v) (pertaining to transactions subject to section 1031 or 1033), (vi) (pertaining to technical terminations of partnerships), or (vii) (anti-abuse rule) of this section.

(C) *Effect of a qualifying disposition on a general asset account.* If the taxpayer elects to apply this paragraph (e)(3)(iii) to a qualifying disposition of an asset, then—

(*1*) The asset is removed from the general asset account as of the first day of the taxable year in which the qualifying disposition occurs. For that taxable year, the taxpayer accounts for the asset in a single asset account in accordance with the rules under § 1.168(i)–7T(b);

(*2*) The unadjusted depreciable basis of the general asset account is reduced by the unadjusted depreciable basis of the asset as of the first day of the taxable year in which the disposition occurs;

(*3*) The depreciation reserve of the general asset account is reduced by the depreciation allowed or allowable for the asset as of the end of the taxable year immediately preceding the year of disposition, computed by using the depreciation method, recovery period, and convention applicable to the general asset account in which the asset was included and by including the portion of the additional first year depreciation deduction claimed for the general asset account that is attributable to the asset disposed of; and

(*4*) For purposes of determining the amount of gain realized on subsequent dispositions that is subject to ordinary income treatment under paragraph (e)(2)(ii) of this section, the amount of any expensed cost with respect to the asset is disregarded.

(D) *Example.* The following example illustrates the application of this paragraph (e)(3)(iii):

Example. (i) Z, a calendar-year corporation, maintains one general asset account for 12 machines. Each machine costs $15,000 and is placed in service in 2012. Of the 12 machines, nine machines that cost a total of $135,000 are used in Z's Kentucky plant, and three machines that cost a total of $45,000 are used in Z's Ohio plant. Assume Z depreciates this general asset account using the optional depreciation table that corresponds with the general depreciation system, the 200-percent declining balance method, a 5-year recovery period, and the half-year convention. Z does not make a section 179 election for any of the machines, and all of the machines are not eligible for any additional first year depreciation deduction. As of January 1, 2014, the depreciation reserve for the account is $93,600.

(ii) On May 27, 2014, Z sells its entire manufacturing plant in Ohio to an unrelated party. The sales proceeds allocated to each of the three machines at the Ohio plant is $5,000. Because this transaction is a qualifying disposition under paragraph (e)(3)(iii)(B) of this section, Z elects to apply paragraph (e)(3)(iii) of this section.

(iii) For Z's 2014 return, the depreciation allowance for the account is computed as follows. As of December 31, 2013, the depreciation allowed or allowable for the three machines at the Ohio plant is $23,400. Thus, as of January 1, 2014, the unadjusted depreciable basis of the account is reduced from $180,000 to $135,000 ($180,000 less the unadjusted depreciable basis of $45,000 for the three machines), and the depreciation reserve of the account is decreased from $93,600 to $70,200 ($93,600 less the depreciation allowed or allowable of $23,400 for the three machines as of December 31, 2013). Consequently, the depreciation allowance for the account in 2014 is $25,920 ($135,000 × 19.2 percent).

(iv) For Z's 2014 return, gain or loss for each of the three machines at the Ohio plant is determined as follows. The depreciation allowed or allowable in 2014 for each machine is $1,440 [($15,000 x 19.2 percent)/2]. Thus, the adjusted depreciable basis of each machine under section 1011 is $5,760 (the adjusted depreciable basis of $7,200 removed from the account less the depreciation allowed or allowable of $1,440 in 2014). As a result, the loss recognized in 2014 for each machine is $760 ($5,000 − $5,760), which is subject to section 1231.

(iv) *Transactions subject to section 168(i)(7)*—(A) *In general.* If a taxpayer transfers one or more assets in a general asset account in a transaction described in section 168(i)(7)(B) (pertaining to treatment of transferees in certain nonrecognition transactions), the taxpayer (the transferor) and the transferee must apply this paragraph (e)(3)(iv) to the asset (instead of applying paragraph (e)(2), (e)(3)(ii), or (e)(3)(iii) of this section). The transferee is bound by the transferor's election under paragraph (l) of this section for the portion of the transferee's basis in the asset that does not exceed the transferor's adjusted depreciable basis of the general asset account or the asset, as applicable (as determined under paragraph (e)(3)(iv)(B)(*2*) or (e)(3)(iv)(C)(*2*) of this section, as applicable).

(B) *All assets remaining in general asset account are transferred.* If a taxpayer transfers all the assets, or the last asset, in a general asset account in a transaction described in section 168(i)(7)(B)—

(*1*) The taxpayer (the transferor) must terminate the general asset account on the date of the transfer. The allowable depreciation deduction for the general asset account for the transferor's taxable year in which the section 168(i)(7)(B) transaction occurs is computed by using the depreciation method, recovery period, and convention applicable to the general asset account. This allowable depreciation deduction is allocated between the transferor and the transferee on a monthly basis. This allocation is made in accordance with the rules in § 1.168(d)–1(b)(7)(ii) for allocating the depreciation deduction between the transferor and the transferee;

(*2*) The transferee must establish a new general asset account for all the assets, or the last asset, in the taxable year in which the section 168(i)(7)(B) transaction occurs for the portion of its basis in the assets that does not exceed the transferor's adjusted depreciable basis of the general asset account in which all the assets, or the last asset, were included. The transferor's adjusted depreciable basis of this general asset account is equal to the adjusted depreciable basis of that account as of the beginning of the transferor's taxable year in which the transaction occurs, decreased by the amount of depreciation allocable to the transferor for the year of the transfer (as determined under paragraph (e)(3)(iv)(B)(*1*) of this section). The transferee is treated as the transferor for purposes of computing the allowable depreciation deduction for the new general asset account under section 168. The new general asset account must be established in accordance with the rules in paragraph (c) of this section, except that the unadjusted depreciable bases of all the assets or the last asset, and the greater of the depreciation allowed or allowable for all the assets or the last asset (including the amount of depreciation for the transferred assets that is allocable to the transferor for the year of the transfer), are included in the newly established general asset account. Consequently, this general asset account in the year of the transfer will have a beginning balance for both the unadjusted depreciable basis and the depreciation reserve of the general asset account; and

(*3*) For purposes of section 168 and this section, the transferee treats the portion of its basis in the assets that exceeds the transferor's adjusted depreciable basis of the general asset account in which all the assets, or the last asset, were included (as determined under paragraph (e)(3)(iv)(B)(*2*) of this section) as a separate asset that the transferee placed in service on the date of the transfer. The transferee accounts for this asset under § 1.168(i)–7T or may make an election under paragraph (l) of this section to include the asset in a general asset account.

(C) *Not all assets remaining in general asset account are transferred.* If a taxpayer transfers an asset in a general asset account in a transaction described in section 168(i)(7)(B) and if paragraph (e)(3)(iv)(B) of this section does not apply to this asset—

(*1*) The taxpayer (the transferor) must remove the transferred asset from the general asset account in which the asset is included, as of the first day of the taxable year in which the section 168(i)(7)(B) transaction occurs. In addition, the adjustments to the general asset account described in paragraph (e)(3)(iii)(C)(*2*) through (*4*) of this section must be made. The allowable depreciation deduction for the asset for the transferor's taxable year in which the section 168(i)(7)(B) transaction occurs is computed by using the depreciation method, recovery period, and convention applicable to the general asset account in which the asset was included. This allowable depreciation deduction is allocated between the transferor and the transferee on a monthly basis. This allocation is made in accordance with the rules in § 1.168(d)–1(b)(7)(ii) for allocating the depreciation deduction between the transferor and the transferee;

(*2*) The transferee must establish a new general asset account for the asset in the taxable year in which the section 168(i)(7)(B) transaction occurs for the portion of its basis in the asset that does not exceed the transferor's adjusted depreciable basis of the asset. The transferor's adjusted depreciable basis of this asset is equal to the adjusted depreciable basis of the asset as of the beginning of the transferor's taxable year in which the transaction occurs, decreased by the amount of depreciation allocable to the transferor for the year of the transfer (as determined under paragraph (e)(3)(iv)(C)(*1*) of this section). The transferee is treated as the transferor for purposes of computing the allowable depreciation deduction for the new general asset account under section 168. The new general asset account must be established in accordance with the rules in paragraph (c) of this section, except that the unadjusted depreciable basis of the asset, and the greater of the depreciation allowed or allowable for the asset (including the amount of depreciation for the transferred asset that is allocable to the transferor for the year of the transfer), are included in the newly established general asset account. Consequently, this general asset account in the year of the transfer will have a beginning balance for both the unadjusted depreciable basis and the depreciation reserve of the general asset account; and

(*3*) For purposes of section 168 and this section, the transferee treats the portion of its basis in the asset that exceeds the transferor's adjusted depreciable basis of the asset (as determined under paragraph (e)(3)(iv)(C)(*2*) of this section) as a separate asset that the transferee placed in service on the date of the transfer. The transferee accounts for this asset under § 1.168(i)–7T or may make an election under paragraph (l) of this section to include the asset in a general asset account.

(v) *Transactions subject to section 1031 or section 1033*—(A) *Like-kind exchange or involuntary conversion of all assets remaining in a general asset account.* If all the assets, or the last asset, in a general asset account are transferred by a taxpayer in a like-kind exchange (as defined under § 1.168–6(b)(11)) or in an involuntary conversion (as defined under § 1.168–6(b)(12)), the taxpayer must apply this paragraph (e)(3)(v)(A) (instead of applying paragraph (e)(2), (e)(3)(ii), or (e)(3)(iii) of this section). Under this paragraph (e)(3)(v)(A), the general asset account terminates as of the first day of the year of disposition (as defined in § 1.168(i)–6(b)(5)) and—

(*1*) The amount of gain or loss for the general asset account is determined under section 1001(a) by taking into account the adjusted depreciable basis of the general asset account at the time of disposition (as defined in § 1.168(i)–6(b)(3)). The depreciation allowance for the general asset account in the year of disposition is determined in the same manner as the depreciation allowance for the relinquished MACRS property (as defined in § 1.168(i)–6(b)(2)) in the year of disposition is determined under § 1.168(i)–6. The recognition and character of gain or loss are determined in accordance with paragraph (e)(3)(ii)(A) of this section (notwithstanding that paragraph (e)(3)(ii) of this section is an optional rule); and

(*2*) The adjusted depreciable basis of the general asset account at the time of disposition is treated as the adjusted depreciable basis of the relinquished MACRS property.

(B) *Like-kind exchange or involuntary conversion of less than all assets remaining in a general asset account.* If an asset in a general asset account is transferred by a taxpayer in a like-kind exchange or in an involuntary conversion and if paragraph (e)(3)(v)(A) of this section does not apply to this asset, the taxpayer must apply this paragraph (e)(3)(v)(B) (instead of applying paragraph (e)(2), (e)(3)(ii), or (e)(3)(iii) of this section). Under this paragraph (e)(3)(v)(B), general asset account treatment for the asset terminates as of the first day of the year of disposition (as defined in § 1.168(i)–6(b)(5)), and—

(*1*) The amount of gain or loss for the asset is determined by taking into account the asset's adjusted depreciable basis at the time of disposition (as defined in § 1.168(i)–6(b)(3)). The adjusted depreciable basis of the asset at the time of disposition equals the unadjusted depreciable basis of the asset less the depreciation allowed or allowable for the asset, computed by using the depreciation method, recovery period, and convention applicable to the general asset account in which the asset was included and by including the portion of the additional first year depreciation deduction claimed for the general asset account that is attributable to the relinquished asset. The depreciation allowance for the asset in the year of disposition is determined in the same manner as the depreciation allowance for the relinquished MACRS property (as defined in § 1.168(i)–6(b)(2)) in the year of disposition is determined under § 1.168(i)–6. The recognition and character of the gain or loss are determined in accordance with paragraph (e)(3)(iii)(A) of this section (notwithstanding that paragraph (e)(3)(iii) of this section is an optional rule); and

(*2*) As of the first day of the year of disposition, the taxpayer must remove the relinquished asset from the general asset account and make the adjustments to the general asset account described in paragraph (e)(3)(iii)(C)(*2*) through (*4*) of this section.

(vi) *Technical termination of a partnership.* In the case of a technical termination of a partnership under section 708(b)(1)(B), the terminated partnership must apply this paragraph (e)(3)(vi) (instead of applying paragraph (e)(2), (e)(3)(ii), or (e)(3)(iii) of this section). Under this paragraph (e)(3)(vi), all of the terminated partnership's

general asset accounts terminate as of the date of its termination under section 708(b)(1)(B). The terminated partnership computes the allowable depreciation deduction for each of its general asset accounts for the taxable year in which the technical termination occurs by using the depreciation method, recovery period, and convention applicable to the general asset account. The new partnership is not bound by the terminated partnership's election under paragraph (l) of this section.

(vii) *Anti-abuse rule*—(A) *In general.* If an asset in a general asset account is disposed of by a taxpayer in a transaction described in paragraph (e)(3)(vii)(B) of this section, general asset account treatment for the asset terminates as of the first day of the taxable year in which the disposition occurs. Consequently, the taxpayer must determine the amount of gain, loss, or other deduction attributable to the disposition in the manner described in paragraph (e)(3)(iii)(A) of this section (notwithstanding that paragraph (e)(3)(iii)(A) of this section is an optional rule) and must make the adjustments to the general asset account described in paragraph (e)(3)(iii)(C)(*1*) through (*4*) of this section.

(B) *Abusive transactions.* A transaction is described in this paragraph (e)(3)(vii)(B) if the transaction is not described in paragraph (e)(3)(iv), (e)(3)(v), or (e)(3)(vi) of this section, and if the transaction is entered into, or made, with a principal purpose of achieving a tax benefit or result that would not be available absent an election under this section. Examples of these types of transactions include—

(*1*) A transaction entered into with a principal purpose of shifting income or deductions among taxpayers in a manner that would not be possible absent an election under this section in order to take advantage of differing effective tax rates among the taxpayers; or

(*2*) An election made under this section with a principal purpose of disposing of an asset from a general asset account in order to utilize an expiring net operating loss or credit if the transaction is not a bona fide disposition. The fact that a taxpayer with a net operating loss carryover or a credit carryover transfers an asset to a related person or transfers an asset pursuant to an arrangement where the asset continues to be used (or is available for use) by the taxpayer pursuant to a lease (or otherwise) indicates, absent strong evidence to the contrary, that the transaction is described in this paragraph (e)(3)(vii)(B).

(f) *Assets generating foreign source income*—(1) *In general.* This paragraph (f) provides the rules for determining the source of any income, gain, or loss recognized, and the appropriate section 904(d) separate limitation category or categories for any foreign source income, gain, or loss recognized on a disposition (within the meaning of paragraph (e)(1) of this section) of an asset in a general asset account that consists of assets generating both United States and foreign source income. These rules apply only to a disposition to which paragraphs (e)(2) (general disposition rules), (e)(3)(ii) (disposition of all assets remaining in a general asset account), (e)(3)(iii) (disposition of an asset in a qualifying disposition), (e)(3)(v) (transactions subject to section 1031 or 1033), or (e)(3)(vii) (anti-abuse rule) of this section applies.

(2) *Source of ordinary income, gain, or loss*—(i) *Source determined by allocation and apportionment of depreciation allowed.* The amount of any ordinary income, gain, or loss that is recognized on the disposition of an asset in a general asset account must be apportioned between United States and foreign sources based on the allocation and apportionment of the—

(A) Depreciation allowed for the general asset account as of the end of the taxable year in which the disposition occurs if paragraph (e)(2) of this section applies to the disposition;

(B) Depreciation allowed for the general asset account as of the time of disposition if the taxpayer applies paragraph (e)(3)(ii) of this section to the disposition of all assets, or the last asset, in the general asset account, or if all the assets, or the last asset, in the general asset account are disposed of in a transaction described in paragraph (e)(3)(v)(A) of this section; or

(C) Depreciation allowed for the asset disposed of for only the taxable year in which the disposition occurs if the taxpayer applies paragraph (e)(3)(iii) of this section to the disposition of the asset in a qualifying disposition, if the asset is disposed of in a transaction described in paragraph (e)(3)(v)(B) of this section (like-kind exchange or involuntary conversion), or if the asset is disposed of in a transaction described in paragraph (e)(3)(vii) of this section (anti-abuse rule).

(ii) *Formula for determining foreign source income, gain, or loss.* The amount of ordinary income, gain, or loss recognized on the disposition that shall be treated as foreign source income, gain, or loss must be determined under the formula in this paragraph (f)(2)(ii). For purposes of this formula, the allowed depreciation deductions are determined for the applicable time period provided in paragraph (f)(2)(i) of this section. The formula is:

Foreign Source Income, Gain, or Loss from the Disposition of an Asset. = Total Ordinary Income, Gain, or Loss from the Disposition of an Asset. × Allowed Depreciation Deductions Allocated and Apportioned to Foreign Source Income/Total Allowed Depreciation Deductions for the General Asset Account or for the Asset Disposed of (as applicable).

(3) *Section 904(d) separate categories.* If the assets in the general asset account generate foreign source income in more than one separate category under section 904(d)(1) or another section of the Internal Revenue Code (for example, income treated as foreign source income under section 904(g)(10)), or under a United States income tax treaty that requires the foreign tax credit limitation to be determined separately for specified types of income, the amount of ''foreign source income, gain, or loss from the disposition of an asset'' (as determined under the formula in paragraph (f)(2)(ii) of this section) must be allocated and apportioned to the applicable separate category or categories under the formula in this paragraph (f)(3). For purposes of this formula, the allowed depreciation deductions are determined for the applicable time period provided in paragraph (f)(2)(i) of this section. The formula is:

Foreign Source Income, Gain, or Loss in a Separate Category. = Foreign Source Income, Gain, or Loss from The Disposition of an Asset. × Allowed Depreciation Deductions Allocated and Apportioned to a Separate Category Total/Allowed Depreciation Deductions and Apportioned to Foreign Source Income.

(g) *Assets subject to recapture.* If the basis of an asset in a general asset account is increased as a result of the recapture of any allowable credit or deduction (for example, the basis adjustment for the recapture amount under section 30(d)(2), 50(c)(2), 168(l)(7), 168(n)(4), 179(d)(10), 179A(e)(4), or 1400N(d)(5)), general asset account treatment for the asset terminates as of the first day of the taxable year in which the recapture event occurs. Consequently, the taxpayer must remove the asset from the general asset account as of that day and must make the adjustments to the general asset account described in paragraph (e)(3)(iii)(C)(*2*) through (*4*) of this section.

(h) *Changes in use*—(1) *Conversion to personal use.* An asset in a general asset account becomes ineligible for general asset account treatment if a taxpayer uses the asset in a personal activity during a taxable year. Upon a conversion to personal use, the taxpayer must remove the asset from the general asset account as of the first day of the taxable year in which the change in use occurs (the year of change) and must make the adjustments to the general asset account described in paragraph (e)(3)(iii)(C)(*2*) through (*4*) of this section.

(2) *Business or income-producing use percentage changes.* If, after the placed-in-service year, a taxpayer uses an asset in a general asset account both in a trade or business (or for the production of income) and in a personal activity, general asset account treatment for the asset terminates as of the first day of the taxable year in which the business (or income-producing) use percentage decreases. Consequently, the taxpayer must remove the asset from the general asset account as of that day and must make the adjustments to the general asset account described in paragraph (e)(3)(iii)(C)(*2*) through (*4*) of this section.

(3) *Change in use results in a different recovery period or depreciation method*—(i) *No effect on general asset account election.* A change in the use described in § 1.168(i)–4(d) (change in use results in a different recovery period or depreciation method) of an asset in a general asset account shall not cause or permit the revocation of the election made under this section.

(ii) *Asset is removed from the general asset account.* Upon a change in the use described in § 1.168(i)–4(d), the taxpayer must remove the asset from the general asset account as of the first day of the year of change (as defined in § 1.168(i)–4(a)) and must make the adjustments to the general asset account described in paragraphs (e)(3)(iii)(C)(*2*) through (*4*) of this section. If, however, the result of the change in use is described in § 1.168(i)–4(d)(3) (change in use results in a shorter recovery period or a more accelerated depreciation method) and the taxpayer elects to treat the asset as though the change in use had not occurred pursuant to § 1.168(i)–4(d)(3)(ii), no adjustment is made to the general asset account upon the change in use.

(iii) *New general asset account is established*—(A) *Change in use results in a shorter recovery period or a more accelerated depreciation method.* If the result of the change in use is described in § 1.168(i)–4(d)(3) (change in use results in a shorter recovery period or a more accelerated depreciation method) and adjustments to the general asset account are made pursuant to paragraph (h)(3)(ii) of this section, the taxpayer must establish a new general asset account for the asset in the year of change in accordance with the rules in paragraph (c) of this section, except that the adjusted depreciable basis of the asset as of the first day of the year of change is included in the general asset account. For purposes of paragraph (c)(2) of this section, the applicable depreciation method, recovery period, and convention are determined under § 1.168(i)–4(d)(3)(i).

(B) *Change in use results in a longer recovery period or a slower depreciation method.* If the result of the change in use is described in § 1.168(i)–4(d)(4) (change in use results in a longer recovery period or a slower depreciation method), the taxpayer must establish a separate general asset account for the asset in the year of change in accordance with the rules in paragraph (c) of this section, except that the unadjusted depreciable basis of the asset, and the greater of the depreciation of the asset allowed or allowable in accordance with section 1016(a)(2), as of the first day of the year of change are included in the newly established general asset account. Consequently, this general asset account as of the first day of the year of change will have a beginning balance for both the unadjusted depreciable basis and the depreciation reserve of the general asset account. For purposes of paragraph (c)(2) of this section, the applicable depreciation method, recovery period, and convention are determined under § 1.168(i)–4(d)(4)(ii).

(i) *Redetermination of basis.* If, after the placed-in-service year, the unadjusted depreciable basis of an asset in a general asset account is redetermined due to a transaction other than that described in paragraph (g) of this section (for example, due to contingent purchase price or discharge of indebtedness), the taxpayer's election under paragraph (l) of this section for the asset also applies to the increase or decrease in basis resulting from the redetermination. For the taxable year in which the increase or decrease in basis occurs, the taxpayer must establish a new general asset account for the amount of the increase or decrease in basis in accordance with the rules in paragraph (c) of this section. For purposes of paragraph (c)(2) of this section, the applicable recovery period for the increase or decrease in basis is the recovery period of the asset remaining as of the beginning of the taxable year in which the increase or decrease in basis occurs, the applicable depreciation method and applicable convention for the increase or decrease in basis are the same depreciation method and convention applicable to the asset that applies for the taxable year in which the increase or decrease in basis occurs, and the increase or decrease in basis is deemed to be placed in service in the same taxable year as the asset.

(j) *Identification of disposed of or converted asset*—(1) *In general.* The rules of this paragraph (j) apply when an asset in a general asset account is disposed of or converted in a transaction described in paragraphs (e)(3)(iii) (disposition of an asset in a qualifying disposition), (e)(3)(iv)(B) (transactions subject to section 168(i)(7)), (e)(3)(v)(B) (transactions subject to section 1031 or 1033), (e)(3)(vii) (anti-abuse rule), (g) (assets subject to recapture), (h)(1) (conversion to personal use), or (h)(2) (business or income-producing use percentage changes) of this section.

(2) *Identifying which asset is disposed of or converted.* For purposes of identifying which asset in a general asset account is disposed of or converted, a taxpayer must identify the disposed of or converted asset by using—

(i) The specific identification method of accounting. Under this method of accounting, the taxpayer can determine the particular taxable year in which the disposed of or converted asset was placed in service by the taxpayer;

(ii) A first-in, first-out method of accounting if the taxpayer can readily determine from its records the total dispositions of assets with the same recovery period during the taxable year but the taxpayer cannot readily determine from its records the unadjusted depreciable basis of the disposed of or converted asset. Under this method of accounting, the taxpayer identifies the general asset account with the earliest placed-in-service year that has the same recovery period as the disposed of or converted asset and that has assets at the beginning of the taxable year of the disposition or conversion, and the taxpayer treats the disposed of or converted asset as being from that general asset account. To determine which general asset account has assets at the beginning of the taxable year of the disposition or conversion, the taxpayer reduces the number of assets originally included in the account by the number of assets disposed of or converted in any prior taxable year in a transaction to which this paragraph (j) applies;

(iii) A modified first-in, first-out method of accounting if the taxpayer can readily determine from its records the total dispositions of assets with the same recovery period during the taxable year and the unadjusted depreciable basis of the disposed of or converted asset. Under this method of accounting, the taxpayer identifies the general asset account with the earliest placed-in-service year that has the same recovery period as the disposed of or converted asset and that has assets at the beginning of the taxable year of the disposition or conversion with the same unadjusted depreciable basis as the disposed of or converted asset, and the taxpayer treats the disposed of or converted asset as being from that general asset account. To determine which general asset account has assets at the beginning of the taxable year of the disposition or conversion, the taxpayer reduces the number of assets originally included in the account by the number of assets disposed of or converted in any prior taxable year in a transaction to which this paragraph (j) applies;

(iv) A mortality dispersion table if the asset is a mass asset accounted for in a separate general asset account in accordance with paragraph (c)(2)(ii)(H) of this section and if the taxpayer can readily determine from its records the total dispositions of assets with the same recovery period during the taxable year. The mortality dispersion table must be based upon an acceptable sampling of the taxpayer's actual disposition and conversion experience for mass assets or other acceptable statistical or engineering techniques. To use a mortality dispersion table, the taxpayer must adopt recordkeeping practices consistent with the taxpayer's prior practices and consonant with good accounting and engineering practices; or

(v) Any other method as the Secretary may designate by publication in the **Federal Register** or in the Internal Revenue Bulletin (see § 601.601(d)(2) of this chapter) on or after December 23, 2011. For this purpose, a last-in, first-out method of accounting is not a designated method. Under the last-in, first-out method of accounting, the taxpayer identifies the general asset account with the most recent placed-in-service year that has the same recovery period as the disposed of or converted asset and that has assets at the beginning of the taxable year of the disposition or conversion, and the taxpayer treats the disposed of or converted asset as being from that general asset account. To determine which general asset account has assets at the beginning of the taxable year of the disposition or conversion, the taxpayer reduces the number of assets originally included in the account by the number of assets disposed of or converted in any prior taxable year in a transaction to which this paragraph (j) applies.

(3) *Basis of disposed of or converted asset.* After identifying which asset in a general asset account is disposed of or converted, the taxpayer may use any reasonable method that is consistently applied to all its general asset accounts for purposes of determining the unadjusted depreciable basis of a disposed of or converted asset.

(k) *Effect of adjustments on prior dispositions.* The adjustments to a general asset account under paragraph (e)(3)(iii), (e)(3)(iv), (e)(3)(v), (e)(3)(vii), (g), or (h) of this section have no effect on the recognition and character of prior dispositions subject to paragraph (e)(2) of this section.

(l) *Election*—(1) *Irrevocable election.* If a taxpayer makes an election under this paragraph (l), the taxpayer consents to, and agrees to apply, all of the provisions of this section to the assets included in a general asset account. Except as provided in paragraph (c)(1)(ii)(A), (e)(3), (g), or (h) of this section, an election made under this section is irrevocable and will be binding on the taxpayer for computing taxable income for the taxable year for which the election is made and for all subsequent taxable years. An election under this paragraph (l) is made separately by each person owning an asset to which this section applies (for example, by each member of a consolidated group, at the partnership level (and not by the partner separately), or at the S corporation level (and not by the shareholder separately)).

(2) [Reserved]. For further guidance, see § 1.168(i)–1(l)(2).

(3) [Reserved]. For further guidance, see § 1.168(i)–1(l)(3).

(m) *Effective/applicability date*—(1) *In general.* This section applies to taxable years beginning on or after January 1, 2012. For the applicability of § 1.168(i)–1 in taxable years beginning before January 1, 2012, see § 1.168(i)–1 in effect prior to January 1, 2012 (§ 1.168(i)–1 as contained in 26 CFR part 1 edition revised as of April 1, 2011).

(2) *Change in method of accounting.* A change to comply with this section for depreciable assets placed in service in a taxable year ending on or after December 30, 2003, is a change in method of accounting to which the provisions of section 446(e) and the regulations under section 446(e) apply. A taxpayer also may treat a change to comply with this section for depreciable assets placed in service in a taxable year ending before December 30, 2003, as a change in method of accounting to which the provisions of section 446(e) and the regulations under section 446(e) apply.

(3) The applicability of this section expires on December 23, 2014.

■ **Par. 21.** Section 1.168(i)–7T is added to read as follows:

§ 1.168(i)–7T Accounting for MACRS property (temporary).

(a) *In general.* A taxpayer may account for MACRS property (as defined in § 1.168(b)–1(a)(2)) by treating each individual asset as an account (a ''single asset account'' or an ''item account'') or by combining two or more assets in a single account (a ''multiple asset account'' or a ''pool''). A taxpayer may establish as many accounts for MACRS property as the taxpayer wants. This section does not apply to assets included in general asset accounts. For rules applicable to general asset accounts, see § 1.168(i)–1T.

(b) *Required use of single asset accounts.* A taxpayer must account for an asset in a single asset account if the taxpayer uses the asset both in a trade or business (or for the production of income) and in a personal activity, or if the taxpayer places in service and disposes of the asset during the same taxable year. Also, if general asset account treatment for an asset terminates under § 1.168(i)–1T(c)(1)(ii)(A), (e)(3)(iii), (e)(3)(vii), (g), or (h)(2), the taxpayer must account for the asset in a single asset account beginning in the taxable year in which the general asset account treatment for the asset terminates. If a taxpayer accounts for an asset in a multiple asset account or pool treatment and the taxpayer disposes of the asset, the taxpayer must account for the asset in a single asset account beginning in the taxable year in which the disposition occurs. *See* § 1.168(i)–8T(g)(2)(i). If a taxpayer disposes of a component of a larger asset and the unadjusted depreciable basis of the disposed of component is included in the unadjusted depreciable basis of the larger asset, the taxpayer must account for the component in a single asset account beginning in the taxable year in which the disposition occurs. *See* § 1.168(i)–8T(g)(3)(i).

(c) *Establishment of multiple asset accounts or pools*—(1) *Assets eligible for multiple asset accounts or pools.* Except as provided in paragraph (b) of this section, assets that are subject to either the general depreciation system of section 168(a) or the alternative depreciation system of section 168(g) may be accounted for in one or more multiple asset accounts or pools.

(2) *Grouping assets in multiple asset accounts or pools*—(i) *General rules.* Assets that are eligible to be grouped into a single multiple asset account or pool may be divided into more than one multiple asset account or pool. Each multiple asset account or pool must include only assets that—

(A) Have the same applicable depreciation method;

(B) Have the same applicable recovery period;

(C) Have the same applicable convention; and

(D) Are placed in service by the taxpayer in the same taxable year.

(ii) *Special rules.* In addition to the general rules in paragraph (c)(2)(i) of this section, the following rules apply when establishing multiple asset accounts or pools—

(A) Assets subject to the mid-quarter convention may only be grouped into a multiple asset account or pool with assets that are placed in service in the same quarter of the taxable year;

(B) Assets subject to the mid-month convention may only be grouped into a multiple asset account or pool with assets that are placed in service in the same month of the taxable year;

(C) Passenger automobiles for which the depreciation allowance is limited under section 280F(a) must be grouped into a separate multiple asset account or pool;

(D) Assets not eligible for any additional first year depreciation deduction (including assets for which the taxpayer elected not to deduct the additional first year depreciation) provided by, for example, section 168(k) through (n), 1400L(b), or 1400N(d), must be grouped into a separate multiple asset account or pool;

(E) Assets eligible for the additional first year depreciation deduction may only be grouped into a multiple asset account or pool with assets for which the taxpayer claimed the same percentage of the additional first year depreciation (for example, 30 percent, 50 percent, or 100 percent);

(F) Except for passenger automobiles described in paragraph (c)(2)(ii)(C) of this section, listed property (as defined in section 280F(d)(4)) must be grouped into a separate multiple asset account or pool;

(G) Assets for which the depreciation allowance for the placed-in-service year is not determined by using an optional depreciation table (for further guidance, see section 8 of Rev. Proc. 87–57, 1987–2 CB 687, 693 (see § 601.601(d)(2) of this chapter) must be grouped into a separate multiple asset account or pool; and

(H) Mass assets (as defined in § 1.168(i)–8T(b)(2)) that are or will be subject to § 1.168–8T(f)(2)(ii) (disposed of or converted mass asset is identified by a mortality dispersion table) must be grouped into a separate multiple asset account or pool.

(d) *Cross references.* See § 1.167(a)–7T(c) for the records to be maintained by a taxpayer for each account. In addition, see § 1.168(i)–1T for the records to be maintained by a taxpayer for each general asset account.

(e) *Effective/applicability date*—(1) This section applies to taxable years beginning on or after January 1, 2012.

(2) *Change in method of accounting.* A change to comply with this section for depreciable assets placed in service in a taxable year ending on or after December 30, 2003, is a change in method of accounting to which the provisions of section 446(e) and the regulations under section 446(e) apply. A taxpayer also may treat a change to comply with this section for depreciable assets placed in service in a taxable year ending before December 30, 2003, as a change in method of accounting to which the provisions of section 446(e) and the regulations under section 446(e) apply.

(3) *Expiration date.* The applicability of this section expires on December 23, 2014.

■ **Par. 22.** Section 1.168(i)–8T is added to read as follows:

§ 1.168(i)–8T Dispositions of MACRS property (temporary).

(a) *Scope.* This section provides rules applicable to dispositions of MACRS property (as defined in § 1.168(b)–1(a)(2)) or to depreciable property (as defined in § 1.168(b)–1(a)(1)) that would be MACRS property but for an election made by the taxpayer either to expense all or some of the property's cost under section 179, 179A, 179B, 179C, 179D, or 1400I(a)(1), or any similar provision, or to amortize all or some of the property's cost under section 1400I(a)(2) or any similar provision. Except as provided in § 1.168(i)–1T(e)(iii), this section does not apply to dispositions of assets included in a general asset account. For rules applicable to dispositions of assets included in a general asset account, see § 1.168(i)–1T(e).

(b) *Definitions.* For purposes of this section—

(1) *Disposition* occurs when ownership of the asset is transferred or when the asset is permanently withdrawn from use either in the taxpayer's trade or business or in the production of income. A disposition includes the sale, exchange, retirement, physical abandonment, or destruction of an asset. A disposition also includes the retirement of a structural component (as defined in § 1.48–1(e)(2)) of a building (as defined in § 1.48–1(e)(1)). A disposition also occurs when an asset is transferred to a supplies, scrap, or similar account.

(2) *Mass assets* is a mass or group of individual items of depreciable assets—

(i) That are not necessarily homogenous;

(ii) Each of which is minor in value relative to the total value of the mass or group;

(iii) Numerous in quantity;

(iv) Usually accounted for only on a total dollar or quantity basis;

(v) With respect to which separate identification is impracticable; and

(vi) Placed in service in the same taxable year.

(3) *Unadjusted depreciable basis of the multiple asset account or pool* is the sum of the unadjusted depreciable bases (as defined in § 1.168(b)–1(a)(3)) of all assets included in the multiple asset account or pool.

(c) *Special rules*—(1) *Manner of disposition.* The manner of disposition (for example, normal retirement, abnormal retirement, ordinary retirement, or extraordinary retirement) is not taken into account in determining whether a disposition occurs or gain or loss is recognized.

(2) *Disposition by transfer to a supplies account.* If a taxpayer made an election under § 1.162–3T(d) to treat the cost of any material and supply as a capital expenditure subject to the allowance for depreciation, the taxpayer can dispose of the material and supply by transferring it to a supplies account only if the taxpayer has obtained the consent of the Commissioner to revoke the § 1.162–3T(d) election. *See* § 1.162–3T(d)(3) for the procedures for revoking a § 1.162–3T(d) election.

(3) *Leasehold improvements.* This section also applies to—

(i) A lessor of leased property that made an improvement to that property for the lessee of the property, has a depreciable basis in the improvement, and disposes of the improvement before or upon the termination of the lease with the lessee. *See* section 168(i)(8)(B); and

(ii) A lessee of leased property that made an improvement to that property, has a depreciable basis in the improvement, and disposes of the improvement before or upon the termination of the lease.

(4) *Determination of asset disposed of*—(i) *In general.* For purposes of applying this section, the facts and circumstances of each disposition are considered in determining what is the appropriate asset disposed of. Except as provided in paragraph (c)(4)(ii) of this section, the asset for disposition purposes cannot be larger than the unit of property as determined under § 1.263(a)-3T(e)(2), (e)(3), and (e)(5) or as otherwise determined in published guidance in the **Federal Register** or in the Internal Revenue Bulletin (see, for example, Rev. Proc. 2011–38, 2011–18 IRB 743, for units of property for wireless network assets (see § 601.601(d)(2)(ii)(*b*) of this chapter)).

(ii) *Exceptions.* For purposes of applying this section:

(A) Each building (not including its structural components) is the asset except as provided in § 1.1250–1(a)(2)(ii) or in paragraph (c)(4)(ii)(B) or (E) of this section.

(B) If a building has two or more condominium or cooperative units, each condominium or cooperative unit (not including its structural components) is the asset except as provided in § 1.1250–1(a)(2)(ii) or in paragraph (c)(4)(ii)(E) of this section.

(C) Each structural component (including all components thereof) of a building, condominium unit, or cooperative unit is the asset.

(D) If a taxpayer properly includes an item in one of the asset classes 00.11 through 00.4 of Rev. Proc. 87–56 (1987–2 CB 674) (see § 601.601(d)(2)(ii)(*b*) of this chapter) or properly classifies an item in one of the categories under section 168(e)(3) (except for a category that includes buildings or structural components; for example, retail motor fuels outlet, qualified leasehold improvement property, qualified restaurant property, and qualified retail improvement property), each item is the asset provided it is not larger than the unit of property as determined under § 1.263(a)–3T(e)(3) or (e)(5) or as otherwise determined in published guidance in the **Federal Register** or in the Internal Revenue Bulletin (see § 601.601(d)(2)(ii)(*b*) of this chapter), or provided paragraph (c)(4)(ii)(E) of this section does not apply to the item. For example, each desk is the asset, each computer is the asset, and each qualified smart electric meter is the asset (assuming these assets are not larger than the unit of property as determined under § 1.263(a)–3T(e)(3) or (e)(5) or as otherwise determined in published guidance in the **Federal Register** or in the Internal Revenue Bulletin (see § 601.601(d)(2)(ii)(*b*) of this chapter)).

(E) If the taxpayer places in service an improvement or addition to an asset after the taxpayer placed the asset in service, the improvement or addition is a separate asset provided it is not larger than the unit of property as determined under § 1.263(a)-3T(e)(3) or (e)(5) or as otherwise determined in published guidance in the **Federal Register** or in the Internal Revenue Bulletin (see § 601.601(d)(2)(ii)(*b*) of this chapter).

(E) If an asset is not described in one of the asset classes 00.11 through 00.4 of Rev. Proc. 87–56 (1987–2 CB 674) (see § 601.601(d)(2)(ii)(*b*) of this chapter) or in one of the categories under section 168(e)(3), a taxpayer also may use any reasonable, consistent method to treat each of the asset's components as the asset.

(d) *Gain or loss on dispositions.* Except as provided by section 280B and § 1.280B–1, the following rules apply when assets within the scope of this section are disposed of during a taxable year:

(1) If an asset is disposed of by sale, exchange, or involuntary conversion, gain or loss must be recognized under the applicable provisions of the Internal Revenue Code.

(2) If an asset is disposed of by physical abandonment, loss must be recognized in the amount of the adjusted depreciable basis (as defined in § 1.168(b)-1(a)(4)) of the asset at the time of the abandonment (taking into account the applicable convention). However, if the abandoned asset is subject to nonrecourse indebtedness, paragraph (d)(1) of this section applies to the asset (instead of this paragraph (d)(2)). For a loss from physical abandonment to qualify for recognition under this paragraph (d)(2), the taxpayer must intend to discard the asset irrevocably so that the taxpayer will neither use the asset again nor retrieve it for sale, exchange, or other disposition.

(3) If an asset is disposed of other than by sale, exchange, involuntary conversion, physical abandonment, or conversion to personal use (as, for example, when the asset is transferred to a supplies or scrap account), gain is not recognized. Loss must be recognized in the amount of the excess of the adjusted depreciable basis of the asset at the time of the disposition (taking into account the applicable convention) over the asset's fair market value at the time of the disposition (taking into account the applicable convention).

(e) *Basis of asset disposed of*—(1) *In general.* The adjusted basis of an asset disposed of for computing gain or loss is its adjusted depreciable basis at the time of the asset's disposition (as determined under the applicable convention for the asset).

(2) *Assets disposed of are in multiple asset accounts or are components.* If the taxpayer accounts for the asset disposed of in a multiple asset account or pool, or the asset disposed of is a component of a larger asset and it is impracticable from the taxpayer's records to determine the unadjusted depreciable basis (as defined in § 1.168(b)-1(a)(3)) of the asset disposed of, the taxpayer may use any reasonable method that is consistently applied to the taxpayer's multiple asset accounts or pools or to the taxpayer's larger assets for purposes of determining the unadjusted depreciable basis of assets disposed of. To determine the adjusted depreciable basis of an asset disposed of in a multiple asset account, the depreciation allowed or allowable for the asset disposed of is computed by using the depreciation method, recovery period, and convention applicable to the multiple asset account or pool in which the asset disposed of was included and by including the additional first year depreciation deduction claimed for the asset disposed of. To determine the adjusted depreciable basis of an asset disposed of that is a component of a larger asset, the depreciation allowed or

allowable for the asset disposed of is computed by using the depreciation method, recovery period, and convention applicable to the larger asset of which the asset disposed of is a component and by including the portion of the additional first year depreciation deduction claimed for the larger asset that is attributable to the asset disposed of.

(f) *Identification of asset disposed of*—(1) *In general.* Except as provided in paragraph (f)(2) of this section, a taxpayer must use the specific identification method of accounting to identify which asset is disposed of by the taxpayer. Under this method of accounting, the taxpayer can determine the particular taxable year in which the asset disposed of was placed in service by the taxpayer.

(2) *Asset disposed of is in a multiple asset account.* If a taxpayer accounts for the asset disposed of in a multiple asset account or pool and the total dispositions of assets with the same recovery period during the taxable year are readily determined from the taxpayer's records but it is impracticable from the taxpayer's records to determine the particular taxable year in which the asset disposed of was placed in service by the taxpayer, the taxpayer may identify the asset disposed of by using—

(i) A first-in, first-out method of accounting if the unadjusted depreciable basis of the asset disposed of cannot be readily determined from the taxpayer's records. Under this method of accounting, the taxpayer identifies the multiple asset account or pool with the earliest placed-in-service year that has the same recovery period as the asset disposed of and that has assets at the beginning of the taxable year of the disposition, and the taxpayer treats the asset disposed of as being from that multiple asset account or pool;

(ii) A modified first-in, first-out method of accounting if the unadjusted depreciable basis of the asset disposed of can be readily determined from the taxpayer's records. Under this method of accounting, the taxpayer identifies the multiple asset account or pool with the earliest placed-in-service year that has the same recovery period as the asset disposed of and that has assets at the beginning of the taxable year of the disposition with the same unadjusted depreciable basis as the asset disposed of, and the taxpayer treats the asset disposed of as being from that multiple asset account or pool;

(iii) A mortality dispersion table if the asset disposed of is a mass asset. The mortality dispersion table must be based upon an acceptable sampling of the taxpayer's actual disposition experience for mass assets or other acceptable statistical or engineering techniques. To use a mortality dispersion table, the taxpayer must adopt recordkeeping practices consistent with the taxpayer's prior practices and consonant with good accounting and engineering practices; or

(iv) Any other method as the Secretary may designate by publication in the **Federal Register** or in the Internal Revenue Bulletin (see § 601.601(d)(2) of this chapter) on or after December 23, 2011. For this purpose, a last-in, first-out method of accounting is not a designated method. Under the last-in, first-out method of accounting, the taxpayer identifies the multiple asset account or pool with the most recent placed-in-service year that has the same recovery period as the asset disposed of and that has assets at the beginning of the taxable year of the disposition, and the taxpayer treats the asset disposed of as being from that multiple asset account or pool.

(g) *Accounting for asset disposed of*—(1) *Depreciation ends.* Depreciation ends for an asset at the time of the asset's disposition (as determined under the applicable convention for the asset). *See* § 1.167(a)–10(b). If the asset disposed of is in a single asset account, the single asset account terminates at the time of the asset's disposition (as determined under the applicable convention for the asset).

(2) *Asset disposed of in a multiple asset account or pool.* If the taxpayer accounts for the asset disposed of in a multiple asset account or pool, then—

(i) As of the first day of the taxable year in which the disposition occurs, the asset disposed of is removed from the multiple asset account or pool and is placed into a single asset account. *See* § 1.168(i)–7T(b);

(ii) The unadjusted depreciable basis of the multiple asset account or pool must be reduced by the unadjusted depreciable basis of the asset disposed of as of the first day of the taxable year in which the disposition occurs. See paragraph (e)(2) of this section for determining the unadjusted depreciable basis of the asset disposed of;

(iii) The depreciation reserve of the multiple asset account or pool must be reduced by the depreciation allowed or allowable for the asset disposed of as of the end of the taxable year immediately preceding the year of disposition, computed by using the depreciation method, recovery period, and convention applicable to the multiple asset account or pool in which the asset disposed of was included and by including the additional first year depreciation deduction claimed for the asset disposed of; and

(iv) In determining the adjusted depreciable basis of the asset disposed of at the time of disposition (taking into account the applicable convention), the depreciation allowed or allowable for the asset disposed of is computed by using the depreciation method, recovery period, and convention applicable to the multiple asset account or pool in which the asset disposed of was included and by including the additional first year depreciation deduction claimed for the asset disposed of.

(3) *Disposed of component of a larger asset.* This paragraph (g)(3) applies only to a taxpayer that uses a reasonable, consistent method to treat each of the asset's components as the asset in accordance with paragraph (c)(4)(E) of this section. If the taxpayer disposes of a component of a larger asset and the unadjusted depreciable basis of the disposed component is included in the unadjusted depreciable basis of the larger asset, then—

(i) As of the first day of the taxable year in which the disposition occurs, the disposed of component is removed from the larger asset and is placed into a single asset account. *See* § 1.168(i)–7T(b);

(ii) The unadjusted depreciable basis of the larger asset must be reduced by the unadjusted depreciable basis of the disposed of component as of the first day of the taxable year in which the disposition occurs. See paragraph (e)(2) of this section for determining the unadjusted depreciable basis of the disposed of component;

(iii) The depreciation reserve of the larger asset must be reduced by the depreciation allowed or allowable for the disposed of component as of the end of the taxable year immediately preceding the year of disposition, computed by using the depreciation method, recovery period, and convention applicable to the larger asset in which the disposed of component was included and by including the portion of the additional first year depreciation deduction claimed for the larger asset that is attributable to the disposed of component; and

(iv) In determining the adjusted depreciable basis of the disposed of component at the time of disposition (taking into account the applicable convention), the depreciation allowed or allowable for the asset disposed of is computed by using the depreciation method, recovery period, and convention applicable to the larger asset in which the disposed of component was included and by including the portion of the additional first year depreciation deduction claimed for the

larger asset that is attributable to the disposed of component.

(h) *Examples.* The application of this section is illustrated by the following examples:

Example 1. A owns an office building with four elevators. A decides to replace one of the elevators. The retirement of the replaced elevator, which is a structural component of the building, is a disposition. As a result, depreciation for the retired elevator ceases at the time of its retirement (taking into account the applicable convention). A recognizes a loss upon this retirement.

Example 2. B, a calendar-year commercial airline company, owns several aircrafts that are used in the commercial carrying of passengers. B replaces the existing engines on one of the aircrafts with new engines and treats each engine of an aircraft as a major component of the aircraft. Assume each aircraft is a unit of property as determined under § 1.263(a)–3T(e)(3). However, for tax disposition purposes, B consistently treats each major component of an aircraft as the asset. Thus, the retirement of the replaced engines is a disposition. As a result, depreciation for the retired engines ceases at the time of their retirement (taking into account the applicable convention). B recognizes a loss upon this retirement.

Example 3. The facts are the same as in *Example 2,* except B treats each aircraft as the asset for tax disposition purposes. Assume each aircraft is a unit of property as determined under § 1.263(a)–3T(e)(3). Thus, the replacement of the engines on one of the aircrafts is not a disposition. As a result, depreciation continues for the cost of the aircraft (including the cost of the replaced engines) and B does not recognize a loss upon this replacement.

Example 4. C, a corporation, owns several trucks that are used in its trade or business and described in asset class 00.241 of Rev. Proc. 87–56. C replaces the engine on one of the trucks with a new engine and treats each engine of a truck as a major component of the truck. Assume each truck is a unit of property as determined under § 1.263(a)–3T(e)(3). Because the trucks are described in asset class 00.241 of Rev. Proc. 87–56, C must treat each truck as the asset for tax disposition purposes. Thus, the replacement of the engine on the truck is not a disposition. As a result, depreciation continues for the cost of the truck (including the cost of the replaced engine) and C does not recognize a loss upon this replacement.

Example 5. (i) On July 1, 2009, D, a calendar-year taxpayer, purchased and placed in service a multi-story office building that costs $20,000,000. The cost of each structural component of the building was not separately stated. D accounts for the building in its records as a single asset with a cost of $20,000,000. D depreciates the building as nonresidential real property and uses the optional depreciation table that corresponds with the general depreciation system, the straight-line method, a 39-year recovery period, and the mid-month convention. As of January 1, 2012, the depreciation reserve for the building is $1,261,000.

(ii) On June 30, 2012, D replaces one of the building's elevators. Because D cannot identify the cost of the structural components of the office building from its records, D uses a reasonable method that is consistently applied to all of the structural components of the office building to determine the cost of the elevator. Using this reasonable method, D allocates $150,000 of the $20,000,000 purchase price for the building to the retired elevator. Using the optional depreciation table that corresponds with the general depreciation system, the straight-line method, a 39-year recovery period, and the mid-month convention, the depreciation allowed or allowable for the retired elevator as of December 31, 2011, is $9,457.50.

(iii) For D's 2012 Federal income tax return, loss for the retired elevator is determined as follows. The depreciation allowed or allowable for 2012 for the retired elevator is $1,923 ((unadjusted depreciable basis of $150,000 × depreciation rate of 2.564 percent for 2012) × 6/12). Thus, the adjusted depreciable basis of the retired elevator is $138,619.50 (the adjusted depreciable basis of $140,542.50 removed from the building cost less the depreciation allowed or allowable of $1,923 for 2012). As a result, D recognizes a loss of $138,619.50 for the retired elevator in 2012, which is subject to section 1231.

(iv) For D's 2012 Federal income tax return, the depreciation allowance for the building is computed as follows. As of January 1, 2012, the unadjusted depreciable basis of the building is reduced from $20,000,000 to $19,850,000 ($20,000,000 less the unadjusted depreciable basis of $150,000 for the retired elevator), and the depreciation reserve of the building is reduced from $1,261,000 to $1,251,542.50 ($1,261,000 less the depreciation allowed or allowable of $9,457.50 for the retired elevator as of December 31, 2011). Consequently, the depreciation allowance for the building for 2012 is $508,954 ($19,850,000 × depreciation rate of 2.564 percent for 2012).

Example 6. (i) Since 2003, E, a calendar year taxpayer, has accounted for items of MACRS property that are mass assets in pools. Each pool includes only the mass assets that have the same depreciation method, recovery period, and convention, and are placed in service by E in the same taxable year. None of the pools are general asset accounts under section 168(i)(4) and the regulations under section 168(i)(4). E identifies any dispositions of these mass assets by specific identification.

(ii) During 2012, E sells 10 items of mass assets with a 5-year recovery period each for $100. Under the specific identification method, E identifies these mass assets as being from the pool established by E in 2010 for mass assets with a 5-year recovery period. Assume E depreciates this pool using the optional depreciation table that corresponds with the general depreciation system, the 200-percent declining balance method, a 5-year recovery period, and the half-year convention. E elected not to deduct the additional first year depreciation provided by section 168(k) for 5-year property placed in service during 2010. As of January 1, 2012, this pool contains 100 similar items of mass assets with a total cost of $25,000 and a total depreciation reserve of $13,000. Thus, E allocates a cost of $250 ($25,000 × (1/100)) to each disposed of mass asset and depreciation allowed or allowable of $130 ($13,000 × (1/100)) to each disposed of mass asset. The depreciation allowed or allowable in 2012 for each disposed of mass asset is $24 [($250 × 19.2 percent)/2]. As a result, the adjusted depreciable basis of each disposed of mass asset under section 1011 is $96 ($250–$130–$24). Thus, E recognizes a gain of $4 for each disposed of mass asset in 2012, which is subject to section 1245.

(iii) Further, as of January 1, 2012, the unadjusted depreciable basis of the 2010 pool of mass assets with a 5-year recovery period is reduced from $25,000 to $22,500 ($25,000 less the unadjusted depreciable basis of $2,500 for the 10 disposed of items), and the depreciation reserve of this 2010 pool is reduced from $13,000 to $11,700 ($13,000 less the depreciation allowed or allowable of $1,300 for the 10 disposed of items as of December 31, 2011). Consequently, as of January 1, 2012, the 2010 pool of mass assets with a 5-year recovery period has 90 items with a total cost of $22,500 and a depreciation reserve of $11,700. Thus, the depreciation allowance for this pool for 2012 is $4,320 ($22,500 × 19.2 percent).

Example 7. (i) Same facts as in *Example 6.* Because of changes in E's recordkeeping in 2013, it is impracticable for E to continue to identify disposed of mass assets using specific identification and to determine the unadjusted depreciable basis of the disposed of mass assets. As a result, E files a Form 3115, Application for Change in Accounting Method, to change to a first-in, first-out method beginning with the taxable year beginning on January 1, 2013, on a modified cut-off basis. *See* § 1.446–1(e)(2)(ii)(*d*)(*2*)(*vii*). Under the first-in, first-out method, the mass assets disposed of in a taxable year are deemed to be from the pool with the earliest placed-in-service year that has assets as of the beginning of the taxable year of the disposition with the same recovery period as the asset disposed of. The Commissioner of Internal Revenue consents to this change in method of accounting.

(ii) During 2013, E sells 20 items of mass assets with a 5-year recovery period each for $50. As of January 1, 2013, the 2006 pool is the pool with the earliest placed-in-service year for mass assets with a 5-year recovery period, and this pool contains 25 items of mass assets with a total cost of $10,000 and a total depreciation reserve of $10,000. Thus, E allocates a cost of $400 ($10,000 × (1/25)) to each disposed of mass asset and depreciation allowed or allowable of $400 to each disposed of mass asset. As a result, the adjusted depreciable basis of each disposed of mass asset is $0. Thus, E recognizes a gain of $50 for each disposed of mass asset in 2013, which is subject to section 1245.

(iii) Further, as of January 1, 2013, the unadjusted depreciable basis of the 2006 pool of mass assets with a 5-year recovery period is reduced from $10,000 to $2,000 ($10,000 less the unadjusted depreciable basis of $8,000 for the 20 disposed of items ($400 × 20)), and the depreciation reserve of this 2006 pool is reduced from $10,000 to $2,000 ($10,000 less the depreciation allowed or allowable of $8,000 for the 20 disposed of

items as of December 31, 2012). Consequently, as of January 1, 2013, the 2006 pool of mass assets with a 5-year recovery period has 5 items with a total cost of $2,000 and a depreciation reserve of $2,000.

(i) *Effective/applicability date.* (1) This section applies to taxable years beginning on or after January 1, 2012.

(2) *Change in method of accounting.* A change to comply with this section for depreciable assets placed in service in a taxable year ending on or after December 30, 2003, is a change in method of accounting to which the provisions of section 446(e) and the regulations under section 446(e) apply. A taxpayer also may treat a change to comply with this section for depreciable assets placed in service in a taxable year ending before December 30, 2003, as a change in method of accounting to which the provisions of section 446(e) and the regulations under section 446(e) apply.

(3) *Expiration Date.* The applicability of this section expires on December 23, 2014.

■ **Par. 23.** Section 1.263(a)–0 is amended by:

■ 1. Revising the section headings of the table of contents for §§ 1.263(a)–2 and 1.263(a)–3.

■ 2. Adding entries to the table of contents for §§ 1.263(a)–1, 1.263(a)–2, and 1.263(a)–3.

The revisions and additions read as follows:

§ 1.263(a)–0 Table of contents.

* * * * *

§ 1.263(a)–1 Capital expenditures; in general.

(a) through (h) [Reserved]. For further guidance, see the table of contents for § 1.263(a)–1T(a) through (h) under § 1.263(a)–0T.

§ 1.263(a)–2 Amounts paid to acquire or produce tangible property.

(a) through (i) [Reserved]. For further guidance, see the table of contents for § 1.263(a)–2T(a) through (i) under § 1.263(a)–0T.

§ 1.263(a)–3 Amounts paid to improve tangible property.

(a) through (q) [Reserved]. For further guidance, see the table of contents for § 1.263(a)–3T(a) though (q) under § 1.263(a)–0T.

* * * * *

■ **Par. 24.** Section 1.263(a)–0T is added to read as follows:

§ 1.263(a)–0T Table of contents (temporary).

This section lists the table of contents for §§ 1.263(a)–1T, 1.263(a)–2T, and 1.263(a)–3T.

§ 1.263(a)–1T Capital expenditures; in general (temporary).

(a) General rule for capital expenditures.
(b) Coordination with section 263A.
(c) Examples of capital expenditures.
(d) Amounts paid to sell property.
(1) In general.
(2) Treatment of capitalized amount.
(3) Examples.
(e) Amount paid.
(f) Accounting method changes.
(g) Effective/applicability date.
(h) Expiration date.

§ 1.263(a)–2T Amounts paid to acquire or produce tangible property (temporary).

(a) Overview.
(b) Definitions.
(1) Amount paid.
(2) Personal property.
(3) Real property.
(4) Produce.
(c) Coordination with other provisions of the Internal Revenue Code.
(1) In general.
(2) Materials and supplies.
(d) Acquired or produced tangible property.
(1) Requirement to capitalize.
(2) Examples.
(e) Defense or perfection of title to property.
(1) In general.
(2) Examples.
(f) Transaction costs.
(1) In general.
(2) Scope of facilitate.
(i) In general.
(ii) Inherently facilitative amounts.
(iii) Special rule for acquisitions of real property.
(A) In general.
(B) Acquisitions of real and personal property in a single transaction.
(iv) Employee compensation and overhead costs.
(A) In general.
(B) Election to capitalize.
(3) Treatment of transaction costs.
(i) In general.
(ii) Treatment of inherently facilitative amounts.
(4) Examples.
(g) De minimis rule.
(1) In general.
(2) Exceptions to de minimis rule.
(3) Additional rules.
(4) Election to capitalize.
(5) Materials and supplies.
(6) Definition of applicable financial statement.
(7) Application to consolidated group member.
(8) Examples.
(h) Treatment of capital expenditures.
(i) Recovery of capitalized amounts.
(1) In general.
(2) Examples.
(j) Accounting method changes.
(k) Effective/applicability date.
(l) Expiration date.

§ 1.263(a)–3T Amounts paid to improve tangible property (temporary).

(a) Overview.
(b) Definitions.
(1) Amount paid.
(2) Personal property.
(3) Real property.
(4) Owner.
(c) Coordination with other provisions of the Internal Revenue Code.
(1) In general.
(2) Materials and supplies.
(3) Exception for amounts subject to de minimis rule.
(4) Example.
(d) Requirement to capitalize amounts paid for improvements.
(e) Determining the unit of property.
(1) In general.
(2) Building.
(i) In general.
(ii) Application of improvement rules to a building.
(A) Building structure.
(B) Building system.
(iii) Condominium.
(A) In general.
(B) Application of improvement rules to a condominium.
(iv) Cooperative.
(A) In general.
(B) Application of improvement rules to a cooperative.
(v) Leased building.
(A) In general.
(B) Application of improvement rules to a leased building.
(*1*) Entire building.
(*2*) Portion of building.
(*3*) Property other than a building.
(i) In general.
(ii) Plant property.
(A) Definition.
(B) Unit of property for plant property.
(iii) Network assets.
(A) Definition.
(B) Unit of property for network assets.
(iv) Leased property other than buildings.
(4) Improvements to property.
(5) Additional rules.
(i) Year placed in service.
(ii) Change in subsequent taxable year.
(6) Examples.
(f) Special rules for determining improvement costs.
(1) Improvements to leased property.
(i) In general.
(ii) Lessee improvements.
(A) Requirement to capitalize.
(B) Unit of property for lessee improvements.

(iii) Lessor improvements.
(A) Requirement to capitalize.
(B) Unit of property for lessor improvements.
(iv) Examples.
(2) Compliance with regulatory requirements.
(3) Certain costs incurred during an improvement.
(i) In general.
(ii) Exception for individuals' residences.
(4) Aggregate of related amounts.
(g) Safe harbor for routine maintenance on property other than buildings.
(1) In general.
(2) Rotable and temporary spare parts.
(3) Exceptions.
(4) Class life.
(5) Examples.
(h) Capitalization of betterments.
(1) In general.
(2) Betterments to buildings.
(3) Application of general rule.
(i) Facts and circumstances.
(ii) Unavailability of replacement parts.
(iii) Appropriate comparison.
(A) In general.
(B) Normal wear and tear.
(C) Particular event.
(4) Examples.
(i) Capitalization of restorations.
(1) In general.
(2) Restorations of buildings.
(3) Rebuild to like-new condition.
(4) Replacement of a major component or substantial structural part.
(5) Examples.
(j) Capitalization of amounts to adapt property to a new or different use.
(1) In general.
(2) Adapting buildings to new or different use.
(3) Examples.
(k) Optional regulatory accounting method.
(1) In general.
(2) Eligibility for regulatory accounting method.
(3) Description of regulatory accounting method.
(4) Examples.
(l) Methods of accounting authorized in published guidance.
(m) Treatment of capital expenditures.
(n) Recovery of capitalized amounts.
(o) Accounting method changes.
(p) Effective/applicability date.
(q) Expiration date.

■ **Par. 25.** Section 1.263(a)–1 is revised to read as follows:

§ 1.263(a)–1 Capital expenditures; in general.

(a) through (c) [Reserved]. For further guidance, see § 1.263(a)&1T(a) through (c).

(d) through (h) [Reserved]. For further guidance, see § 1.263(a)–1T(d) through (h).

■ **Par. 26.** Section 1.263(a)–1T is added to read as follows:

§ 1.263(a)–1T Capital expenditures; in general (temporary)—

(a) *General rule for capital expenditures.* Except as provided in chapter 1 of the Internal Revenue Code, no deduction is allowed for—

(1) Any amount paid for new buildings or for permanent improvements or betterments made to increase the value of any property or estate; or

(2) Any amount paid in restoring property or in making good the exhaustion thereof for which an allowance is or has been made.

(b) *Coordination with section 263A.* Section 263(a) generally requires taxpayers to capitalize an amount paid to acquire, produce, or improve real or personal tangible property. Section 263A generally prescribes the direct and indirect costs that must be capitalized to property produced by the taxpayer and property acquired for resale.

(c) *Examples of capital expenditures.* The following amounts paid are examples of capital expenditures:

(1) An amount paid to acquire or produce a unit of real or personal tangible property. *See* § 1.263(a)–2T.

(2) An amount paid to improve a unit of real or personal tangible property. *See* § 1.263(a)–3T.

(3) An amount paid to acquire or create intangibles. *See* § 1.263(a)–4.

(4) An amount paid or incurred to facilitate an acquisition of a trade or business, a change in capital structure of a business entity, and certain other transactions. *See* § 1.263(a)–5.

(5) An amount paid to acquire or create interests in land, such as easements, life estates, mineral interests, timber rights, zoning variances, or other interests in land.

(6) An amount assessed and paid under an agreement between bondholders or shareholders of a corporation to be used in a reorganization of the corporation or voluntary contributions by shareholders to the capital of the corporation for any corporate purpose. *See* section 118 and § 1.118–1.

(7) An amount paid by a holding company to carry out a guaranty of dividends at a specified rate on the stock of a subsidiary corporation for the purpose of securing new capital for the subsidiary and increasing the value of its stockholdings in the subsidiary. This amount must be added to the cost of the stock in the subsidiary.

(d) *Amounts paid to sell property*—(1) *In general.* Commissions and other transaction costs paid to facilitate the sale of property generally must be capitalized. However, in the case of dealers in property, amounts paid to facilitate the sale of property are treated as ordinary and necessary business expenses. See § 1.263(a)–5(g) for the treatment of amounts paid to facilitate the disposition of assets that constitute a trade or business.

(2) *Treatment of capitalized amount.* Amounts capitalized under paragraph (d)(1) of this section are treated as a reduction in the amount realized and generally are taken into account either in the taxable year in which the sale occurs or in the taxable year in which the sale is abandoned if a loss deduction is permissible. The capitalized amount is not added to the basis of the property and is not treated as an intangible under § 1.263(a)–4.

(3) *Examples.* The following examples, which assume the sale is not an installment sale under section 453, illustrate the rules of this paragraph (d):

Example 1. Sales costs of real property. X owns a parcel of real estate. X sells the real estate and pays legal fees, recording fees, and sales commissions to facilitate the sale. X must capitalize the fees and commissions and, in the taxable year of the sale, offset the fees and commissions against the amount realized from the sale of the real estate.

Example 2. Sales costs of dealers. Assume the same facts as in *Example 1,* except that X is a dealer in real estate. The commissions and fees paid to facilitate the sale of the real estate are treated as ordinary and necessary business expenses under section 162.

Example 3. Sales costs of personal property used in a trade or business. X owns a truck for use in X's trade or business. X decides to sell the truck on November 15, Year 1. X pays for an appraisal to determine a reasonable asking price. On February 15, Year 2, X sells the truck to Y. X is required to capitalize in Year 1 the amount paid to appraise the truck and, in Year 2, is required to offset the amount paid against the amount realized from the sale of the truck.

Example 4. Costs of abandoned sale of personal property used in a trade or business. Assume the same facts as in *Example 3,* except that, instead of selling the truck on February 15, Year 2, X decides on that date not to sell the truck and takes the truck off the market. X is required to capitalize in Year 1 the amount paid to appraise the truck. However, X may treat the amount paid to appraise the truck as a loss under section 165 in Year 2 when the sale is abandoned.

Example 5. Sales costs of personal property not used in a trade or business. Assume the same facts as in *Example 3,* except that X does not use the truck in X's trade or business, but instead uses it for personal purposes. X decides to sell the truck and on November 15, Year 1, X pays for an appraisal to determine a reasonable asking price. On February 15, Year 2, X sells the truck to *Y.*

X is required to capitalize in Year 1 the amount paid to appraise the truck and, in Year 2, is required to offset the amount paid against the amount realized from the sale of the truck.

Example 6. Costs of abandoned sale of personal property not used in a trade or business. Assume the same facts as in *Example 5,* except that, instead of selling the truck on February 15, Year 2, X decides on that date not to sell the truck and takes the truck off the market. X is required to capitalize in Year 1 the amount paid to appraise the truck. Although the sale is abandoned in Year 2, X may not treat the amount paid to appraise the truck as a loss under section 165 because the truck was not used in X's trade or business or in a transaction entered into for profit.

(e) *Amount paid.* In the case of a taxpayer using an accrual method of accounting, the terms *amount paid* and *payment* mean a liability incurred (within the meaning of § 1.446–1(c)(1)(ii)). A liability may not be taken into account under this section prior to the taxable year during which the liability is incurred.

(f) *Accounting method changes.* Except as otherwise provided in this section, a change to comply with this section is a change in method of accounting to which the provisions of sections 446 and 481, and the regulations thereunder apply. A taxpayer seeking to change to a method of accounting permitted in this section must secure the consent of the Commissioner in accordance with § 1.446–1(e) and follow the administrative procedures issued under § 1.446–1(e)(3)(ii) for obtaining the Commissioner's consent to change its accounting method.

(g) *Effective/applicability date.* This section applies to taxable years beginning on or after January 1, 2012. For the applicability of regulations to taxable years beginning before January 1, 2012, see § 1.263(a)–1 in effect prior to January 1, 2012 (§ 1.263(a)–1 as contained in 26 CFR part 1 edition revised as of April 1, 2011).

(h) *Expiration date.* The applicability of this section expires on December 23, 2014.

■ **Par. 27.** Section 1.263(a)–2 is revised to read as follows:

§ 1.263(a)–2 Amounts paid to acquire or produce tangible property.

(a) through (h) [Reserved]. For further guidance, see §§ 1.263(a)–2T(a) through (h).

(i) through (l) [Reserved]. For further guidance, see §§ 1.263(a)–2T(i) through (l).

■ **Par. 28.** Section 1.263(a)–2T is added to read as follows:

§ 1.263(a)–2T Amounts paid to acquire or produce tangible property (temporary).

(a) *Overview.* This section provides rules for applying section 263(a) to amounts paid to acquire or produce a unit of real or personal property. Paragraph (b) of this section contains definitions. Paragraph (c) of this section contains the rules for coordinating this section with other provisions of the Internal Revenue Code. Paragraph (d) of this section provides the general requirement to capitalize amounts paid to acquire or produce a unit of real or personal property. Paragraph (e) of this section provides the requirement to capitalize amounts paid to defend or perfect title to real or personal property. Paragraph (f) of this section provides the rules for determining the extent to which taxpayers must capitalize transaction costs related to the acquisition of property. Paragraph (g) of this section provides a de minimis rule for certain amounts paid for the acquisition or production of property. Paragraphs (h) and (i) of this section address the treatment and recovery of capital expenditures. Paragraph (j) of this section provides for changes in methods of accounting to comply with this section, and paragraphs (k) and (l) of this section provide the effective, applicability, and expiration dates for the rules under this section.

(b) *Definitions.* For purposes of this section, the following definitions apply:

(1) *Amount paid.* In the case of a taxpayer using an accrual method of accounting, the terms *amount paid* and *payment* mean a liability incurred (within the meaning of § 1.446–1(c)(1)(ii)). A liability may not be taken into account under this section prior to the taxable year during which the liability is incurred.

(2) *Personal property* means tangible personal property as defined in § 1.48–1(c).

(3) *Real property* means land and improvements thereto, such as buildings or other inherently permanent structures (including items that are structural components of the buildings or structures) that are not personal property as defined in paragraph (b)(2) of this section. Any property that constitutes other tangible property under § 1.48–1(d) is treated as real property for purposes of this section. Local law is not controlling in determining whether property is real property for purposes of this section.

(4) *Produce* means construct, build, install, manufacture, develop, create, raise, or grow. This definition is intended to have the same meaning as the definition used for purposes of section 263A(g)(1) and § 1.263A–2(a)(1)(i), except that improvements are excluded from the definition in this paragraph (b)(4) and are separately defined and addressed in § 1.263(a)–3T.

(c) *Coordination with other provisions of the Internal Revenue Code*—(1) *In general.* Except as provided under the de minimis rule in paragraph (g) of this section, nothing in this section changes the treatment of any amount that is specifically provided for under any provision of the Internal Revenue Code or regulations thereunder other than section 162(a) or section 212 and the regulations under those sections. For example, see section 263A requiring taxpayers to capitalize the direct and indirect costs of producing property or acquiring property for resale. See also section 195 requiring taxpayers to capitalize certain costs as start-up expenditures.

(2) *Materials and supplies.* Except as provided under the de minimis rule in paragraph (g) of this section, nothing in this section changes the treatment of amounts paid to acquire or produce property that is properly treated as materials and supplies under § 1.162–3T.

(d) *Acquired or produced tangible property*—(1) *Requirement to capitalize.* Except as provided in paragraph (g) of this section (providing the de minimis rule) and in § 1.162–3T (relating to materials and supplies), a taxpayer must capitalize amounts paid to acquire or produce a unit of real or personal property (as determined under § 1.263(a)–3T(e)), including leasehold improvement property, land and land improvements, buildings, machinery and equipment, and furniture and fixtures. Amounts paid to acquire or produce a unit of real or personal property include the invoice price, transaction costs as determined under paragraph (f) of this section, and costs for work performed prior to the date that the unit of property is placed in service by the taxpayer (without regard to any applicable convention under section 168(d)). A taxpayer also must capitalize amounts paid to acquire real or personal property for resale and to produce real or personal property. See section 263A for the costs required to be capitalized to property produced by the taxpayer or to property acquired for resale.

(2) *Examples.* The rules of this section are illustrated by the following examples, in which it is assumed that the taxpayer does not apply the de minimis rule under paragraph (g) of this section:

Example 1. Acquisition of personal property. X purchases new cash registers for use in its retail store located in leased space in a shopping mall. Assume each cash

register is a unit of property as determined under § 1.263(a)–3T(e) and is not a material or supply under § 1.162–3T. X must capitalize under this paragraph (d)(1) the amount paid to acquire each cash register.

Example 2. Acquisition of personal property that is a material or supply; coordination with § 1.162–3T. X operates a fleet of aircraft. In Year 1, X acquires a stock of component parts, which it intends to use to maintain and repair its aircraft. X does not make elections under § 1.162–3T(d) to treat the materials and supplies as capital expenditures. In Year 2, X uses the component parts in the repair and maintenance of its aircraft. Because the parts are materials and supplies under § 1.162–3T, X is not required to capitalize the amounts paid for the parts under this paragraph (d)(1). Rather, X must apply the rules in § 1.162–3T, governing the treatment of materials and supplies, to determine the treatment of these amounts.

Example 3. Acquisition of unit of personal property; coordination with § 1.162–3T. X operates a rental business that rents out a variety of small individual items to customers (rental items). X maintains a supply of rental items on hand to replace worn or damaged items. X purchases a large quantity of rental items to be used in its business. Assume that each of these rental items is a unit of property under § 1.263(a)–3T(e). Also assume that a portion of the rental items are materials and supplies under § 1.162–3T(c)(1). Under paragraph (d)(1) of this section, X must capitalize the amounts paid for the rental items that are not materials and supplies under § 1.162–3T(c)(1). However, X must apply the rules in § 1.162–3T to determine the treatment of the rental items that are materials and supplies under § 1.162–3T(c)(1).

Example 4. Acquisition or production cost. X purchases and produces jigs, dies, molds, and patterns for use in the manufacture of X's products. Assume that each of these items is a unit of property as determined under § 1.263(a)–3T(e) and is not a material and supply under § 1.162–3T(c)(1). X is required to capitalize under paragraph (d)(1) of this section the amounts paid to acquire and produce the jigs, dies, molds, and patterns. See section 263A for the costs required to be capitalized to the property acquired or produced by X.

Example 5. Acquisition of land. X purchases a parcel of undeveloped real estate. X must capitalize under paragraph (d)(1) of this section the amount paid to acquire the real estate. See paragraph (f) of this section for the treatment of amounts paid to facilitate the acquisition of real property.

Example 6. Acquisition of building. X purchases a building. X must capitalize under paragraph (d)(1) of this section the amount paid to acquire the building. See paragraph (f) of this section for the treatment of amounts paid to facilitate the acquisition of real property.

Example 7. Acquisition of property for resale and production of property for sale. X purchases goods for resale and produces other goods for sale. X must capitalize under paragraph (d)(1) of this section the amounts paid to acquire and produce the goods. See section 263A for the costs required to be capitalized to the property produced or property acquired for resale.

Example 8. Production of building. X constructs a building. X must capitalize under paragraph (d)(1) of this section the amount paid to construct the building. See section 263A for the costs required to be capitalized to the real property produced by X.

Example 9. Acquisition of assets constituting a trade or business. Y owns tangible and intangible assets that constitute a trade or business. X purchases all the assets of Y in a taxable transaction. X must capitalize under paragraph (d)(1) of this section the amount paid for the tangible assets of Y. See § 1.263(a)–4 for the treatment of amounts paid to acquire intangibles and § 1.263(a)–5 for the treatment of amounts paid to facilitate the acquisition of assets that constitute a trade or business. See section 1060 for special allocation rules for certain asset acquisitions.

Example 10. Work performed prior to placing the property in service. In Year 1, X purchases a building for use as a business office. Prior to placing the building in service, X incurs costs to repair cement steps, refinish wood floors, patch holes in walls, and paint the interiors and exteriors of the building. In Year 2, X places the building in service and begins using the building as its business office. Assume that the work that X performs does not constitute an improvement to the building or its structural components under § 1.263(a)–3T. Under § 1.263–3T(e)(2)(i), the building and its structural components is a single unit of property. Under paragraph (d)(1) of this section, the amounts paid must be capitalized as costs of acquiring the building because they were for work performed prior to X's placing the building in service.

Example 11. Work performed prior to placing the property in service. In January Year 1, X purchases a new machine for use in an existing production line of its manufacturing business. Assume that the machine is a unit of property under § 1.263(a)–3T(e) and is not a material or supply under § 1.162–3T. After the machine is installed, X performs a critical test on the machine to ensure that it will operate in accordance with quality standards. On November 1, Year 1, the critical test is complete, and X places the machine in service on the production line. X performs periodic quality control testing after the machine is placed in service. Under paragraph (d)(1) of this section, the amounts paid for the installation and the critical test performed before the machine is placed in service must be capitalized as costs of acquiring the machine. However, amounts paid for periodic quality control testing after X placed the machine in service are not required to be capitalized as a cost of acquiring the machine.

(e) *Defense or perfection of title to property*—(1) *In general.* Amounts paid to defend or perfect title to real or personal property are amounts paid to acquire or produce property within the meaning of this section and must be capitalized. See section 263A for the costs required to be capitalized to property produced by the taxpayer or to property acquired for resale.

(2) *Examples.* The following examples illustrate the rule of paragraph (e):

Example 1. Amounts paid to contest condemnation. X owns real property located in County. County files an eminent domain complaint condemning a portion of X's property to use as a roadway. X hires an attorney to contest the condemnation. The amounts that X paid to the attorney must be capitalized because they were to defend X's title to the property.

Example 2. Amounts paid to invalidate ordinance. X is in the business of quarrying and supplying for sale sand and stone in a certain municipality. Several years after X establishes its business, the municipality in which it is located passes an ordinance that prohibits the operation of X's business. X incurs attorney's fees in a successful prosecution of a suit to invalidate the municipal ordinance. X prosecutes the suit to preserve its business activities and not to defend X's title in the property. Therefore, the attorney's fees that X paid are not required to be capitalized under paragraph (e)(1) of this section. See section 263A for the rules requiring direct and allocable indirect costs (including otherwise deductible costs) to be capitalized to property produced or property acquired for resale.

Example 3. Amounts paid to challenge building line. The board of public works of a municipality establishes a building line across X's business property, adversely affecting the value of the property. X incurs legal fees in unsuccessfully litigating the establishment of the building line. The amounts X paid to the attorney must be capitalized because they were to defend X's title to the property.

(f) *Transaction costs*—(1) *In general.* A taxpayer must capitalize amounts paid to facilitate the acquisition or production of real or personal property. See section 263A for the costs required to be capitalized to property produced by the taxpayer or to property acquired for resale. See § 1.263(a)–5 for the treatment of amounts paid to facilitate the acquisition of assets that constitute a trade or business. See § 1.167(a)–5 for allocations of facilitative costs between depreciable and non-depreciable property.

(2) *Scope of facilitate*—(i) *In general.* Except as otherwise provided in this section, an amount is paid to facilitate the acquisition of real or personal property if the amount is paid in the process of investigating or otherwise pursuing the acquisition. Whether an amount is paid in the process of investigating or otherwise pursuing the acquisition is determined based on all of the facts and circumstances. In determining whether an amount is paid to facilitate an acquisition, the fact that the amount would (or would not) have been paid but for the acquisition is

relevant but is not determinative. Amounts paid to facilitate an acquisition include, but are not limited to, inherently facilitative amounts specified in paragraph (f)(2)(ii) of this section.

(ii) *Inherently facilitative amounts.* An amount is paid in the process of investigating or otherwise pursuing the acquisition of real or personal property if the amount is inherently facilitative. An amount is inherently facilitative if the amount is paid for—

(A) Transporting the property (for example, shipping fees and moving costs);

(B) Securing an appraisal or determining the value or price of property;

(C) Negotiating the terms or structure of the acquisition and obtaining tax advice on the acquisition;

(D) Application fees, bidding costs, or similar expenses;

(E) Preparing and reviewing the documents that effectuate the acquisition of the property (for example, preparing the bid, offer, sales contract, or purchase agreement);

(F) Examining and evaluating the title of property;

(G) Obtaining regulatory approval of the acquisition or securing permits related to the acquisition, including application fees;

(H) Conveying property between the parties, including sales and transfer taxes, and title registration costs;

(I) Finders' fees or brokers' commissions, including amounts paid that are contingent on the successful closing of the acquisition;

(J) Architectural, geological, engineering, environmental, or inspection services pertaining to particular properties; or

(K) Services provided by a qualified intermediary or other facilitator of an exchange under section 1031.

(iii) *Special rule for acquisitions of real property*—(A) *In general.* Except as provided in paragraph (f)(2)(ii) of this section (relating to inherently facilitative amounts), an amount paid by the taxpayer in the process of investigating or otherwise pursuing the acquisition of real property does not facilitate the acquisition if it relates to activities performed in the process of determining whether to acquire real property and which real property to acquire.

(B) *Acquisitions of real and personal property in a single transaction.* An amount paid by the taxpayer in the process of investigating or otherwise pursuing the acquisition of personal property facilitates the acquisition of such personal property even if such property is acquired in a single transaction that also includes the acquisition of real property subject to the special rule set out in paragraph (f)(2)(iii)(A) of this section. A taxpayer may use a reasonable allocation to determine which costs facilitate the acquisition of personal property and which costs relate to the acquisition of real property and are subject to the special rule of paragraph (f)(2)(iii)(A) of this section.

(iv) *Employee compensation and overhead costs*—(A) *In general.* For purposes of paragraph (f) of this section, amounts paid for employee compensation (within the meaning of § 1.263(a)–4(e)(4)(ii)) and overhead are treated as amounts that do not facilitate the acquisition of real or personal property. See section 263A, however, for the treatment of employee compensation and overhead costs required to be capitalized to property produced by the taxpayer or to property acquired for resale.

(B) *Election to capitalize.* A taxpayer may elect to treat amounts paid for employee compensation or overhead as amounts that facilitate the acquisition of property. The election is made separately for each acquisition and applies to employee compensation or overhead, or both. For example, a taxpayer may elect to treat overhead, but not employee compensation, as amounts that facilitate the acquisition of property. A taxpayer makes the election by treating the amounts to which the election applies as amounts that facilitate the acquisition in the taxpayer's timely filed original Federal income tax return (including extensions) for the taxable year during which the amounts are paid. In the case of an S corporation or a partnership, the election is made by the S corporation or by the partnership, and not by the shareholders or partners. A taxpayer may revoke an election made under this paragraph (f)(2)(iv)(B) with respect to each acquisition only by filing a request for a private letter ruling and obtaining the Commissioner's consent to revoke the election. The Commissioner may grant a request to revoke this election if the taxpayer can demonstrate good cause for the revocation. An election may not be made or revoked through the filing of an application for change in accounting method or, before obtaining the Commissioner's consent to make the late election or to revoke the election, by filing an amended Federal income tax return.

(3) *Treatment of transaction costs*—(i) *In general.* All amounts paid to facilitate the acquisition or production of real or personal property are capital expenditures. Facilitative amounts allocable to real or personal property must be included in the basis of the property acquired or produced.

(ii) *Treatment of inherently facilitative amounts.* Inherently facilitative amounts allocable to real or personal property are capital expenditures related to such property even if the property is not eventually acquired or produced. Inherently facilitative amounts allocable to real or personal property not acquired may be allocated to those properties and recovered as appropriate in accordance with the applicable provisions of the Internal Revenue Code and the regulations thereunder (for example, sections 165, 167, or 168). See paragraph (i) of this section for the recovery of capitalized amounts.

(4) *Examples.* The following examples illustrate the rules of paragraph (f) of this section:

Example 1. Broker's fees to facilitate an acquisition. X decides to purchase a building in which to relocate its offices and hires a real estate broker to find a suitable building. X pays fees to the broker to find property for X to acquire. Under paragraph (f)(2)(ii)(I) of this section, X must capitalize the amounts paid to the broker because these costs are inherently facilitative of the acquisition of real property.

Example 2. Inspection and survey costs to facilitate an acquisition. X decides to purchase building A and pays amounts to third-party contractors for a termite inspection and an environmental survey of building A. Under paragraph (f)(2)(ii)(J) of this section, X must capitalize the amounts paid for the inspection and the survey of the building because these costs are inherently facilitative of the acquisition of real property.

Example 3. Moving costs to facilitate an acquisition. X purchases all the assets of Y and, in connection with the purchase, hires a transportation company to move storage tanks from Y's plant to X's plant. Under paragraph (f)(2)(ii)(A) of this section, X must capitalize the amount paid to move the storage tanks from Y's plant to X's plant because this cost is inherently facilitative to the acquisition of personal property.

Example 4. Geological and geophysical costs; coordination with other provisions. X is in the business of exploring, purchasing, and developing properties in the United States for the production of oil and gas. X considers acquiring a particular property but first incurs costs for the services of an engineering firm to perform geological and geophysical studies to determine if the property is suitable for oil or gas production. Assume that the amounts that X paid to the engineering firm constitute geological and geophysical expenditures under section 167(h). Although the amounts that X paid for the geological and geophysical services are inherently facilitative to the acquisition of real property under paragraph (f)(2)(ii)(J) of this section, X is not required to include those amounts in the basis of the real

property acquired. Rather, under paragraph (c) of this section, X must capitalize these costs separately and amortize such costs as required under section 167(h) (addressing the amortization of geological and geophysical expenditures).

Example 5. Scope of facilitate. X is in the business of providing legal services to clients. X is interested in acquiring a new conference table for its office. X hires and incurs fees for an interior designer to shop for, evaluate, and make recommendations to X regarding which new table to acquire. Under paragraphs (f)(1) and (2) of this section, X must capitalize the amounts paid to the interior designer to provide these services because they are paid in the process of investigating or otherwise pursuing the acquisition of personal property.

Example 6. Transaction costs allocable to multiple properties. X, a retailer, wants to acquire land for the purpose of building a new distribution facility for its products. X considers various properties on highway A in state B. X incurs fees for the services of an architect to advise and evaluate the suitability of the sites for the type of facility that X intends to construct on the selected site. X must capitalize the architect fees as amounts paid to acquire land because these amounts are inherently facilitative to the acquisition of land under paragraph (f)(2)(ii)(J) of this section.

Example 7. Transaction costs allocable to multiple properties. X, a retailer, wants to acquire land for the purpose of building a new distribution facility for its products. X considers various properties on highway A in state B. X incurs fees for the services of an architect to prepare preliminary floor plans for a building that X could construct at any of the sites. Under these facts, the architect's fees are not inherently facilitative to the acquisition of land under paragraph (f)(2)(iii)(J) of this section but are allocable as construction costs of the building under section 263A. Therefore, X does not capitalize the architect fees as amounts paid to acquire land but instead must capitalize these costs as indirect costs allocable to the production of property under section 263A.

Example 8. Special rule for acquisitions of real property. X owns several retail stores. X decides to examine the feasibility of opening a new store in city A. In October, Year 1, X hires and incurs costs for a development consulting firm to study city A and perform market surveys, evaluate zoning and environmental requirements, and make preliminary reports and recommendations as to areas that X should consider for purposes of locating a new store. In December, Year 1, X continues to consider whether to purchase real property in city *A* and which property to acquire. X hires, and incurs fees for, an appraiser to perform appraisals on two different sites to determine a fair offering price for each site. In March, Year 2, X decides to acquire one of these two sites for the location of its new store. At the same time, X determines not to acquire the other site. Under paragraph (f)(2)(iii) of this section, X is not required to capitalize amounts paid to the development consultant in Year 1 because the amounts relate to activities performed in the process of determining whether to acquire real property and which real property to acquire and the amounts are not inherently facilitative costs under paragraph (f)(2)(ii) of this section. However, X must capitalize amounts paid to the appraiser in Year 1 because the appraisal costs are inherently facilitative costs under paragraph (f)(2)(ii)(B) of this section. In Year 2, X must include the appraisal costs allocable to property acquired in the basis of the property acquired and may recover the appraisal costs allocable to the property not acquired in accordance with paragraphs (f)(3)(ii) and (i) of this section.

Example 9. Employee compensation and overhead. X, a freight carrier, maintains an acquisition department whose sole function is to arrange for the purchase of vehicles and aircraft from manufacturers or other parties to be used in its freight carrying business. As provided in paragraph (f)(2)(iv)(A) of this section, X is not required to capitalize any portion of the compensation paid to employees in its acquisition department or any portion of its overhead allocable to its acquisition department. However, under paragraph (f)(2)(iv)(B) of this section, X may elect to capitalize the compensation and overhead costs allocable to the acquisition of a vehicle or aircraft by treating these amounts as costs that facilitate the acquisition of that property in its timely filed original federal income tax return for the year the amounts are paid.

(g) *De minimis rule*—(1) *In general.* Except as otherwise provided in this paragraph (g), a taxpayer is not required to capitalize under paragraph (d)(1) of this section nor treat as a material or supply under § 1.162–3T(a) amounts paid for the acquisition or production (including any amounts paid to facilitate the acquisition or production) of a unit of property (as determined under § 1.263(a)–3T(e)) or for the acquisition or production of any material or supply (as defined in § 1.162–3T(c)(1)) if—

(i) The taxpayer has an applicable financial statement (as defined in paragraph (g)(6) of this section);

(ii) The taxpayer has at the beginning of the taxable year written accounting procedures treating as an expense for non-tax purposes the amounts paid for property costing less than a certain dollar amount;

(iii) The taxpayer treats the amounts paid during the taxable year as an expense on its applicable financial statement in accordance with its written accounting procedures; and

(iv) The total aggregate of amounts paid and not capitalized under paragraph (g)(1) of this section and § 1.162–3T(f) (materials and supplies) for the taxable year are less than or equal to the greater of—

(A) 0.1 percent of the taxpayer's gross receipts for the taxable year as determined for Federal income tax purposes; or

(B) 2 percent of the taxpayer's total depreciation and amortization expense for the taxable year as determined in its applicable financial statement.

(2) *Exceptions to de minimis rule.* The de minimis rule in paragraph (g)(1) of this section does not apply to the following:

(i) Amounts paid for property that is or is intended to be included in inventory property; and

(ii) Amounts paid for land.

(3) *Additional rules.* Property to which a taxpayer applies the de minimis rule contained in paragraph (g) of this section is not treated upon sale or other disposition as a capital asset under section 1221 or as property used in the trade or business under section 1231. The cost of property to which a taxpayer properly applies the de minimis rule contained in paragraph (g) of this section is not required to be capitalized under section 263A to a separate unit of property but may be required to be capitalized as a cost of other property if incurred by reason of the production of the other property. See, for example, § 1.263A–1(e)(3)(ii)(R) requiring taxpayers to capitalize the cost of tools and equipment allocable to property produced or property acquired for resale.

(4) *Election to capitalize.* A taxpayer may elect not to apply the de minimis rule contained in paragraph (g)(1) of this section. An election made under this paragraph (g)(4) may apply to any unit of property during the taxable year to which paragraph (g)(1) of this section would apply (but for the election under this paragraph (g)(4)). A taxpayer makes the election by capitalizing the amounts paid to acquire or produce the unit of property in the taxable year the amounts are paid and by beginning to recover the costs when the unit of property is placed in service by the taxpayer for the purposes of determining depreciation under the applicable provisions of the Internal Revenue Code and the regulations thereunder. A taxpayer must make this election on its timely filed original Federal income tax return (including extensions) for the taxable year the unit of property is placed in service by the taxpayer for the purposes of determining depreciation. In the case of an S corporation or a partnership, the election is made by the S corporation or by the partnership, and not by the shareholders or partners. A taxpayer may revoke an election made under this paragraph (g)(4) with respect to a unit of property only by filing a request for a private letter ruling and obtaining the Commissioner's consent to revoke the election. The Commissioner may grant a request to revoke this election if the

taxpayer can demonstrate good cause for the revocation. An election may not be made or revoked through the filing of an application for change in accounting method or by filing an amended Federal income tax return.

(5) *Materials and supplies.* A taxpayer must treat amounts paid to acquire or produce a unit of property that is a material or supply as defined under § 1.162–3T(c)(1) under § 1.162–3T unless the taxpayer elects under § 1.162–3T(f) to apply the de minimis rule to that property under this paragraph (g). Property to which a taxpayer applies the de minimis rule contained in paragraph (g) of this section is not treated as a material or supply under § 1.162–3T.

(6) *Definition of applicable financial statement.* For purposes of this section (g), the taxpayer's applicable financial statement is the taxpayer's financial statement listed in paragraphs (g)(6)(i) through (iii) of this section that has the highest priority (including within paragraph (g)(6)(ii) of this section). The financial statements are, in descending priority—

(i) A financial statement required to be filed with the Securities and Exchange Commission (SEC) (the 10–K or the Annual Statement to Shareholders);

(ii) A certified audited financial statement that is accompanied by the report of an independent CPA (or in the case of a foreign entity, by the report of a similarly qualified independent professional), that is used for—

(A) Credit purposes;

(B) Reporting to shareholders, partners, or similar persons; or

(C) Any other substantial non-tax purpose; or

(iii) A financial statement (other than a tax return) required to be provided to the federal or a state government or any federal or state agencies (other than the SEC or the Internal Revenue Service).

(7) *Application to consolidated group member.* If the taxpayer is a member of a consolidated group for federal income tax purposes and the member's financial results are reported on the applicable financial statement (as defined in paragraph (g)(6) of this section) for the consolidated group then, for purposes of paragraphs (g)(1)(ii) and (g)(1)(iii) of this section, the written accounting procedures provided for the group and utilized for the group's applicable financial statement may be treated as the written accounting procedures of the member.

(8) *Examples.* The following examples illustrate the rule of this paragraph (g):

Example 1. De minimis rule. X purchases 10 printers at $200 each for a total cost of $2,000. Assume that each printer is a unit of property under § 1.263(a)–3T(e) and is not a material or supply under § 1.162–3T. X has an applicable financial statement and a written policy at the beginning of the taxable year to expense amounts paid for property costing less than $500. X treats the amounts paid for the printers as an expense on its applicable financial statement. Assume that the total aggregate amounts treated as de minimis and not capitalized by X under paragraphs (g)(1)(i), (ii), and (iii) of this section, including the amounts paid for the printers, are less than or equal to the greater of 0.1 percent of total gross receipts or 2 percent of X's total financial statement depreciation under paragraph (g)(1)(iv) of this section. X is not required to capitalize the amounts paid for the 10 printers under paragraph (g)(1) of this section.

Example 2. De minimis rule not met. X is a member of a consolidated group for federal income tax purposes. X's financial results are reported on the consolidated applicable financial statements for the affiliated group. X's affiliated group has a written policy at the beginning of Year 1, which is followed by X, to expense amounts paid for property costing less than $500. In Year 1, X pays $160,000 to purchase 400 computers at $400 each. Assume that each computer is a unit of property under § 1.263(a)–3T(e), is not a material or supply under § 1.162–3T, and that X intends to treat the cost of only the computers as de minimis under paragraph (g)(1) of this section. X treats the amounts paid for the computers as an expense on the applicable financial statements for the affiliated group. For its Year 1 taxable year, X has gross receipts of $125,000,000 for Federal tax purposes and reports $7,000,000 of it's own depreciation and amortization expense on the affiliated group's applicable financial statement. Thus, in order to meet the criteria of paragraph (g)(1)(iv) of this section for Year 1, the total aggregate amounts paid and not capitalized by X under paragraphs (g)(1)(i), (ii), and (iii) of this section must be less than or equal to the greater of $125,000 (0.1 percent of X's total gross receipts of $125,000,000) or $140,000 (2 percent of X's total deprecation and amortization of $7,000,000). Because X pays $160,000 for the computers and this amount exceeds $140,000, the greater of the two limitations provided in paragraph (g)(1)(iv) of this section, X may not apply the de minimis rule under paragraph (g)(1) of this section to the total amounts paid for the 400 computers.

Example 3. De minimis rule; election to capitalize. Assume the same facts as in *Example 2,* except that X makes an election under paragraph (g)(4) of this section to capitalize $20,000, the amounts paid to acquire 50 of the 400 computers purchased in Year 1. Under these facts, the $140,000 paid by X in Year 1 for the remaining 350 computers qualifies for the de minimis rule under paragraph (g)(1) of this section because this amount is equal to 2 percent of X's total depreciation ($140,000), the greater of the two amounts calculated under paragraph (g)(1)(iv) of this section. Accordingly, X is not required to capitalize the amounts paid to acquire the 350 computers in Year 1.

Example 4. Election to apply de minimis rule to certain materials and supplies. (i) X is a corporation that provides consulting services to its customers. X has an applicable financial statement and a written policy at the beginning of the taxable year to expense amounts paid for property costing $500 or less. In Year 1, X purchases 200 computers at $500 each for a total cost of $100,000. Assume that each computer is a unit of property under § 1.263(a)–3T(e) and is not a material or supply under § 1.162–3T. In addition, X purchases 200 office chairs at $100 each for a total cost of $20,000 and 250 customized briefcases at $80 each for a total cost of $20,000. Assume that each office chair and each briefcase is a material or supply under § 1.162–3T(c)(1). In Year 1, X also acquires 10 books at $100 each, which are also materials and supplies under § 1.162–3T(c)(1). X makes the election under § 1.162–3T(f) to apply the de minimis rule to the office chairs and briefcases, but does not make that election for the books and treats the books as materials and supplies in accordance with the provisions of § 1.162–3T. X treats the amounts paid for the computers, office chairs, and briefcases as expenses on its applicable financial statement. Assume also that for Year 1, the amounts that X paid for the computers, office chairs, and briefcases are the only amounts that X intends to treat as de minimis costs not capitalized under paragraph (g)(1) of this section. For its Year 1 taxable year, X has gross receipts of $125,000,000 and reports $7,000,000 of depreciation and amortization on its applicable financial statement.

(ii) In order to meet the requirements of paragraph (g)(1)(iv) of this section for Year 1, X's total aggregate amounts paid and not capitalized under paragraphs (g)(1)(i), (ii), and (iii) of this section must be less than or equal to the greater of $125,000 (0.1 percent of X's total gross receipts of $125,000,000) or $140,000 (2 percent of X's total depreciation and amortization of $7,000,000). X pays a total of $140,000 ($100,000 + $20,000 + $20,000) for the computers, office chairs, and briefcases. X is not required to include the amounts paid for the books in this computation because X has not elected under § 1.162–3T(f) to apply the de minimis rule to the books. Thus, the total aggregate amounts paid and not capitalized under paragraph (g)(1) of this section is equal to $140,000 (2 percent of X's total financial depreciation), the greater of the two limitations set out under paragraph (g)(1)(iv) of this section. Accordingly, under paragraph (g)(1) of this section, in Year 1, X may treat as de minimis and is not required to capitalize the $140,000 paid to acquire the computers, office chairs, and briefcases.

(h) *Treatment of capital expenditures.* Amounts required to be capitalized under this section are capital expenditures and must be taken into account through a charge to capital account or basis, or in the case of property that is inventory in the hands of a taxpayer, through inclusion in inventory costs. See section 263A for the treatment of direct and certain indirect costs of producing property or acquiring property for resale.

(i) *Recovery of capitalized amounts*—(1) *In general.* Amounts that are capitalized under this section are recovered through depreciation, cost of goods sold, or by an adjustment to basis at the time the property is placed in service, sold, used, or otherwise disposed of by the taxpayer. Cost recovery is determined by the applicable provisions of the Internal Revenue Code and regulations relating to the use, sale, or disposition of property.

(2) *Examples.* The following examples illustrate the rule of paragraph (i)(1) of this section. Assume that X does not apply the de minimis rule under paragraph (g) of this section.

Example 1. Recovery when property placed in service. X owns a 10-unit apartment building. The refrigerator in one of the apartments stops functioning, and X purchases a new refrigerator to replace the old one. X pays for the acquisition, delivery, and installation of the new refrigerator. Assume that the refrigerator is the unit of property, as determined under § 1.263(a)–3T(e), and is not a material or supply under § 1.162–3T. Under paragraph (d)(1) of this section, X is required to capitalize the amounts paid for the acquisition, delivery, and installation of the refrigerator. Under paragraph (i) of this section, the capitalized amounts are recovered through depreciation, which begins when the refrigerator is placed in service by X.

Example 2. Recovery when property used in the production of property. X operates a plant where it manufactures widgets. X purchases a tractor loader to move raw materials into and around the plant for use in the manufacturing process. Assume that the tractor loader is a unit of property, as determined under § 1.263(a)–3T(e), and is not a material or supply under § 1.162–3T. Under paragraph (d)(1) of this section, X is required to capitalize the amounts paid to acquire the tractor loader. Under paragraph (i) of this section, the capitalized amounts are recovered through depreciation, which begins when X places the tractor loader in service. However, because the tractor/loader is used in the production of property, under section 263A the cost recovery (that is, the depreciation) on the capitalized amounts must be capitalized to X's property produced, and, consequently, recovered through cost of goods sold. *See* § 1.263A–1(e)(3)(ii)(I).

(j) *Accounting method changes.* Except as otherwise provided in this section, a change to comply with this section is a change in method of accounting to which the provisions of sections 446 and 481, and the regulations thereunder apply. A taxpayer seeking to change to a method of accounting permitted in this section must secure the consent of the Commissioner in accordance with § 1.446–1(e) and follow the administrative procedures issued under § 1.446–1(e)(3)(ii) for obtaining the Commissioner's consent to change its accounting method.

(k) *Effective/applicability date.* Except for paragraphs (f)(2)(iii), (f)(2)(iv),(f)(3)(ii) and (g) of this section, this section generally applies to taxable years beginning on or after January 1, 2012. Paragraphs (f)(2)(iii), (f)(2)(iv), (f)(3)(ii), and (g) of this section apply to amounts paid or incurred (to acquire or produce property) in taxable years beginning on or after January 1, 2012. For the applicability of regulations to taxable years beginning before January 1, 2012, see § 1.263(a)– in effect prior to January 1, 2012 (§ 1.263(a)–2 as contained in 26 CFR part 1 edition revised as of April 1, 2011).

(l) *Expiration Date.* The applicability of this section expires on December 23, 2014.

■ **Par. 29.** Section 1.263(a)–3 is revised to read as follows:

§ 1.263(a)–3 Amounts paid to improve tangible property.

(a) and (b) [Reserved]. For further guidance, see § 1.263(a)–3T(a) and (b).

(c) through (q) [Reserved]. For further guidance, see §§ 1.263(a)–3T(c) through (q).

■ **Par. 30.** Section 1.263(a)–3T is added to read as follows:

§ 1.263(a)–3T Amounts paid to improve tangible property (temporary).

(a) *Overview.* This section provides rules for applying section 263(a) to amounts paid to improve tangible property. Paragraph (b) of this section provides definitions. Paragraph (c) of this section provides rules for coordinating this section with other provisions of the Internal Revenue Code. Paragraph (d) of this section provides the requirement to capitalize amounts paid to improve tangible property and provides the general rules for determining whether a unit of property is improved. Paragraph (e) of this section provides the rules for determining the appropriate unit of property. Paragraph (f) of this section provides special rules for determining improvement costs in particular contexts. Paragraph (g) provides a safe harbor for routine maintenance costs. Paragraph (h) of this section provides rules for determining whether amounts paid result in betterments to the unit of property. Paragraph (i) of this section provides rules for determining whether amounts paid restore the unit of property. Paragraph (j) of this section provides rules for amounts paid to adapt the unit of property to a new or different use. Paragraph (k) of this section provides an optional regulatory accounting method. Paragraph (l) of this section provides for a repair allowance or other methods of accounting identified in published guidance. Paragraphs (m) through (o) of this section provide additional rules related to these provisions. Paragraphs (p) and (q) of this section provides the effective/applicability and expiration dates for the rules in this section.

(b) *Definitions.* For purposes this section, the following definitions apply:

(1) *Amount paid.* In the case of a taxpayer using an accrual method of accounting, the terms *amounts paid* and *payment* mean a liability incurred (within the meaning of § 1.446–1(c)(1)(ii)). A liability may not be taken into account under this section prior to the taxable year during which the liability is incurred.

(2) *Personal property* means tangible personal property as defined in § 1.48–1(c).

(3) *Real property* means land and improvements thereto, such as buildings or other inherently permanent structures (including items that are structural components of the buildings or structures) that are not personal property as defined in paragraph (b)(2) of this section. Any property that constitutes other tangible property under § 1.48–1(d) is also treated as real property for purposes of this section. Local law is not controlling in determining whether property is real property for purposes of this section.

(4) *Owner* means the taxpayer that has the benefits and burdens of ownership of the unit of property for Federal income tax purposes.

(c) *Coordination with other provisions of the Internal Revenue Code*—(1) *In general.* Nothing in this section changes the treatment of any amount that is specifically provided for under any provision of the Internal Revenue Code or the regulations other than section 162(a) or section 212 and the regulations under those sections. For example, see section 263A requiring taxpayers to capitalize the direct and indirect costs of producing property or acquiring property for resale.

(2) *Materials and supplies.* A material or supply as defined in § 1.162–3T(c)(1) that is acquired and used to improve a unit of tangible property is subject to this section and is not treated as a material or supply under § 1.162–3T.

(3) *Exception for amounts subject to de minimis rule.* A taxpayer is not required to capitalize amounts paid to acquire or produce units of property used in improvements under paragraph (d) of this section (including materials and supplies used in improvements) if these amounts are properly deducted

under the de minimis rule of section § 1.263(a)–2(g).

(3) *Example.* The following example illustrates the rules of this paragraph (c):

Example. Railroad rolling stock. X is a railroad that properly treats amounts paid for the rehabilitation of railroad rolling stock as deductible expenses under section 263(d). X is not required to capitalize the amounts paid because nothing in this section changes the treatment of amounts specifically provided for under section 263(d).

(d) *Requirement to capitalize amounts paid for improvements.* Except as provided in the optional regulatory accounting method in paragraph (k) of this section or under any other accounting method published in accordance with paragraph (l) of this section, a taxpayer generally must capitalize the aggregate of related amounts (as defined in paragraph (f)(4) of this section) paid to improve a unit of property owned by the taxpayer. However, see paragraph (f)(1) of this section for the treatment of amounts paid to improve leased property. See section 263A for the costs required to be capitalized to property produced by the taxpayer or to property acquired for resale; section 1016 for adding capitalized amounts to the basis of the unit of property; and section 168 for the treatment of additions or improvements for depreciation purposes. For purposes of this section, a unit of property is improved if the amounts paid for activities performed after the property is placed in service by the taxpayer—

(1) Result in a betterment to the unit of property (see paragraph (h) of this section);

(2) Restore the unit of property (see paragraph (i) of this section); or

(3) Adapt the unit of property to a new or different use (see paragraph (j) of this section).

(e) *Determining the unit of property*—(1) *In general.* The unit of property rules in this paragraph (e) apply only for purposes of section 263(a) and §§ 1.263(a)–1T, 1.263(a)–2T, 1.263(a)–3T, and 1.162–3T. Unless otherwise specified, the unit of property determination is based upon the functional interdependence standard provided in paragraph (e)(3)(i) of this section. However, special rules are provided for buildings (see paragraph (e)(2) of this section), plant property (see paragraph (e)(3)(ii) of this section), network assets (see paragraph (e)(3)(iii) of this section), leased property (see paragraph (e)(2)(v) of this section for leased buildings and paragraph (e)(3)(iv) of this section for leased property other than buildings), and improvements to property (see paragraph (e)(4) of this section). Additional rules are provided if a taxpayer has assigned different MACRS classes or depreciation methods to components of property or subsequently changes the class or depreciation method of a component or other item of property (see paragraph (e)(5) of this section). Property that is aggregated or subject to a general asset account election or accounted for in a multiple asset account (that is, pooled) may not be treated as a single unit of property.

(2) *Building*—(i) *In general.* Except as otherwise provided in paragraphs (e)(4), (e)(5)(ii), and (f)(1)(ii)(B) of this section, in the case of a building (as defined in § 1.48–1(e)(1)), each building and its structural components (as defined in § 1.48–1(e)(2)) is a single unit of property (''building'').

(ii) *Application of improvement rules to a building.* An amount is paid for an improvement to a building under paragraphs (d) and (f)(1)(iii) of this section if the amount paid results in an improvement under paragraph (h), (i), or (j) of this section to any of the following:

(A) *Building structure.* A building structure consists of the building (as defined in § 1.48–1(e)(1)), and its structural components (as defined in § 1.48–1(e)(2)), other than the structural components designated as buildings systems in paragraph (e)(2)(ii)(B) of this section.

(B) *Building system.* Each of the following structural components (as defined in § 1.48–1(e)(2)), including the components thereof, constitutes a building system that is separate from the building structure, and to which the improvement rules must be applied—

(*1*) Heating, ventilation, and air conditioning (''HVAC'') systems (including motors, compressors, boilers, furnace, chillers, pipes, ducts, radiators);

(*2*) Plumbing systems (including pipes, drains, valves, sinks, bathtubs, toilets, water and sanitary sewer collection equipment, and site utility equipment used to distribute water and waste to and from the property line and between buildings and other permanent structures);

(*3*) Electrical systems (including wiring, outlets, junction boxes, lighting fixtures and associated connectors, and site utility equipment used to distribute electricity from property line to and between buildings and other permanent structures);

(*4*) All escalators;

(*5*) All elevators;

(*6*) Fire-protection and alarm systems (including sensing devices, computer controls, sprinkler heads, sprinkler mains, associated piping or plumbing, pumps, visual and audible alarms, alarm control panels, heat and smoke detection devices, fire escapes, fire doors, emergency exit lighting and signage, and fire fighting equipment, such as extinguishers, hoses);

(*7*) Security systems for the protection of the building and its occupants (including window and door locks, security cameras, recorders, monitors, motion detectors, security lighting, alarm systems, entry and access systems, related junction boxes, associated wiring and conduit);

(*8*) Gas distribution system (including associated pipes and equipment used to distribute gas to and from property line and between buildings or permanent structures); and

(*9*) Other structural components identified in published guidance in the **Federal Register** or in the Internal Revenue Bulletin (see § 601.601(d)(2)(ii)(*b*) of this chapter) that are excepted from the building structure under paragraph (e)(2)(ii)(A) of this section and are specifically designated as building systems under this section.

(iii) *Condominium*—(A) *In general.* In the case of a taxpayer that is the owner of an individual unit in a building with multiple units (such as a condominium), the unit of property is the individual unit owned by the taxpayer and the structural components (as defined in § 1.48–1(e)(2)) that are part of the unit (condominium).

(B) *Application of improvement rules to a condominium.* An amount is paid for an improvement to a condominium under paragraph (d) of this section if the amount paid results in an improvement under paragraph (h), (i), or (j) of this section to the building structure (as defined in paragraph (e)(2)(ii)(A) of this section) that is part of the condominium or to the portion of any building system (as defined in paragraph (e)(2)(ii)(B) of this section) that is part of the condominium. In the case of the condominium management association, the association must apply the improvement rules to the building structure or to any building system as determined under paragraphs (e)(2)(ii)(A) and (e)(2)(ii)(B) of this section.

(iv) *Cooperative*—(A) *In general.* In the case of a taxpayer that has an ownership interest in a cooperative housing corporation, the unit of property is the portion of the building in which the taxpayer has possessory rights and the structural components (as defined in § 1.48–1(e)(2)) that are part of the portion of the building subject to the taxpayer's possessory rights (cooperative).

(B) *Application of improvement rules to a cooperative.* An amount is paid for

an improvement to a cooperative under paragraph (d) of this section if the amount paid results in an improvement under paragraph (h), (i), or (j) of this section to the portion of the building structure (as defined in paragraph (e)(2)(ii)(A) of this section) in which the taxpayer has possessory rights or to the portion of any building system (as defined in paragraph (e)(2)(ii)(B) of this section) that is part of the portion of the building structure subject to the taxpayer's possessory rights. In the case of a cooperative housing corporation, the corporation must apply the improvement rules to the building structure or to any building system as determined under paragraphs (e)(2)(ii)(A) and (e)(2)(ii)(B) of this section.

(v) *Leased building*—(A) *In general.* In the case of a taxpayer that is a lessee of all or a portion of a building (such as an office, floor, or certain square footage), the unit of property is each building and its structural components or the portion of each building subject to the lease and the structural components associated with the leased portion.

(B) *Application of improvement rules to a leased building.* An amount is paid for an improvement to a leased building or a leased portion of a building under paragraphs (d) and (f)(1)(ii) of this section if the amount paid results in an improvement under paragraph (h), (i), or (j) of this section to any of the following:

(*1*) *Entire building.* In the case of a taxpayer that is a lessee of an entire building, the building structure (as defined under paragraph (e)(2)(ii)(A) of this section) or any building system (as defined under paragraph (e)(2)(ii)(B) of this section) to which the expenditure relates.

(*2*) *Portion of a building.* In the case of a taxpayer that is a lessee of a portion of a building (such as an office, floor, or certain square footage), the portion of the building structure (as defined under paragraph (e)(2)(ii)(A) of this section) subject to the lease or the portion of any building system (as defined under paragraph (e)(2)(ii)(B) of this section) associated with that portion of the leased building structure.

(3) *Property other than building*—(i) *In general.* Except as otherwise provided in paragraphs (e)(3), (e)(4), (e)(5), and (f)(1) of this section, in the case of real or personal property other than property described in paragraph (e)(2) of this section, all the components that are functionally interdependent comprise a single unit of property. Components of property are functionally interdependent if the placing in service of one component by the taxpayer is dependent on the placing in service of the other component by the taxpayer.

(ii) *Plant property*—(A) *Definition.* For purposes of this paragraph (e) of this section, the term *plant property* means functionally interdependent machinery or equipment, other than network assets, used to perform an industrial process, such as manufacturing, generation, warehousing, distribution, automated materials handling in service industries, or other similar activities.

(B) *Unit of property for plant property.* In the case of plant property, the unit of property determined under the general rule of paragraph (e)(3)(i) of this section is further divided into smaller units comprised of each component (or group of components) that performs a discrete and major function or operation within the functionally interdependent machinery or equipment.

(iii) *Network assets*—(A) *Definition.* For purposes of this paragraph (e), the term *network assets* means railroad track, oil and gas pipelines, water and sewage pipelines, power transmission and distribution lines, and telephone and cable lines that are owned or leased by taxpayers in each of those respective industries. The term includes, for example, trunk and feeder lines, pole lines, and buried conduit. It does not include property that would be included as building structure or building systems under paragraphs (e)(2)(ii)(A) and (e)(2)(ii)(B) of this section, nor does it include separate property that is adjacent to, but not part of a network asset, such as bridges, culverts, or tunnels.

(B) *Unit of property for network assets.* In the case of network assets, the unit of property is determined by the taxpayer's particular facts and circumstances except as otherwise provided in published guidance in the **Federal Register** or in the Internal Revenue Bulletin (see § 601.601(d)(2)(ii)(*b*) of this chapter). For these purposes, the functional interdependence standard provided in paragraph (e)(3)(i) of this section is not determinative.

(iv) *Leased property other than buildings.* In the case of a taxpayer that is a lessee of real or personal property other than property described in paragraph (e)(2) of this section, the unit of property for the leased property is determined under paragraphs (e)(3)(i), (ii), (iii), and (e)(5) of this section except that, after applying the applicable rules under those paragraphs, the unit of property may not be larger than the unit of leased property.

(4) *Improvements to property.* An improvement to a unit of property, other than a lessee improvement as determined under paragraph (f)(1)(ii) of this section, is not a unit of property separate from the unit of property improved. For the unit of property for lessee improvements, see paragraph (f)(1)(ii)(B) of this section.

(5) *Additional rules*—(i) *Year placed in service.* Notwithstanding the unit of property determination under paragraph (e)(3) of this section, a component (or a group of components) of a unit property must be treated as a separate unit of property if, at the time the unit of property is initially placed in service by the taxpayer, the taxpayer has properly treated the component as being within a different class of property under section 168(e) (MACRS classes) than the class of the unit of property of which the component is a part, or the taxpayer has properly depreciated the component using a different depreciation method than the depreciation method of the unit of property of which the component is a part.

(ii) *Change in subsequent taxable year.* Notwithstanding the unit of property determination under paragraphs (e)(2), (3), (4), or (5)(i) of this section, in any taxable year after the unit of property is initially placed in service by the taxpayer, if the taxpayer or the Internal Revenue Service changes the treatment of that property (or any portion thereof) to a proper MACRS class or a proper depreciation method (for example, as a result of a cost segregation study or a change in the use of the property), then the taxpayer must change the unit of property determination for that property (or the portion thereof) under this section to be consistent with the change in treatment for depreciation purposes. Thus, for example, if a portion of a unit of property is properly reclassified to a MACRS class different from the MACRS class of the unit of property of which it was previously treated as a part, then the reclassified portion of the property should be treated as a separate unit of property for purposes of this section.

(6) *Examples.* The rules of this paragraph (e) are illustrated by the following examples, in which it is assumed that the taxpayer has not made a general asset account election with regard to property or accounted for property in a multiple asset account. In addition, unless the facts specifically indicate otherwise, assume that the additional rules in paragraph (e)(5) of this section do not apply:

Example 1. Building systems. X owns an office building that contains a HVAC system. The HVAC system incorporates ten roof-mounted units that service different parts of the building. The roof-mounted units are not

connected and have separate controls and duct work that distribute the heated or cooled air to different spaces in the building's interior. X pays an amount for labor and materials for work performed on the roof-mounted units. Under paragraph (e)(2)(i) of this section, X must treat the building and its structural components as a single unit of property. As provided under paragraph (e)(2)(ii) of this section, an amount is paid for an improvement to a building if it results in an improvement to the building structure or any designated building system. Under paragraph (e)(2)(ii)(B)(*1*) of this section, the entire HVAC system, including all of the roof-mounted units and their components, comprise a building system. Therefore, under paragraph (e)(2)(ii) of this section, if an amount paid by X for work on the roof-mounted units results in an improvement (for example, a betterment) to the HVAC system, X must treat this amount as an improvement to the building.

Example 2. Building systems. X owns a building that it uses in its retail business. The building contains two elevator banks in different locations in its building. Each elevator bank contains three elevators. X pays an amount for labor and materials for work performed on the elevators. Under paragraph (e)(2)(i) of this section, X must treat the building and its structural components as a single unit of property. As provided under paragraph (e)(2)(ii) of this section, an amount is paid for an improvement to a building if it results in an improvement to the building structure or any designated building system. Under paragraph (e)(2)(ii)(B)(*5*) of this section, all of the elevators, including all their components, comprise a building system. Therefore, under paragraph (e)(2)(ii) of this section, if an amount paid by X for work on the elevators results in an improvement (for example, a betterment) to the entire elevator system, X must treat these amounts as an improvement to the building.

Example 3. Building structure and systems; condominium. X owns a condominium unit in a condominium office building. X uses the condominium unit in its business of providing medical services. The condominium unit contains two restrooms, each of which contains a sink, a toilet, water and drainage pipes and bathroom fixtures. X pays an amount for labor and materials to perform work on the pipes, sinks, toilets, and plumbing fixtures that are part of the condominium unit. Under paragraph (e)(2)(iii) of this section, X must treat the individual unit that it owns, including the structural components that are part of that unit, as a single unit of property. As provided under paragraph (e)(2)(iii)(B) of this section, an amount is paid for an improvement to the condominium if it results in an improvement to the building structure that is part of the unit or to a portion of any designated building system that is part of the unit. Under paragraph (e)(2)(ii)(B)(*2*) of this section, the pipes, sinks, toilets, and plumbing fixtures that are part of X's unit comprise the plumbing system for the condominium unit. Therefore, under paragraph (e)(2)(iii) of this section, if an amount paid by X for work on pipes, sinks, toilets, and plumbing fixtures results in an improvement (for example, a betterment) to the portion of the plumbing system that is part of X's condominium unit, X must treat this amount as an improvement to the condominium.

Example 4. Building structure and systems; property other than buildings. X, a manufacturer, owns a building adjacent to its manufacturing facility that contains office space and related facilities for X's employees that manage and administer X's manufacturing operations. The office building contains equipment, such as desks, chairs, computers, telephones, and bookshelves that are not building structure or building systems. X pays an amount to add an extension to the office building. Under paragraph (e)(2)(i) of this section, X must treat the building and its structural components as a single unit of property. As provided under paragraph (e)(2)(ii) of this section, an amount is paid for an improvement to a building if it results in an improvement to the building structure or any designated building system. Therefore, under paragraph (e)(2)(ii) of this section, if an amount paid by X for the addition of an extension to the office building results in an improvement (for example, a betterment) to the building structure, X must treat this amount as an improvement to the building. In addition, because the equipment contained within the office building constitutes property other than the building, the units of property for the office equipment are initially determined under the general rule in paragraph (e)(3)(i) of this section and are comprised of the groups of components that are functionally interdependent.

Example 5. Plant property; discrete and major function. X is an electric utility company that operates a power plant to generate electricity. The power plant includes a structure that is not a building under § 1.48–1(e)(1), four pulverizers that grind coal, one boiler that produces steam, one turbine that converts the steam into mechanical energy, and one generator that converts mechanical energy into electrical energy. In addition, the turbine contains a series of blades that cause the turbine to rotate when affected by the steam. Because the plant is composed of real and personal tangible property other than a building, the unit of property for the generating equipment is initially determined under the general rule in paragraph (e)(3)(i) of this section and is comprised of all the components that are functionally interdependent. Under this rule, the initial unit of property is the entire plant because the components of the plant are functionally interdependent. However, because the power plant is plant property under paragraph (e)(3)(ii) of this section, the initial unit of property is further divided into smaller units of property by determining the components (or groups of components) that perform discrete and major functions within the plant. Under this paragraph, X must treat the structure, the boiler, the turbine, and the generator each as a separate unit of property, and each of the four pulverizers as a separate unit of property because each of these components performs a discrete and major function within the power plant. X is not required to treat components, such as the turbine blades, as separate units of property because each of these components does not perform a discrete and major function within the plant.

Example 6. Plant property; discrete and major function. X is engaged in a uniform and linen rental business. X owns and operates a plant that utilizes many different machines and equipment in an assembly line-like process to treat, launder, and prepare rental items for its customers. X utilizes two laundering lines in its plant, each of which can operate independently. One line is used for uniforms and another line is used for linens. Both lines incorporate several sorters, boilers, washers, dryers, ironers, folders, and waste water treatment systems. Because the laundering equipment contained within the plant is property other than a building, the unit of property for the laundering equipment is initially determined under the general rule in paragraph (e)(3)(i) of this section and is comprised of all the components that are functionally interdependent. Under this rule, the initial units of property are each laundering line because each line is functionally independent and is comprised of components that are functionally interdependent. However, because each line is comprised of plant property under paragraph (e)(3)(ii) of this section, X must further divide these initial units of property into smaller units of property by determining the components (or groups of components) that perform discrete and major functions within the line. Under paragraph (e)(3)(ii) of this section, X must treat each sorter, boiler, washer, dryer, ironer, folder, and waste water treatment system in each line as a separate unit of property because each of these components performs a discrete and major function within the line.

Example 7. Plant property; industrial process. X operates a restaurant that prepares and serves food to retail customers. Within its restaurant, X has a large piece of equipment that uses an assembly line-like process to prepare and cook tortillas that X serves to its customers. Because the tortilla-making equipment is property other than a building, the unit of property for the equipment is initially determined under the general rule in paragraph (e)(3)(i) of this section and is comprised of all the components that are functionally interdependent. Under this rule, the initial unit of property is the entire tortilla-making equipment because the various components of the equipment are functionally interdependent. The equipment is not plant property under paragraph (e)(3)(ii) of this section because the equipment is not used in an industrial process, as it performs a small-scale function in X's retail restaurant operations. Thus, X is not required to further divide the equipment into separate units of property based on the components that perform discrete and major functions.

Example 8. Personal property. X owns locomotives that it uses in its railroad business. Each locomotive consists of various components, such as an engine, generators, batteries and trucks. X acquired a locomotive with all its components and treated all the components of the locomotive as being

within the same class of property under section 168(e) and depreciated all the components using the same depreciation method. Because X's locomotive is property other than a building, the initial unit of property is determined under the general rule in paragraph (e)(3)(i) of this section and is comprised of the components that are functionally interdependent. Under paragraph (e)(3)(i) of this section, the locomotive is a single unit of property because it consists entirely of components that are functionally interdependent.

Example 9. Personal property. X provides legal services to its clients. X purchased a laptop computer and a printer for its employees to use in providing legal services. When X placed the computer and printer into service, X treated the computer and printer and all their components as being within the same class of property under section 168(e) and depreciated all the components using the same depreciation method. Because the computer and printer are property other than a building, the initial units of property are determined under the general rule in paragraph (e)(3)(i) of this section and are comprised of the components that are functionally interdependent. Under paragraph (e)(3)(i) of this section, the computer and the printer are separate units of property because the computer and the printer are not components that are functionally interdependent (that is, the placing in service of the computer is not dependent on the placing in service of the printer).

Example 10. Building structure and systems; leased building. X is a retailer of consumer products. X conducts its retail sales in a building that it leases from Y. The leased building consists of the building structure (including the floor, walls, and a roof) and various building systems, including a plumbing system, an electrical system, a HVAC system, a security system, and a fire protection and prevention system. X pays an amount for labor and materials to perform work on the HVAC system of the leased building. Under paragraph (e)(2)(v)(A) of this section, because X leases the entire building, X must treat the leased building and its structural components as a single unit of property. As provided under paragraph (e)(2)(v)(B) of this section, an amount is paid for an improvement to a leased building if it results in an improvement (for example, a betterment) to the leased building structure or to any building system within the leased building. Therefore, under paragraphs (e)(2)(v)(B)(*1*) and (e)(2)(ii)(B)(*1*) of this section, if an amount paid by X for work on the HVAC system results in an improvement to the heating and air conditioning system in the leased building, X must treat this amount as an improvement to the entire leased building.

Example 11. Production of real property related to leased property. Assume the same facts as in *Example 10,* except that X receives a construction allowance from Y and X uses the construction allowance to build a driveway adjacent to the leased building. Assume that under the terms of the lease, X, the lessee, is treated as the owner of any property that it constructs on or nearby the leased building. Also assume that section 110 does not apply to the construction allowance. Finally, assume that the driveway is not plant property or a network asset. Because the construction of the driveway consists of the production of real property other than a building, all the components of the driveway that are functionally interdependent are a single unit of property under paragraphs (e)(3)(i) and (e)(3)(iv) of this section.

Example 12. Leasehold improvements; construction allowance used for lessor-owned improvements. Assume the same facts as *Example 11,* except that under the terms of the lease Y, the lessor, is treated as the owner of any property constructed on the leased premises. Because Y, the lessor, is the owner of the driveway and the driveway is real property other than a building, all the components of the driveway that are functionally interdependent are a single unit of property under paragraph (e)(3)(i) of this section.

Example 13. Buildings and structural components; leased office space. X provides consulting services to its clients. X conducts its consulting services business in two office spaces in the same building, each of which it leases from Y under separate lease agreements. Each office space contains a separate HVAC unit, which is part of the leased property. Both lease agreements provide that X is responsible for maintaining, repairing, and replacing the HVAC conditioning system that is part of the leased property. X pays amounts to perform work on the HVAC units in each office space. Because X leases two separate office spaces subject to two leases, X must treat the portion of the building structure and the structural components subject to each lease as a separate unit of property under paragraph (e)(2)(v)(A) of this section. As provided under paragraph (e)(2)(v)(B) of this section, an amount is paid for an improvement to a leased unit of property, if it results in an improvement to the leased portion of the building structure or the associated portion of any designated building system subject to each lease. Under paragraphs (e)(2)(v)(B)(*1*) and (e)(2)(ii)(B)(*1*) of this section, X must treat the HVAC unit associated with one leased office space as a building system of that leased space and the HVAC unit associated with the second leased office space as a building system of that second leased space. Thus, under paragraph (e)(2)(v)(B) of this section, if the amount paid by X for work on the HVAC unit in one leased space results in an improvement (for example, a betterment) to the HVAC system that is part of that one leased space, then X must treat the amount as an improvement to that one unit of leased property.

Example 14. Leased property; personal property. X is engaged in the business of transporting passengers on private jet aircraft. To conduct its business, X leases several aircraft from Y. Assume that each aircraft is not plant property or a network asset. Under paragraph (e)(3)(iv) of this section (referencing paragraph (e)(3)(i) of this section), X must treat all of the components of each leased aircraft that are functionally interdependent as a single unit of property. Thus, X must treat each leased aircraft as a single unit of property.

Example 15. Improvement property. (i) X is a retailer of consumer products. In Year 1, X purchases a building from Y, which X intends to use as a retail sales facility. Under paragraph (e)(2)(i) of this section, X must treat the building and its structural components as a single unit of property. As provided under paragraph (e)(2)(ii) of this section, an amount is paid for an improvement to a building if it results in an improvement to the building structure or any designated building system.

(ii) In Year 2, X pays an amount to construct an extension to the building to be used for additional warehouse space. Assume that the extension involves the addition of walls, floors, roof, and doors, but does not include the addition or extension of any building systems described in paragraph (e)(2)(ii)(B) of this section. Also assume that the amount paid to build the extension results in a betterment to the building structure under paragraph (h) of this section, and is therefore treated as an amount paid for an improvement to the entire building under paragraph (e)(2)(ii) of this section. Accordingly, X capitalizes the amount paid as an improvement to the building under paragraph (d) of this section. Under paragraph (e)(4) of this section, the extension is not a unit of property separate from the building, the unit of property improved. Thus, to determine whether any future expenditure constitutes an improvement to the building under paragraph (e)(2)(ii), X must determine whether the expenditure constitutes an improvement to the building structure, including the building extension, or any of the designated building systems.

Example 16. Personal property; additional rules. X is engaged in the business of transporting freight throughout the United States. To conduct its business, X owns a fleet of truck tractors and trailers. Each tractor and trailer is comprised of various components, including tires. X purchased a truck tractor with all of its components, including tires. The tractor tires have an average useful life to X of more than one year. At the time X placed the tractor in service, it treated the tractor tires as a separate asset for depreciation purposes under section 168. X properly treated the tractor (excluding the cost of the tires) as 3-year property and the tractor tires as 5-year property under section 168(e). Because X's tractor is property other than a building, the initial units of property for the tractor are determined under the general rule in paragraph (e)(3)(i) of this section, and are comprised of all the components that are functionally interdependent. Under this rule, X must treat the tractor, including its tires, as a single unit of property because the tractor and the tires are functionally interdependent (that is, the placing in service of the tires is dependent upon the placing in service of the tractor). However, under paragraph (e)(5)(i) of this section, X must treat the tractor and tires as separate units of property because X properly treated the tires as being within a different class of property under section 168(e).

Example 17. Additional rules; change in subsequent year. X is engaged in the business of leasing nonresidential real

property to retailers. In Year 1, X acquired and placed in service a building for use in its retail leasing operation. In Year 5, in order to accommodate the needs of a new lessee, X incurred costs to improve the building structure. X capitalized the costs of the improvement under paragraph (d) of this section and depreciated the improvement in accordance with section 168(i)(6) as nonresidential real property under section 168(e). In Year 7, X determined that the structural improvement made in Year 5 qualified under section 168(e)(8) as qualified retail improvement property and, therefore, is 15-year property under section 168(e). In Year 5, X changed its method of accounting to use a 15-year recovery period for the improvement. Under the additional rule of paragraph (e)(5)(ii) of this section, in Year 7, X must treat the improvement as a unit of property separate from the building.

Example 18. Additional rules; change in subsequent year. In Year 1, X acquired and placed in service a building and parking lot for use in its retail operations. Under § 1.263(a)–2T of the regulations, X capitalized the cost of the building and the parking lot and began depreciating the building and the parking lot as nonresidential real property under section 168(e). In Year 3, X completed a cost segregation study under which it properly determined that the parking lot qualifies as 15-year property under section 168(e). In Year 3, X changed its method of accounting to use a 15-year recovery period and the 150-percent declining balance method of depreciation for the parking lot. Under the additional rule of paragraph (e)(5)(ii) of this section, in Year 3, X must treat the parking lot as a unit of property separate from the building.

Example 19. Additional rules; change in subsequent year. In Year 1, X acquired and placed in service a building for use in its manufacturing business. X capitalized the costs allocable to the building's wiring separately from the building and depreciated the wiring as 7-year property under section 168(e). X capitalized the cost of the building and all other structural components of the building and began depreciating them as nonresidential real property under section 168(e). In Year 3, X completed a cost segregation study under which it properly determined that the wiring is a structural component of the building and, therefore, should have been depreciated as nonresidential real property. In Year 3, X changed its method of accounting to treat the wiring as nonresidential real property. Under the additional rule of paragraph (e)(5)(ii) of this section, in Year 3, X must change the unit of property for the wiring in a manner that is consistent with the change in treatment for depreciation purposes. Therefore, X must change the unit of property for the wiring to treat it as a structural component of the building, and as part of the building unit of property, in accordance with paragraph (e)(2)(i) of this section.

(f) *Special rules for determining improvement costs*—(1) *Improvements to leased property*—(i) *In general.* This paragraph (f)(1) provides the exclusive rules for determining whether amounts paid by a taxpayer are for the improvement to a unit of leased property and must be capitalized. In the case of a leased building or a leased portion of a building, an amount results in an improvement to a unit of leased property if it results in an improvement to any of the properties designated under paragraph (e)(2)(ii) of this section (for lessor improvements) or under paragraph (e)(2)(v)(B) of this section (for lessee improvements except as provided in paragraph (f)(ii)(B) of this section). Section 1.263(a)-4 of the regulations does not apply to amounts paid for improvements to units of leased property or to amounts paid for the acquisition or production of leasehold improvement property.

(ii) *Lessee improvements*—(A) *Requirement to capitalize.* A taxpayer lessee must capitalize the aggregate of related amounts that it pays to improve (as defined under paragraph (d) of this section) a unit of leased property except to the extent that section 110 applies to a construction allowance received by the lessee for the purpose of such improvement or where the improvement constitutes a substitute for rent. See § 1.61–8(c) for the treatment of lessee expenditures that constitute a substitute for rent. A taxpayer lessee must also capitalize the aggregate of related amounts that a lessor pays to improve (as defined under paragraph (d) of this section) a unit of leased property if the lessee is the owner of the improvement except to the extent that section 110 applies to a construction allowance received by the lessee for the purpose of such improvement. An amount paid for a lessee improvement under this paragraph (f)(1)(ii)(A) is treated as an amount paid to acquire or produce a unit of real or personal property under § 1.263(a)-2T(d)(1) of the regulations. See paragraph (e)(2)(v) of this section for the unit of property for a leased building and paragraph (e)(3)(iv) of this section for the unit of property for leased real or personal property other than a building.

(B) *Unit of property for lessee improvements.* An amount capitalized as a lessee improvement under paragraph (f)(1)(ii)(A) of this section comprises a unit of property separate from the leased property being improved. However, an amount that a lessee pays to improve (as defined under paragraph (d) of this section) a lessee improvement under paragraph (f)(1)(ii)(A) is not a unit of property separate from such lessee improvement.

(iii) *Lessor improvements*—(A) *Requirement to capitalize.* A taxpayer lessor must capitalize the aggregate of related amounts that it pays directly, or indirectly through a construction allowance to the lessee, to improve (as defined in paragraph (d) of this section) a unit of leased property where the lessor is the owner of the improvement or to the extent that section 110 applies to the construction allowance. A lessor must also capitalize the aggregate of related amounts that the lessee pays to improve a unit of property (as defined in paragraph (e) of this section) where the lessee's improvement constitutes a substitute for rent. See § 1.61–8(c) for treatment of expenditures by lessees that constitute a substitute for rent. Amounts capitalized by the lessor under this paragraph (f)(1)(iii)(A) may not be capitalized by the lessee. See paragraphs (e)(2) of this section for the unit of property for a building and paragraph (e)(3) of this section for the unit of property for real or personal property other than a building.

(B) *Unit of property for lessor improvements.* An amount capitalized as a lessor improvement under paragraph (f)(1)(iii)(A) of this section is not a unit of property separate from the unit of property improved. See paragraph (e)(4) of this section.

(iv) *Examples.* The application of this paragraph (f)(1) is illustrated by the following examples, in which it is assumed that section 110 does not apply to the lessee.

Example 1. Lessee improvements; additions to building. (i) T is a retailer of consumer products. In Year 1, T leases a building from L, which T intends to use as a retail sales facility. The leased building consists of the building structure under paragraph (e)(2)(ii)(A) of this section and various building systems under paragraph (e)(2)(ii)(B) of this section, including a plumbing system, an electrical system, and an HVAC system. Under the terms of the lease, T is permitted to improve the building at its own expense. Under paragraph (e)(2)(v)(A) of this section, because T leases the entire building, T must treat the leased building and its structural components as a single unit of property. As provided under paragraph (e)(2)(v)(B)(1) of this section, an amount is paid for an improvement to the entire leased building if it results in an improvement to the leased building structure or to any building system within the leased building. Therefore, under paragraphs (e)(2)(v)(B)(1) and (e)(2)(ii) of this section, if T pays an amount that improves the building structure, the plumbing system, the electrical system, or the HVAC system, then T must treat this amount as an improvement to the entire leased building.

(ii) In Year 2, T pays an amount to construct an extension to the building to be used for additional warehouse space. Assume that this amount results in a betterment (as defined under paragraph (h) of this section) to T's leased building structure and does not affect any building systems. Accordingly, the

amount that T pays for the building extension results in an improvement to the leased building structure, and thus, under paragraph (e)(2)(v)(B)(*1*) of this section, is treated as an improvement to the entire leased building under paragraph (d) of this section. Because T, the lessee, paid an amount to improve a unit of leased property, T is required to capitalize the amount paid for the building extension under paragraph (f)(1)(ii)(A) of this section. In addition, paragraph (f)(1)(ii)(A) of this section requires T to treat the amount paid for the improvement as the acquisition or production of a unit of property (leasehold improvement property) under § 1.263(a)–2T(d)(1). Moreover, under paragraph (f)(1)(ii)(B) of this section, the building extension is a unit of property separate from the unit of leased property (the building and its structural components).

(iii) In Year 5, T pays an amount to add a larger door to the building extension that it constructed in Year 2 in order to accommodate the loading of larger products into the warehouse space. Assume that the amount paid to add the larger door results in a betterment under paragraph (h) of this section to the building structure extension, the unit of property under paragraph (f)(1)(ii)(B) of this section. As a result, T must capitalize the amounts paid to add the larger door as an improvement to T's unit of property (the building extension) under paragraph (d) of this section. In addition, because the amount that T paid to add the larger door is for an improvement to the building extension (a lessee improvement under paragraph (f)(1)(ii)(A)), the larger door is not a unit of property separate from the unit of property improved. See paragraphs (e)(4) and (f)(1)(ii)(B) of this section.

Example 2. Lessee improvements; additions to certain structural components of buildings. (i) Assume the same facts as *Example 1* except that in Year 2, T also pays an amount to construct an extension of the HVAC system into the building extension. Assume that the extension is a betterment under paragraph (h) of this section to the leased HVAC system (a building system under paragraph (e)(2)(ii)(B)(*1*) of this section). Accordingly, the amount that T pays for the extension of the HVAC system results in an improvement to a leased building system, the HVAC system, and thus, under paragraph (e)(2)(v)(B)(*1*) of this section, is treated as an improvement to the entire leased building under paragraph (d) of this section. Because T, the lessee, incurs costs to improve a unit of leased property, T is required to capitalize the costs of the improvement under paragraph (f)(1)(ii)(A) of this section. Under paragraph (f)(1)(ii)(B), the extension to the leased HVAC is a unit of property separate from the unit of leased property (the leased building and its structural components). In addition, under paragraph (f)(1)(ii)(A) of this section, T must treat the amount paid for the HVAC extension as the acquisition and production of a unit of property under § 1.263(a)–2T(d)(1).

(ii) In Year 5, T pays an amount to add an additional chiller to the portion of the HVAC system that it constructed in Year 2 in order to accommodate the climate control requirements for new product offerings. Assume that the amount paid for the chiller results in a betterment under paragraph (h) of this section to the HVAC system extension, the unit of property under paragraph (f)(1)(ii)(B) of this section. Accordingly, T must capitalize the amount paid to add the chiller as an improvement to T's unit of property (the HVAC system extension) under paragraph (d) of this section. In addition, because the amount that T paid to add the chiller is for an improvement to the HVAC system extension (a lessee improvement under paragraph (f)(1)(ii)(A) of this section), the chiller is not a unit of property separate from the unit of property improved. See paragraphs (f)(1)(ii)(B) and (e)(4) of this section.

Example 3. Lessor Improvements; additions to building. (i) T is a retailer of consumer products. In Year 1, T leases a building from L, which T intends to use as a retail sales facility. Pursuant to the lease, L provides a construction allowance to T, which T intends to use to construct an extension to the retail sales facility for additional warehouse space. Assume that the amount paid for any improvement to the building does not exceed the construction allowance and that L is treated as the owner of any improvement to the building. Under paragraph (e)(2)(i) of this section, L must treat the leased building and its structural components as a single unit of property. As provided under paragraph (e)(2)(ii) of this section, an amount paid is for an improvement to the building if it results in an improvement to the building structure or to any building system.

(ii) In Year 2, T uses L's construction allowance to construct an extension to the leased building to provide additional warehouse space in the building. Assume that the extension is a betterment (as defined under paragraph (h) of this section) to the building structure, and therefore, the amount paid for the extension results in an improvement to the building structure under paragraph (d) of this section. Under paragraph (f)(1)(iii)(A) of this section, L, the lessor and owner of the improvement, must capitalize the amounts paid to T to construct the extension to the retail sales facility. T is not permitted to capitalize the amounts paid for the lessor-owned improvement. Finally, under paragraph (f)(1)(iii)(B) of this section, the extension to L's building is not a unit of property separate from the building and its structural components.

Example 4. Lessee property; personal property added to leased building. T is a retailer of consumer products. T leases a building from L, which T intends to use as a retail sales facility. Pursuant to the lease, L provides a construction allowance to T, which T uses to acquire and construct partitions for fitting rooms, counters, and shelving. Assume that each partition, counter, and shelving unit is a unit of property under paragraph (e)(3) of this section. Assume that for federal income tax purposes T is treated as the owner of any personal property that it acquires or constructs with the construction allowance and that the amounts paid for acquisition or construction of any personal property used in the leased property do not constitute a substitute for rent. T's expenditures for the partitions, counters, and shelving are not improvements to the leased property under paragraph (d) of this section, but rather constitute amounts paid to acquire or produce separate units of personal property under § 1.263(a)–2T.

Example 5. Lessor property; buildings on leased property. L is the owner of a parcel of unimproved real property that L leases to T. Pursuant to the lease, L provides a construction allowance to T of $500,000, which T agrees to use to construct a building costing not more than $500,000 on the leased real property and to lease the building from L after it is constructed. Assume that for Federal income tax purposes, L is treated as the owner of the building that T will construct. T uses the $500,000 to construct the building as required under the lease. The building consists of the building structure and the following building systems: (1) A plumbing system; (2) an electrical system; and (3) an HVAC system. Because L provides a construction allowance to T to construct a building, the total cost of the building equals $500,000, and L is treated as the owner of the building, under paragraph (f)(1)(iii)(A) of this section L must capitalize the amounts that it pays indirectly to acquire and produce the building under § 1.263(a)–2T(d)(1). Under paragraph (e)(2)(i) of this section, L must treat the building and its structural components as a single unit of property. Under paragraph (f)(1)(iii)(A) of this section, T, the lessee, may not capitalize the amounts paid (with the construction allowance received from L) for construction of the building.

Example 6. Lessee contribution to construction costs. Assume the same facts as in *Example 5,* except T spends $600,000 to construct the building. T uses the $500,000 construction allowance provided by L plus $100,000 of its own funds to construct the building that L will own pursuant to the lease. Also assume that the additional $100,000 that T incurs is not a substitute for rent. For the reasons discussed in *Example 5,* L must capitalize the $500,000 it paid T to construct the building under § 1.263(a)–2T(d)(1). In addition, because T spends its own funds to complete the building, T has a depreciable interest of $100,000 in the building and must capitalize the $100,000 it paid to construct the building as a leasehold improvement under § 1.263(a)–2T(d)(1) of the regulations. Under paragraph (e)(2)(i) of this section, L must treat the building as a single unit of property to the extent of its depreciable interest of $500,000 In addition, under paragraph (e)(2)(v)(A) of this section, T must also treat the building as a single unit of property to the extent of its depreciable interest of $100,000.

(2) *Compliance with regulatory requirements.* For purposes of this section, a Federal, state, or local regulator's requirement that a taxpayer perform certain repairs or maintenance on a unit of property to continue operating the property is not relevant in

determining whether the amount paid improves the unit of property.

(3) *Certain costs incurred during an improvement*—(i) *In general.* A taxpayer must capitalize all the direct costs of an improvement and all the indirect costs (including, for example, otherwise deductible repair or component removal costs) that directly benefit or are incurred by reason of an improvement in accordance with the rules under section 263A. Therefore, indirect costs that do not directly benefit and are not incurred by reason of an improvement are not required to be capitalized under section 263(a), regardless of whether they are made at the same time as an improvement.

(ii) *Exception for individuals' residences.* A taxpayer who is an individual may capitalize amounts paid for repairs and maintenance that are made at the same time as capital improvements to units of property not used in the taxpayer's trade or business or for the production of income if the amounts are paid as part of a remodeling of the taxpayer's residence.

(4) *Aggregate of related amounts.* For purposes of paragraph (d) of this section, the aggregate of related amounts paid to improve a unit of property may be incurred over a period of more than one taxable year. Whether amounts are related to the same improvement depends on the facts and circumstances of the activities being performed and whether the costs are incurred by reason of a single improvement or directly benefit a single improvement.

(g) *Safe harbor for routine maintenance on property other than buildings*—(1) *In general.* An amount paid for routine maintenance performed on a unit of property other than a building or a structural component of a building is deemed not to improve that unit of property. Routine maintenance is the recurring activities that a taxpayer expects to perform as a result of the taxpayer's use of the unit of property to keep the unit of property in its ordinarily efficient operating condition. Routine maintenance activities include, for example, the inspection, cleaning, and testing of the unit of property, and the replacement of parts of the unit of property with comparable and commercially available and reasonable replacement parts. The activities are routine only if, at the time the unit of property is placed in service by the taxpayer, the taxpayer reasonably expects to perform the activities more than once during the class life (as defined in paragraph (g)(4) of this section) of the unit of property. Among the factors to be considered in determining whether a taxpayer is performing routine maintenance are the recurring nature of the activity, industry practice, manufacturers' recommendations, the taxpayer's experience, and the taxpayer's treatment of the activity on its applicable financial statement (as defined in paragraph (b)(4) of this section). With respect to a taxpayer that is a lessor of a unit of property, the taxpayer's use of the unit of property includes the lessee's use of the unit of property.

(2) *Rotable and temporary spare parts.* Except as provided in paragraph (g)(3) of this section, for purposes of paragraph (g)(1) of this section, amounts paid for routine maintenance include routine maintenance performed on (and with regard to) rotable and temporary spare parts. But see § 1.162–3T(a)(3), which provides generally that rotable and temporary spare parts are used or consumed by the taxpayer in the taxable year in which the taxpayer disposes of the parts.

(3) *Exceptions.* Routine maintenance does not include the following:

(i) Amounts paid for the replacement of a component of a unit of property and the taxpayer has properly deducted a loss for that component (other than a casualty loss under § 1.165–7).

(ii) Amounts paid for the replacement of a component of a unit of property and the taxpayer has properly taken into account the adjusted basis of the component in realizing gain or loss resulting from the sale or exchange of the component.

(iii) Amounts paid for the repair of damage to a unit of property for which the taxpayer has taken a basis adjustment as a result of a casualty loss under section 165, or relating to a casualty event described in section 165.

(iv) Amounts paid to return a unit of property to its ordinarily efficient operating condition, if the property has deteriorated to a state of disrepair and is no longer functional for its intended use.

(v) Amounts paid for repairs, maintenance, or improvement of rotable and temporary spare parts to which the taxpayer applies the optional method of accounting for rotable and temporary spare parts under § 1.162–3T(e).

(4) *Class life.* The class life of a unit of property is the recovery period prescribed for the property under sections 168(g)(2) and (3) for purposes of the alternative depreciation system, regardless of whether the property is depreciated under section 168(g). For purposes of determining class life under this section, section 168(g)(3)(A) (relating to tax-exempt use property subject to lease) does not apply. If the unit of property is comprised of more than one component with different class lives, then the class life of the unit of property is deemed to be the same as the component with the longest class life.

(5) *Examples.* The following examples illustrate the rules of this paragraph (g). Unless otherwise stated, assume that X has not applied the optional method of accounting for rotable and temporary spare parts under § 1.162–3T(e):

Example 1. Routine maintenance on component. (i) X is a commercial airline engaged in the business of transporting passengers and freight throughout the United States and abroad. To conduct its business, X owns or leases various types of aircraft. As a condition of maintaining its airworthiness certification for these aircraft, X is required by the Federal Aviation Administration (FAA) to establish and adhere to a continuous maintenance program for each aircraft within its fleet. These programs, which are designed by X and the aircraft's manufacturer and approved by the FAA, are incorporated into each aircraft's maintenance manual. The maintenance manuals require a variety of periodic maintenance visits at various intervals. One type of maintenance visit is an engine shop visit (ESV), which X expects to perform on its aircraft engines approximately every 4 years in order to keep its aircraft in its ordinarily efficient operating condition. In Year 1, X purchased a new aircraft, which included four new engines attached to the airframe. The four aircraft engines acquired with the aircraft are not materials or supplies under § 1.162–3T(c)(1)(i) because they are acquired as part of a single unit of property, the aircraft. In Year 5, X performs its first ESV on the aircraft engines. The ESV includes disassembly, cleaning, inspection, repair, replacement, reassembly, and testing of the engine and its component parts. During the ESV, the engine is removed from the aircraft and shipped to an outside vendor who performs the ESV. If inspection or testing discloses a discrepancy in a part's conformity to the specifications in X's maintenance program, the part is repaired, or if necessary, replaced with a comparable and commercially available and reasonable replacement part. After the ESVs, the engines are returned to X to be reinstalled on another aircraft or stored for later installation. Assume that the unit of property for X's aircraft is the entire aircraft, including the aircraft engines, and that the class life for X's aircraft is 12 years. Assume that none of the exceptions set out in paragraph (g)(3) of this section applies to the costs of performing the ESVs.

(ii) Because the ESVs involve the recurring activities that X expects to perform as a result of its use of the aircraft to keep the aircraft in ordinarily efficient operating condition, and consist of maintenance activities that X expects to perform more than once during the 12 year class life of the aircraft, X's ESVs are within the routine maintenance safe harbor under paragraph (g) of this section. Accordingly, the amounts paid for the ESVs are deemed not to improve the aircraft and are not required to be capitalized under paragraph (d) of this section.

Example 2. Routine maintenance after class life. Assume the same facts as in *Example 1,* except that in year 15, X pays amounts to perform an ESV on one of the original aircraft engines, after the end of the class life of the aircraft. Because this ESV involves the same routine maintenance activities that were performed on aircraft engines in *Example 1,* this ESV also is within the routine maintenance safe harbor under paragraph (g) of this section. Accordingly, the amounts paid for this ESV, even though performed after the class life of the aircraft, are deemed not to improve the aircraft and are not required to be capitalized under paragraph (d) of this section.

Example 3. Routine maintenance on rotable spare parts. (i) Assume the same facts as in *Example 1,* except that in addition to the four engines purchased as part of the aircraft, X separately purchases four additional new engines that X intends to use in its aircraft fleet to avoid operational downtime when ESVs are required to be performed on the engines previously installed on an aircraft. Later in Year 1, X installs these four engines on an aircraft in its fleet. In Year 5, X performs the first ESVs on these four engines. Assume that these ESVs involve the same routine maintenance activities that were performed on the engines in *Example 1,* and that none of the exceptions set out in paragraph (g)(3) of this section apply to these ESVs. After the ESVs were performed, these engines were reinstalled on other aircraft or stored for later installation.

(ii) The additional aircraft engines are rotable spare parts because they were acquired separately from the aircraft, they are removable from the aircraft, and are repaired and reinstalled on other aircraft or stored for later installation. *See* § 1.162–3T(c)(2) (definition of rotable and temporary spare parts). The class life of an engine is the same as the airframe, 12 years. Because the ESVs involve the recurring activities that X expects to perform as a result of its use of the engines to keep the engines in ordinarily efficient operating condition, and consist of maintenance activities that X expects to perform more than once during the 12 year class life of the engine, the ESVs fall within the routine maintenance safe harbor under paragraph (g) of this section. Accordingly, the amounts paid for the ESVs for the four additional engines are deemed not to improve these engines and are not required to be capitalized under paragraph (d) of this section. For the treatment of amounts paid to acquire the engines, see § 1.162–3T(a).

Example 4. Routine maintenance resulting from prior owner's use. (i) In January, Year 1, X purchases a used machine for use in its manufacturing operations. Assume that the machine is the unit of property and has a class life of 10 years. X places the machine in service in January, Year 1, and at that time, X expects to perform manufacturer recommended scheduled maintenance on the machine approximately every three years. The scheduled maintenance includes the cleaning and oiling of the machine, the inspection of parts for defects, and the replacement of minor items such as springs, bearings, and seals with comparable and commercially available and reasonable replacement parts. At the time X purchased the machine, the machine was approaching the end of a three-year scheduled maintenance period. As a result, in February, Year 1, X pays amounts to perform the manufacturer recommended scheduled maintenance. Assume that none of the exceptions set out in paragraph (g)(3) of this section apply to the amounts paid for the scheduled maintenance.

(ii) The majority of X's costs do not qualify under the routine maintenance safe harbor in paragraph (g) of this section because the costs were incurred primarily as a result of the prior owner's use of the property and not X's use. X acquired the machine just before it had received its three-year scheduled maintenance. Accordingly, the amounts paid for the scheduled maintenance resulted from the prior owner's, and not the taxpayer's, use of the property and must be capitalized if those amounts result in a betterment under paragraph (h) of this section, including the amelioration of a material condition or defect, or otherwise result in an improvement under paragraph (d) of this section. See also section 263A and the regulations thereunder for the requirement to capitalize indirect costs (including otherwise deductible repair costs) that directly benefit or are incurred by reason of production activities.

Example 5. Routine maintenance resulting from new owner's use. Assume the same facts as in *Example 4*, except that after X pays amounts for the maintenance in Year 1, X continues to operate the machine in its manufacturing business. In Year 4, X pays amounts to perform the next scheduled manufacturer recommended maintenance on the machine. Assume that the scheduled maintenance activities performed are the same as those performed in *Example 4* and that none of the exceptions set out in paragraph (g)(3) of this section apply to the amounts paid for the scheduled maintenance. Because the scheduled maintenance performed in Year 4 involves the recurring activities that X performs as a result of its use of the machine, keeps the machine in an ordinarily efficient operating condition, and consists of maintenance activities that X expects to perform more than once during the 10 year class life of the machine, X's scheduled maintenance costs are within the routine maintenance safe harbor under paragraph (g) of this section. Accordingly, the amounts paid for the scheduled maintenance in Year 4 are deemed not to improve the machine and are not required to be capitalized under paragraph (d) of this section. But see section 263A and the regulations thereunder for the requirement to capitalize indirect costs (including otherwise deductible repair costs) that directly benefit or are incurred by reason of production activities.

Example 6. Routine maintenance; replacement of substantial structural part. X is in the business of producing commercial products for sale. As part of the production process, X places raw materials into lined containers in which a chemical reaction is used to convert raw materials into the finished product. The lining is a substantial structural part of the container, and comprises 60 percent of the total physical structure of the container. Assume that each container, including its lining, is the unit of property and that a container has a class life of 12 years. At the time that X placed the container into service, X was aware that approximately every three years, X would be required to replace the lining in the container with comparable and commercially available and reasonable replacement materials. At the end of that period, the container will continue to function, but will become less efficient and the replacement of the lining will be necessary to keep the container in an ordinarily efficient operating condition. In Year 1, X acquired 10 new containers and placed them into service. In Year 4, Year 7, Year 9, and Year 12, X pays amounts to replace the containers' linings with comparable and commercially available and reasonable replacement parts. Assume that none of the exceptions set out in paragraph (g)(3) of this section apply to the amounts paid for the replacement linings. Because the replacement of the linings involves recurring activities that X expects to perform as a result of its use of the containers to keep the containers in their ordinarily efficient operating condition, and consists of maintenance activities that X expects to perform more than once during the 12 year class lives of the containers, X's lining replacement costs are within the routine maintenance safe harbor under paragraph (g) of this section. Accordingly, the amounts that X paid for the replacement of the container linings are deemed not to improve the containers and are not required to be capitalized under paragraph (d) of this section. But see section 263A and the regulations thereunder for the requirement to capitalize indirect costs (including otherwise deductible repair costs) that directly benefit or are incurred by reason of production activities.

Example 7. Routine maintenance once during class life. X is a Class I railroad that owns a fleet of freight cars. Assume that a freight car, including all its components, is a unit of property and has a class life of 14 years. At the time that X places a freight car into service, X expects to perform cyclical reconditioning to the car every 8 to 10 years in order to keep the freight car in ordinarily efficient operating condition. During this reconditioning, X pays amounts to disassemble, inspect, and recondition or replace components of the freight car with comparable and commercially available and reasonable replacement parts. Ten years after X places the freight car in service, X pays amounts to perform a cyclical reconditioning on the car. Because X expects to perform the reconditioning only once during the 14 year class life of the freight car, the amounts X pays for the reconditioning do not qualify for the routine maintenance safe harbor under paragraph (g) of this section. Accordingly, X must capitalize the amounts paid for the reconditioning of the freight car if these amounts result in an improvement under paragraph (d) of this section.

Example 8. Routine maintenance on non-rotable part. X is a towboat operator that owns and leases a fleet of towboats. Each towboat is equipped with two diesel-

powered engines. Assume that each towboat, including its engines, is the unit of property and that a towboat has a class life of 18 years. At the time that X places its towboats into service, X is aware that approximately every three to four years, X will need to perform scheduled maintenance on the two towboat engines to keep the engines in their ordinarily efficient operating condition. This maintenance is completed while the engines are attached to the towboat and involves the cleaning and inspecting of the engines to determine which parts are within acceptable operating tolerances and can continue to be used, which parts must be reconditioned to be brought back to acceptable tolerances, and which parts must be replaced. Engine parts replaced during these procedures are replaced with comparable and commercially available and reasonable replacement parts. Assume the towboat engines are not rotable spare parts under § 1.162–3T(c)(2). In Year 1, X acquired a new towboat, including its two engines, and placed the towboat into service. In Year 5, X pays amounts to perform scheduled maintenance on both engines in the towboat. Assume that none of the exceptions set out in paragraph (g)(3) of this section apply to the scheduled maintenance costs. Because the scheduled maintenance involves recurring activities that X expects to perform more than once during the 18 year class life of the towboat, the maintenance results from X's use of the towboat and the maintenance is performed to keep the towboat in an ordinarily efficient operating condition, the scheduled maintenance on X's towboat is within the routine maintenance safe harbor under paragraph (g) of this section. Accordingly, the amounts paid for the scheduled maintenance to its towboat engines in Year 5 are deemed not to improve the towboat and are not required to be capitalized under paragraph (d) of this section.

Example 9. Routine maintenance with betterments. Assume the same facts as *Example 8,* except that in Year 9, X's towboat engines are due for another scheduled maintenance visit. At this time, X decides to upgrade the engines to increase their horsepower and propulsion, which would permit the towboats to tow heavier loads. Accordingly, in Year 9, X pays amounts to perform many of the same activities that it would perform during the typical scheduled maintenance activities such as cleaning, inspecting, reconditioning, and replacing minor parts, but at the same time, X incurs costs to upgrade certain engine parts to increase the towing capacity of the boats in excess of the capacity of the boats when X placed them in service. Both the scheduled maintenance procedures and the replacement of parts with new and upgraded parts are necessary to increase the horsepower of the engines and the towing capacity of the boat. Thus, the work done on the engines encompasses more than the recurring activities that X expected to perform as a result of its use of the towboats and did more than keep the towboat in its ordinarily efficient operating condition. In addition, under paragraph (f)(3)(i) of this section, the scheduled maintenance procedures directly benefit the upgrades. Therefore, the amounts that X paid in Year 9 for the maintenance and upgrade of the engines do not qualify for the routine maintenance safe harbor described under paragraph (g) of this section. These amounts must be capitalized if they result in a betterment under paragraph (h) of this section, including a material increase in the capacity of the towboat, or otherwise result in an improvement under paragraph (d) of this section.

Example 10. Exceptions to routine maintenance. X owns and operates a farming and cattle ranch with an irrigation system that provides water for crops. Assume that each canal in the irrigation system is a single unit of property and has a class life of 20 years. At the time X placed the canals into service, X expected to have to perform major maintenance on the canals every 3 years to keep the canals in their ordinarily efficient operating condition. This maintenance includes draining the canals, and then cleaning, inspecting, repairing, reconditioning or replacing parts of the canal with comparable and commercially available and reasonable replacement parts. X placed the canals into service in Year 1 and did not perform any maintenance on the canals until Year 6. At that time, the canals had fallen into a state of disrepair and no longer functioned for irrigation. In Year 6, X pays amounts to drain the canals, and do extensive cleaning, repairing, reconditioning, and replacing parts of the canals with comparable and commercially available and reasonable replacement parts. Although the work performed on X's canals was similar to the activities that X expected to perform, but did not perform, every three years, the costs of these activities do not fall within the routine maintenance safe harbor. Specifically, under paragraph (g)(3)(iv) of this section, routine maintenance does not include activities that return a unit of property to its former ordinary efficient operating condition if the property has deteriorated to a state of disrepair and is no longer functional for its intended use. Accordingly, amounts that X pays for work performed on the canals in Year 6 must be capitalized if they result in improvements under paragraph (d) of this section (for example, restorations under paragraph (i) of this section).

(h) *Capitalization of betterments*—(1) *In general.* A taxpayer must capitalize amounts paid that result in the betterment of a unit of property. An amount paid results in the betterment of a unit of property only if it—

(i) Ameliorates a material condition or defect that either existed prior to the taxpayer's acquisition of the unit of property or arose during the production of the unit of property, whether or not the taxpayer was aware of the condition or defect at the time of acquisition or production;

(ii) Results in a material addition (including a physical enlargement, expansion, or extension) to the unit of property; or

(iii) Results in a material increase in capacity (including additional cubic or square space), productivity, efficiency, strength, or quality of the unit of property or the output of the unit of property.

(2) *Betterments to buildings.* In the case of a building, an amount results in a betterment to the unit of property if it results in a betterment to any of the properties designated in paragraphs (e)(2)(ii), (e)(2)(iii)(B), (e)(2)(iv)(B), or (e)(2)(v)(B) of this section.

(3) *Application of general rule*—(i) *Facts and circumstances.* To determine whether an amount paid results in a betterment described in paragraph (h)(1) of this section, it is appropriate to consider all the facts and circumstances including, but not limited to, the purpose of the expenditure, the physical nature of the work performed, the effect of the expenditure on the unit of property, and the taxpayer's treatment of the expenditure on its applicable financial statement (as described in paragraph (b)(4) of this section).

(ii) *Unavailability of replacement parts.* If a taxpayer needs to replace part of a unit of property that cannot practicably be replaced with the same type of part (for example, because of technological advancements or product enhancements), the replacement of the part with an improved, but comparable, part does not, by itself, result in a betterment to the unit of property.

(iii) *Appropriate comparison*—(A) *In general.* In cases in which a particular event necessitates an expenditure, the determination of whether an expenditure results in a betterment of the unit of property is made by comparing the condition of the property immediately after the expenditure with the condition of the property immediately prior to the circumstances necessitating the expenditure.

(B) *Normal wear and tear.* If the expenditure is made to correct the effects of normal wear and tear to the unit of property (including the amelioration of a condition or defect that existed prior to the taxpayer's acquisition of the unit of property resulting from normal wear and tear), the condition of the property immediately prior to the circumstances necessitating the expenditure is the condition of the property after the last time the taxpayer corrected the effects of normal wear and tear (whether the amounts paid were for maintenance or improvements) or, if the taxpayer has not previously corrected the effects of normal wear and tear, the condition of the property when placed in service by the taxpayer.

(C) *Particular event.* If the expenditure is made as a result of a particular event, the condition of the

property immediately prior to the circumstances necessitating the expenditure is the condition of the property immediately prior to the particular event.

(4) *Examples.* The following examples illustrate the application of this paragraph (h) only and do not address whether capitalization is required under another provision of this section or another provision of the Internal Revenue Code (for example, section 263A):

Example 1. Amelioration of pre-existing material condition or defect. In Year 1, X purchases a store located on a parcel of land that contained underground gasoline storage tanks left by prior occupants. Assume that the parcel of land is the unit of property. The tanks had leaked, causing soil contamination. X is not aware of the contamination at the time of purchase. In Year 2, X discovers the contamination and incurs costs to remediate the soil. The remediation costs result in a betterment to the land under paragraph (h)(1)(i) of this section because X incurred the costs to ameliorate a material condition or defect that existed prior to X's acquisition of the land.

Example 2. Not amelioration of pre-existing condition or defect. X owns a building that was constructed with insulation that contained asbestos. The health dangers of asbestos were not widely known when the building was constructed. X determines that certain areas of asbestos-containing insulation had begun to deteriorate and could eventually pose a health risk to employees. Therefore, X pays an amount to remove the asbestos-containing insulation from the building structure and replace it with new insulation that is safer to employees, but no more efficient or effective than the asbestos insulation. Under paragraph (e)(2)(ii) of this section, if the amount paid results in a betterment to the building structure or any building system, X must treat the amount as an improvement to the building. Although the asbestos is determined to be unsafe under certain circumstances, the asbestos is not a preexisting or material defect of the building structure under paragraph (h)(1)(i) of this section. In addition, the removal and replacement of the asbestos does not result in a material addition to the building structure under paragraph (h)(1)(ii) of this section or result in a material increase in capacity, productivity, efficiency, strength, or quality of the building structure or the output of the building structure under paragraph (h)(1)(iii) of this section. Therefore, the amount paid to remove and replace the asbestos insulation does not result in a betterment to the building structure under paragraph (h) of this section.

Example 3. Not amelioration of pre-existing material condition or defect. (i) In January, Year 1, X purchased a used machine for use in its manufacturing operations. Assume that the machine is a unit of property and has a class life of 10 years. X placed the machine in service in January, Year 1 and at that time expected to perform manufacturer recommended scheduled maintenance on the machine every three years. The scheduled maintenance includes the cleaning and oiling of the machine, the inspection of parts for defects, and the replacement of minor items such as springs, bearings, and seals with comparable and commercially available and reasonable replacement parts. The scheduled maintenance does not result in any material additions or material increases in capacity, productivity, efficiency, strength or quality of the machine or the output of the machine. At the time X purchased the machine, it was approaching the end of a three-year scheduled maintenance period. As a result, in February, Year 1, X pays an amount to perform the manufacturer recommended scheduled maintenance to keep the machine in its ordinarily efficient operating condition.

(ii) The amount that X pays does not qualify under the routine maintenance safe harbor in paragraph (g) of this section because the cost primarily results from the prior owner's use of the property and not the taxpayer's use. X acquired the machine just before it had received its three-year scheduled maintenance. Accordingly, the amount that X pays for the scheduled maintenance results from the prior owner's use of the property and ameliorates conditions or defects that existed prior to X's ownership of the machine. Nevertheless, considering the facts and circumstances under paragraph (h)(2)(i) of this section, including the purpose and minor nature of the work performed, this amount does not ameliorate a material condition or defect in the machine under paragraph (h)(1)(i) of this section, result in a material addition to the machine under paragraph (h)(1)(ii) of this section, or result in a material increase in the capacity, productivity, efficiency, strength, or quality of the machine or the output of the machine under paragraph (h)(1)(iii) of this section. Therefore, X is not required to capitalize the amount paid for the scheduled maintenance as a betterment to the machine under this paragraph (h).

Example 4. Not amelioration of pre-existing material condition or defect. X purchases a used ice resurfacing machine for use in the operation of its ice skating rink. To comply with local regulations, X is required to monitor routinely the air quality in the ice skating rink. One week after X places the machine into service, during a routine air quality check, X discovers that the operation of the machine is adversely affecting the air quality in the skating rink. As a result, X pays an amount to inspect and retune the machine, which includes replacing minor components of the engine, which had worn out prior to X's acquisition of the machine. Assume the resurfacing machine, including the engine, is the unit of property. The routine maintenance safe harbor in paragraph (g) of this section does not apply to the amounts paid because the activities performed do more than return the machine to the condition that existed at the time X placed it in service. The amount that X pays to inspect, retune, and replace minor components of the ice resurfacing machine ameliorates a condition or defect that existed prior to X's acquisition of the equipment. Nevertheless, considering the facts and circumstances under paragraph (h)(3)(i) of this section, including the purpose and minor nature of the work performed, this amount does not ameliorate a material condition or defect in the machine under paragraph (h)(1)(i) of this section, result in a material addition to the machine under paragraph (h)(1)(ii) of this section, or result in a material increase in the capacity, productivity, efficiency, strength, or quality of the machine or the output of the machine under paragraph(h)(1)(iii) of this section. Therefore, X is not required to capitalize the amount paid to inspect, retune, and replace minor components of the machine as a betterment under this paragraph (h).

Example 5. Amelioration of material condition or defect. (i) X acquires a building for use in its business of providing assisted living services. Before and after the purchase, the building functions as an assisted living facility. However, at the time of the purchase, X is aware that the building is in a condition that is below the standards that X requires for facilities used in its business. Immediately after the acquisition and during the following two years, while X continues to use the building as an assisted living facility, X pays amounts for repairs, maintenance, and the acquisition of new property to bring the facility into the high-quality condition for which X's facilities are known. The work on X's building includes repairing damaged drywall, repainting, re-wallpapering, replacing windows, repairing and replacing doors; replacing and regrouting tile; repairing millwork; and repairing and replacing roofing materials. The work also involves the replacement of section 1245 property including window treatments, furniture, and cabinets. On its applicable financial statements, X capitalizes the costs of the repairs and maintenance to the building. The work that X performs affects only the building structure under paragraph (e)(2)(ii)(A) of this section and does not affect any of the building systems described in paragraph (e)(2)(ii)(B) of this section. Assume that each section 1245 property is a separate unit of property.

(ii) Under paragraph (e)(2)(ii) of this section, if an amount paid results in a betterment to the building structure or any building system, X must treat the amount as an improvement to the building. Considering the facts and circumstances, as required under paragraph (h)(3)(i) of this section, including the purpose of the expenditures, the effect of the expenditures on the building structure, and the treatment of the expenditures in X's applicable financial statements, the amounts that X paid for repairs and maintenance to the building structure comprises a betterment to the building structure under paragraph (h)(1)(i) of this section because the amounts ameliorate material conditions or defects that existed prior to X's acquisition of the building. Therefore, in accordance with paragraph (e)(2)(ii) of this section, X must treat the amounts paid for the betterment to the building structure as an improvement to the building and must capitalize the amounts under paragraph (d)(1) of this section. Moreover, X is required to capitalize the amounts paid to acquire and install each

section 1245 property, including each window treatment, each item of furniture, and each cabinet, in accordance with § 1.263(a)–2T(d)(1).

Example 6. Not a betterment; building refresh. (i) X owns a nationwide chain of retail stores that sell a wide variety of items. To remain competitive in the industry and increase customer traffic and sales volume, X periodically refreshes the appearance and layout of its stores. The work that X performs to refresh a store consists of cosmetic and layout changes to the store's interiors and general repairs and maintenance to the store building to make the stores more attractive and the merchandise more accessible to customers. The work to each store building consists of replacing and reconfiguring a small number of display tables and racks to provide better exposure of the merchandise, making corresponding lighting relocations and flooring repairs, moving one wall to accommodate the reconfiguration of tables and racks, patching holes in walls, repainting the interior structure with a new color scheme to coordinate with new signage, replacing damaged ceiling tiles, cleaning and repairing vinyl flooring throughout the store building, and power washing building exteriors. The display tables and the racks all constitute section 1245 property. X pays amounts to refresh 50 stores during the taxable year. In its applicable financial statement, X capitalizes all the costs to refresh the store buildings and amortizes them over a 5-year period. Assume that each section 1245 property within each store is a separate unit of property. Finally, assume that the work does not ameliorate any material conditions or defects that existed when X acquired the store buildings or result in any material additions to the store buildings.

(ii) Under paragraph (e)(2)(ii) of this section, if an amount paid results in a betterment to the building structure or any building system, X must treat the amount as an improvement to the building. Considering the facts and circumstances, as required under paragraph (h)(3)(i) of this section, including the purpose of the expenditure, the physical nature of the work performed, the effect of the expenditure on buildings' structure and systems, and the treatment of the work on X's applicable financial statements, the amounts paid for the refresh of each building do not result in material increases in capacity, productivity, efficiency, strength, or quality of the buildings' structures or any building systems as compared to the condition of the buildings' structures and systems after the previous refresh. Rather, the work performed keeps X's store buildings' structures and buildings' systems in the ordinary efficient operating condition that is necessary for X to continue to attract customers to its stores. Therefore, X is not required to treat the amounts paid for the refresh of its store buildings' structures and buildings' systems as betterments under paragraph (h)(1)(iii) of this section. However, X is required to capitalize the amounts paid to acquire and install each section 1245 property in accordance with § 1.263(a)–2T(d)(1).

Example 7. Building refresh; limited improvement. Assume the same facts as *Example 6* except, in the course of X's refresh of its stores, X pays amounts to remove and replace the bathroom fixtures (that is, the toilets, sinks, and plumbing fixtures) with upgraded bathroom fixtures in all of the restrooms in X's retail buildings in order to update the restroom facilities. As part of the update of the restrooms, X also pays amounts to replace the floor and wall tiles that were removed or damaged in the installation of the new plumbing fixtures. Under paragraph (e)(2)(ii) of this section, if any of the amounts paid result in betterments to the building structure or any building system, X must treat the amounts as an improvement to the building. Under paragraph (e)(2)(ii)(B)(*2*) of this section, the plumbing system in each of X's store buildings, including the plumbing fixtures, is a building system. X must treat the amounts paid to replace the bathroom fixtures with upgraded fixtures as a betterment because they result in a material increase in the quality of each plumbing system under paragraph (h)(1)(iii) of this section. Under paragraph (f)(3) of this section, X is required to capitalize all the indirect costs that directly benefit or are incurred by reason of the betterment, or improvement, to each plumbing system. Because the costs to remove the old plumbing fixtures and to remove and replace the bathroom tiles directly benefit and are incurred by reason of the improvement to the plumbing system, these costs must also be capitalized under paragraph (f)(3) of this section. Therefore, in accordance with paragraph (e)(2)(ii) of this section, X must treat the amounts paid for a betterment to each plumbing system as an improvement to X's retail building to which the costs relate, and must capitalize the amounts under paragraph (d)(1) of this section. However, X is not required under paragraph (f)(3) of this section to capitalize the costs described in *Example 6* to refresh the appearance and layout of its stores because those costs do not directly benefit and are not incurred by reason of the improvements to the stores' plumbing systems. Thus, X is not required to capitalize under paragraphs (f)(3) of this section any costs specified in *Example 6* for the reconfiguration, cosmetic changes, repairs, and maintenance to the other parts of X's store buildings.

Example 8. Betterment; building remodel. (i) Assume the same facts as *Example 6,* but assume that the work performed to refresh the stores directly benefits or was incurred by reason of a substantial remodel to X's store buildings. In addition to the reconfiguration, cosmetic changes, repairs, and maintenance activities performed in *Example 6,* X performs significant additional work to alter the appearance and layout of its stores in order to increase customer traffic and sales volume. First, X pays amounts to upgrade the buildings' structures as defined under (e)(2)(ii)(A). This work includes removing and rebuilding walls to move built-in changing rooms and specialty departments to different areas of the stores, replacing ceilings with acoustical tiles to reduce noise and create a more pleasant shopping environment, rebuilding the interior and exterior facades around the main doors to create a more appealing entrance, replacing conventional doors with automatic doors, and replacing carpet with ceramic flooring of different textures and styles to delineate departments and direct customer traffic. Second, X pays amounts for work on the electrical systems, which are building systems under paragraph (e)(2)(ii)(B)(*3*) of this section. Specifically, X upgrades the wiring in the buildings so that X can add video monitors and an expanded electronics department. X also removes and replaces the recessed lighting throughout the buildings with more efficient and brighter lighting. The work performed on the buildings' structures and the electrical systems includes the removal and replacement of both section 1250 and section 1245 property. In its applicable financial statement, X capitalizes all the costs incurred over a 10-year period. Upon completion of this period, X anticipates that it will have to remodel the store buildings again.

(ii) Under paragraph (e)(2)(ii) of this section, if any of the amounts paid result in a betterment to the building structure or any building system, X must treat those amounts as an improvement to the building. Considering the facts and circumstances, as required under paragraph (h)(3)(i) of this section, including the purpose of the expenditure, the physical nature of the work performed, the effect of the work on the buildings' structures and buildings' systems, and the treatment of the work on X's applicable financial statements, the amounts that X pays for the remodeling of its stores result in betterments to the buildings' structures and electrical systems under paragraph (h) of this section. Specifically, amounts paid to upgrade the wiring and to remove and replace the recess lighting throughout the stores materially increase the productivity, efficiency, and quality of X's stores' electrical systems under paragraph (h)(1)(iii) of this section. Also, the amounts paid to remove and rebuild walls, to replace ceilings, to rebuild facades, to replace doors, and replace flooring materially increase the productivity, efficiency, and quality of X's store buildings' structures under paragraph (h)(1)(iii) of this section. In addition, the amounts paid for the refresh of the store buildings described in *Example 6* must be capitalized under paragraph (f)(3)(i) of this section because these expenditures directly benefitted or were incurred by reason of the improvements to X's store buildings' structures and electrical systems. Therefore, in accordance with paragraph (e)(2)(ii) of this section, X must treat the costs of improving the buildings' structures and systems, including the costs to refresh, as improvements to X's retail buildings and must capitalize the amounts paid for these improvements under paragraph (d)(1) of this section. Moreover, X is required to capitalize the amounts paid to acquire and install each section 1245 property in accordance with § 1.263(a)–2T(d)(1).

Example 9. Not betterment; relocation and reinstallation of personal property. In Year 1, X purchases new cash registers for use in its retail store located in leased space in a shopping mall. Assume that each cash register is a unit of property as determined under paragraph (e)(3) of this section. In Year

1, X capitalizes the costs of acquiring and installing the new cash registers under § 1.263(a)–2T(d)(1). In Year 3, X's lease expires and X decides to relocate its retail store to a different building. In addition to various other costs, X pays $5,000 to move the cash registers and $1,000 to reinstall them in the new store. The cash registers are used for the same purposes and in the same manner that they were used in the former location. The amounts that X pays to move and reinstall the cash registers into its new store do not result in a betterment to the cash registers under paragraph (h) of this section.

Example 10. Betterment; relocation and reinstallation of manufacturing equipment. X operates a manufacturing facility in Building A, which contains various machines that X uses in its manufacturing business. X decides to expand part of its operations by relocating a machine to Building B to reconfigure the machine with additional components. Assume that the machine is a single unit of property under paragraph (e)(3) of this section. X pays amounts to disassemble the machine, to move the machine to the new location, and to reinstall the machine in a new configuration with additional components. Assume that the reinstallation, including the reconfiguration and the addition of components, results in an increase in capacity of the machine, and therefore results in a betterment to the machine under paragraph (h)(3)(iii) of this section. Accordingly, X must capitalize the costs of reinstalling the machine as an improvement to the machine under paragraph (d)(1) of this section. X is also required to capitalize the costs of disassembling and moving the machine to Building B because these costs directly benefit and are incurred by reason of the improvement to the machine under paragraph (f)(3)(i) of this section.

Example 11. Betterment; regulatory requirement. X owns a hotel that includes five feet high unreinforced terra cotta and concrete parapets with overhanging cornices around the entire roof perimeter. The parapets and cornices are in good condition. In Year 1, City passes an ordinance setting higher safety standards for parapets and cornices because of the hazardous conditions caused by earthquakes. To comply with the ordinance, X pays an amount to remove the old parapets and cornices and replace them with new ones made of glass fiber reinforced concrete, which makes them lighter and stronger than the original components. They are attached to the hotel using welded connections instead of wire supports, making them more resistant to damage from lateral movement. Under paragraph (e)(2)(ii) of this section, if the amount paid results in a betterment to the building structure or any building system, X must treat the amount as an improvement to the building. The parapets and cornices are part of the building structure as defined in paragraph (e)(2)(ii)(A) of this section. The event necessitating the expenditure was the City ordinance. Prior to the ordinance, the old parapets and cornices were in good condition, but were determined by City to create a potential hazard. After the expenditure, the new parapets and cornices materially increased the structural soundness (that is, the strength) of the hotel structure. X must treat the amount paid to remove and replace the parapets and cornices as an improvement because it results in a betterment to the building structure under paragraph (h)(1)(iii) of this section. Therefore, in accordance with paragraph (e)(2)(ii) of this section, X must treat the amount paid for the betterment to the building structure as an improvement to the hotel building and must capitalize the amount paid under paragraph (d)(1) of this section. City's requirement that X correct the potential hazard to continue operating the hotel is not relevant in determining whether the amount paid improved the hotel. See paragraph (f)(2) of this section.

Example 12. Not a betterment; regulatory requirement. X owns a meat processing plant. X discovers that oil is seeping through the concrete walls of the plant, creating a fire hazard. Federal meat inspectors advise X that it must correct the seepage problem or shut down its plant. To correct the problem, X pays an amount to add a concrete lining to the walls from the floor to a height of about four feet and also to add concrete to the floor of the plant. Under paragraph (e)(2)(ii) of this section, if the amount paid results in a betterment to the building structure or any building system, X must treat the amount as an improvement to the building. The event necessitating the expenditure was the seepage of the oil. Prior to the seepage, the plant did not leak and was functioning for its intended use. X is not required to treat the amount paid as a betterment under paragraph (h) of this section because it does not result in a material addition or material increase in capacity, productivity, efficiency, strength or quality of the building structure or its output compared to the condition of the structure prior to the seepage of the oil. The federal meat inspectors' requirement that X correct the seepage to continue operating the plant is not relevant in determining whether the amount paid improves the plant. See paragraph (f)(2) of this section.

Example 13. Not a betterment; replacement with same part. X owns a small retail shop. A storm damages the roof of X's shop by displacing numerous wooden shingles. X pays a contractor to replace all the wooden shingles on the roof with new wooden shingles. Under paragraph (e)(2)(ii) of this section, if the amount paid results in a betterment to the building structure or any building system, X must treat the amount as an improvement to the building. The roof is part of the building structure under paragraph (e)(2)(ii)(A) of this section. The event necessitating the expenditure was the storm. Prior to the storm, the building structure was functioning for its intended use. X is not required to treat the amount paid to replace the shingles as a betterment under paragraph (h) of this section because it does not result in a material addition, or material increase in the capacity, productivity, efficiency, strength, or quality of the building structure or the output of the building structure compared to the condition of the building structure prior to the storm.

Example 14. Not a betterment; replacement with comparable part. Assume the same facts as in *Example 13,* except that wooden shingles are not available on the market. X pays a contractor to replace all the wooden shingles with comparable asphalt shingles. The amount that X pays to reshingle the roof with asphalt shingles does not result in a betterment to the shop building structure, even though the asphalt shingles may be stronger than the wooden shingles. Because the wooden shingles could not practicably be replaced with new wooden shingles, the replacement of the old shingles with comparable asphalt shingles does not, by itself, result in a betterment, and therefore, an improvement, to the shop building structure under this paragraph (h).

Example 15. Betterment; replacement with improved parts. Assume the same facts as in *Example 14,* except that, instead of replacing the wooden shingles with asphalt shingles, X pays a contractor to replace all the wooden shingles with shingles made of lightweight composite materials that are maintenance-free and do not absorb moisture. The new shingles have a 50-year warranty and a Class A fire rating. The amount paid for these shingles results in a betterment to the shop building structure under paragraphs (h)(1)(iii) and (h)(3)(iii) of this section because it results in a material increase in the quality of the shop building structure as compared to the condition of the shop building structure prior to the storm. Therefore, in accordance with paragraph (e)(2)(ii), X must treat the amount paid for the betterment of the building structure as an improvement to the building and must capitalize the amount paid under paragraph (d)(1) of this section.

Example 16. Material increase in capacity. X owns a factory building with a storage area on the second floor. X pays an amount to replace the columns and girders supporting the second floor to permit storage of supplies with a gross weight 50 percent greater than the previous load-carrying capacity of the storage area. Under paragraph (e)(2)(ii) of this section, if the amount results in a betterment to the building structure or any building system, X must treat the amount as an improvement to the building. The columns and girders are part of the building structure defined under paragraph (e)(2)(ii)(A) of this section. X must treat the amount paid to replace the columns and girders as a betterment under paragraph (h)(1)(iii) of this section because it materially increases the load-carrying capacity of the building structure. The comparison rule in paragraph (h)(3)(iii) of this section does not apply to this amount because the expenditure was not necessitated by a particular event. Therefore, in accordance with paragraph (e)(2)(ii) of this section, X must treat the amount paid for betterment of the building structure as an improvement to the building and must capitalize the amount paid under paragraph (d)(1) of this section.

Example 17. Material increase in capacity. X owns harbor facilities consisting of a slip for the loading and unloading of barges and a channel leading from the slip to the river. At the time of purchase, the channel was 150 feet wide, 1,000 feet long, and 10 feet deep. To allow for ingress and egress and for the unloading of its barges, X needs to deepen the channel to a depth of 20 feet. X pays a

contractor to dredge the channel to the required depth. Assume the channel is the unit of property. X must capitalize as an improvement the amounts paid for the dredging because they result in a material increase in the capacity of the channel under paragraph (h)(1)(iii) of this section. The comparison rule in paragraph (h)(3)(iii) of this section does not apply to these amounts paid because the expenditure was not necessitated by a particular event.

Example 18. Not a material increase in capacity. Assume the same facts as in *Example 17,* except that the channel was susceptible to siltation and, by the next taxable year, the channel depth had been reduced to 18 feet. X pays a contractor to redredge the channel to a depth of 20 feet. The event necessitating the expenditure was the siltation of the channel. Both prior to the siltation and after the redredging, the depth of the channel was 20 feet. X is not required to treat the amounts paid to redredge the channel as a betterment under paragraphs (h)(1)(ii) or (h)(1)(iii) of this section because they do not result in a material addition to the unit of property or a material increase in the capacity, productivity, efficiency, strength, or quality of the unit of property or the output of the unit of property.

Example 19. Not a material increase in capacity. X owns a building used in its trade or business. The first floor has a drop-ceiling. X pays an amount to remove the drop-ceiling and repaint the original ceiling. Under paragraph (e)(2)(ii) of this section, if the amount paid results in a betterment to the building structure or any building system, X must treat the amount as an improvement to the building. The ceiling is part of the building structure as defined under paragraph (e)(2)(ii)(A) of this section. X is not required to treat the amount paid to remove the drop-ceiling as a betterment because it did not result in a material addition under paragraph (h)(1)(ii) of this section or a material increase to the capacity, productivity, efficiency, strength, or quality of the building structure or output of the building structure under paragraph (h)(1)(iii) of this section. The comparison rule in paragraph (h)(3)(iii) of this section does not apply to these amounts paid because the expenditure was not necessitated by a particular event.

(i) *Capitalization of restorations*—(1) *In general.* A taxpayer must capitalize amounts paid to restore a unit of property, including amounts paid in making good the exhaustion for which an allowance is or has been made. An amount is paid to restore a unit of property only if it—

(i) Is for the replacement of a component of a unit of property and the taxpayer has properly deducted a loss for that component (other than a casualty loss under § 1.165–7);

(ii) Is for the replacement of a component of a unit of property and the taxpayer has properly taken into account the adjusted basis of the component in realizing gain or loss resulting from the sale or exchange of the component;

(iii) Is for the repair of damage to a unit of property for which the taxpayer has properly taken a basis adjustment as a result of a casualty loss under section 165, or relating to a casualty event described in section 165;

(iv) Returns the unit of property to its ordinarily efficient operating condition if the property has deteriorated to a state of disrepair and is no longer functional for its intended use;

(v) Results in the rebuilding of the unit of property to a like-new condition after the end of its class life as defined in paragraph (g)(4) of this section (see paragraph (i)(3) of this section); or

(vi) Is for the replacement of a part or a combination of parts that comprise a major component or a substantial structural part of a unit of property (see paragraph (i)(4) of this section).

(2) *Restorations of buildings.* In the case of a building, an amount is paid to restore the unit of property if it restores any of the properties designated in paragraphs (e)(2)(ii), (e)(2)(iii)(B), (e)(2)(iv)(B), (e)(2)(v)(B) of this section.

(3) *Rebuild to like-new condition.* For purposes of paragraph (i)(1)(v) of this section, a unit of property is rebuilt to a like-new condition if it is brought to the status of new, rebuilt, remanufactured, or similar status under the terms of any federal regulatory guideline or the manufacturer's original specifications.

(4) *Replacement of a major component or a substantial structural part.* To determine whether an amount is for the replacement of a part or a combination of parts that comprise a major component or a substantial structural part of the unit of property, it is appropriate to consider all the facts and circumstances. These facts and circumstances include the quantitative or qualitative significance of the part or combination of parts in relation to the unit of property. A major component or substantial structural part includes a part or combination of parts that comprise a large portion of the physical structure of the unit of property or that perform a discrete and critical function in the operation of the unit of property. However, the replacement of a minor component of the unit of property, even though such component may affect the function of the unit of property, will not generally, by itself, constitute a major component or substantial structural part.

(5) *Examples.* The following examples illustrate the application of this paragraph (i) only and do not address whether capitalization is required under another provision of this section or another provision of the Internal Revenue Code (for example, section 263A). Unless otherwise stated, assume that X has not properly deducted a loss for, nor taken into account the adjusted basis on a sale or exchange of, any unit of property, asset, or component of a unit of property that is replaced:

Example 1. Replacement of loss component. X owns a manufacturing building containing various types of manufacturing equipment. X does a cost segregation study of the manufacturing building and properly determines that a walk-in freezer in the manufacturing building is section 1245 property as defined in section 1245(a)(3). The freezer is not part of the building structure under paragraph (e)(2)(i) of this section or the HVAC system, which is a separate building system under paragraph (e)(2)(ii)(B)(*1*) of this section. Several components of the walk-in freezer cease to function and X decides to replace them. X abandons the old freezer components and properly recognizes a loss from the abandonment of the components. X replaces the abandoned freezer components with new components and incurs costs to acquire and install the new components. Under paragraph (i)(1)(i) of this section, X must capitalize the amounts paid to acquire and install the new freezer components because X replaced components for which it had properly deducted a loss.

Example 2. Replacement of sold component. Assume the same facts as in *Example 1* except that X did not abandon the components, but instead sold them to another party and properly recognized a loss on the sale. Under paragraph (i)(1)(ii) of this section, X must capitalize the amounts paid to acquire and install the new freezer components because X replaced components for which it had properly taken into account the adjusted basis of the components in realizing a loss from the sale of the components.

Example 3. Restoration after casualty loss. X owns an office building that it uses in its trade or business. A storm damages the office building at a time when the building has an adjusted basis of $500,000. X deducts under section 165 a casualty loss in the amount of $50,000 and properly reduces its basis in the office building to $450,000. X hires a contractor to repair the damage to the building and pays the contractor $50,000 for the work. Under paragraph (i)(1)(iii) of this section, X must capitalize the $50,000 amount paid to the contractor because X properly adjusted its basis in that amount as a result of a casualty loss under section 165.

Example 4. Restoration after casualty event. Assume the same facts as in *Example 3,* except that X receives insurance proceeds of $50,000 after the casualty to compensate for its loss. X cannot deduct a casualty loss under section 165 because its loss was compensated by insurance. However, X properly reduces its basis in the property by the amount of the insurance proceeds. Under paragraph (i)(1)(iii) of this section, X must capitalize the $50,000 amount paid to the contractor because X has properly taken a basis adjustment relating to a casualty event described in section 165.

Example 5. Restoration of property in a state of disrepair. X owns and operates a farm with several barns and outbuildings. X did not use or maintain one of the outbuildings on a regular basis, and the outbuilding fell into a state of disrepair. The outbuilding previously was used for storage but can no longer be used for that purpose because the building is not structurally sound. X decides to restore the outbuilding and pays an amount to shore up the walls and replace the siding. Under paragraph (e)(2)(ii) of this section, if the amount paid results in a restoration of the building structure or any building system, X must treat the amount as an improvement to the building. The walls and siding are part of the building structure under paragraph (e)(2)(ii)(A) of this section. Under paragraph (i)(1)(iv) of this section, X must treat the amount paid to shore up the walls and replace the siding as a restoration of the building structure because the amounts return the building structure to its ordinarily efficient operating condition after it had deteriorated to a state of disrepair and was no longer functional for its intended use. Therefore, in accordance with paragraph (e)(2)(ii) of this section, X must treat the amount paid as an improvement to the building and must capitalize the amount paid under paragraph (d)(2) of this section.

Example 6. Rebuild of property to like-new condition before end of class life. X is a Class I railroad that owns a fleet of freight cars. Freight cars have a recovery period of 7 years under section 168(c) and a class life of 14 years. Every 8 to 10 years, X rebuilds its freight cars. Ten years after X places the freight car in service, X performs a rebuild, which includes a complete disassembly, inspection, and reconditioning or replacement of components of the suspension and draft systems, trailer hitches, and other special equipment. X modifies the car to upgrade various components to the latest engineering standards. The freight car essentially is stripped to the frame, with all of its substantial components either reconditioned or replaced. The frame itself is the longest-lasting part of the car and is reconditioned. The walls of the freight car are replaced or are sandblasted and repainted. New wheels are installed on the car. All the remaining components of the car are restored before they are reassembled. At the end of the rebuild, the freight car has been restored to rebuilt condition under the manufacturer's specifications. Assume the freight car is the unit of property. X is not required to capitalize under paragraph (i)(1)(v) of this section the amounts paid to rebuild the freight car because, although the amounts paid restore the freight car to like-new condition, the amounts were not paid after the end of the class life of the freight car.

Example 7. Rebuild of property to like-new condition after end of class life. Assume the same facts as in *Example 6,* except that X rebuilds the freight car 15 years after X places it in service. Under paragraph (i)(1)(v) of this section, X must capitalize the amounts paid to rebuild the freight car because the amounts paid restore the freight car to like-new condition after the end of the class life of the freight car.

Example 8. Replacement of major component or substantial structural part; personal property. X is a common carrier that owns a fleet of petroleum hauling trucks. X pays amounts to replace the existing engine, cab, and petroleum tank with a new engine, cab, and tank. Assume the tractor of the truck (which includes the cab and the engine) is a single unit of property, and that the trailer (which contains the petroleum tank) is a separate unit of property. The new engine and cab constitute parts or combinations of parts that comprise a major component or substantial structural part of X's tractor. Therefore, the amounts paid for the replacement of those components must be capitalized under paragraph (i)(1)(vi) of this section. The new petroleum tank constitutes a part or combination of parts that comprise a major component and a substantial structural part of the trailer. Accordingly, the amounts paid for the replacement of the tank also must be capitalized under paragraph (i)(1)(vi) of this section.

Example 9. Repair performed during a restoration. Assume the same facts as in *Example 8,* except that, at the same time the engine and cab of the tractor are replaced, X pays amounts to paint the cab of the tractor with its company logo and to fix a broken taillight on the tractor. The repair of the broken taillight and the painting of the cab generally are deductible expenses under § 1.162–4T. However, under paragraph (f)(3)(i) of this section, a taxpayer must capitalize all the direct costs of an improvement and all the indirect costs that directly benefit or are incurred by reason of an improvement in accordance with the rules under section 263A. Repairs and maintenance that do not directly benefit or are not incurred by reason of an improvement are not required to be capitalized under section 263(a), regardless of whether they are made at the same time as an improvement. Under paragraph (f)(3)(i) of this section, X must capitalize the amounts paid to paint the cab as part of the improvement to the tractor because these amounts directly benefit and are incurred by reason of the restoration of the cab. Amounts paid to repair the broken taillight, however, are not incurred by reason of the restoration of the tractor, nor do the amounts paid directly benefit the tractor restoration, even though the repair was performed at the same time as the restoration. Thus, X must capitalize the amounts paid to paint the cab under paragraph (i)(1)(vi) and (f)(3)(i) of this section, but X is not required to capitalize the amounts paid to repair the broken taillight.

Example 10. Related amounts to replace major component or substantial structural part; personal property. (i) X owns a retail gasoline station, consisting of a paved area used for automobile access to the pumps and parking areas, a building used to market gasoline, and a canopy covering the gasoline pumps. The premises also consist of underground storage tanks (USTs) that are connected by piping to the pumps and are part of the machinery used in the immediate retail sale of gas. To comply with regulations issued by the Environmental Protection Agency, X is required to remove and replace leaking USTs. In Year 1, X hires a contractor to perform the removal and replacement, which consists of removing the old tanks and installing new tanks with leak detection systems. The removal of the old tanks includes removing the paving material covering the tanks, excavating a hole large enough to gain access to the old tanks, disconnecting any strapping and pipe connections to the old tanks, and lifting the old tanks out of the hole. Installation of the new tanks includes placement of a liner in the excavated hole, placement of the new tanks, installation of a leak detection system, installation of an overfill system, connection of the tanks to the pipes leading to the pumps, backfilling of the hole, and replacement of the paving. X also is required to pay a permit fee to the county to undertake the installation of the new tanks.

(ii) X pays the permit fee to the county on October 15, Year 1. On December 15, Year 1, the contractor completes the removal of the old USTs and bills X for the costs of removal. On January 15, Year 2, the contractor completes the installation of the new USTs and bills X for the remainder of the work. Assume that X computes its taxes on a calendar year basis and X's gasoline distribution system is the unit of property. Under paragraph (i)(1)(vi) of this section, X must capitalize the amounts paid to replace the USTs as a restoration to the gasoline distribution system because the USTs are parts or combinations of parts that comprise a major component and substantial structural part of the gasoline distribution system. Moreover, under paragraph (f)(3) of this section, X must capitalize the costs of removing the old USTs because these amounts directly benefit and are incurred by reason of the improvement to the gasoline distribution system. Finally, under paragraph (f)(4) of this section, X must capitalize the aggregate of related amounts paid to improve the gasoline distribution system, including the amount paid to the county, the amount paid to remove the old USTs, and the amount paid to install the new USTs, even though the amounts were separately invoiced, paid to different parties, and incurred in different tax years.

Example 11. Not replacement of major component or substantial structural part; personal property. X owns a machine shop in which it makes dies used by manufacturers. In Year 1, X purchased a drill press for use in its production process. In Year 3, X discovers that the power switch assembly, which controls the supply of electric power to the drill press, has become damaged and could not operate. To correct this problem, X paid amounts to replace the power switch assembly with comparable, commercially available and reasonable replacement parts. Assume that the drill press is a unit of property under paragraph (e) of this section and the power switch assembly is a small component of the drill press that may be removed and installed with relative ease. Thus, the power switch assembly is not a major component or substantial structural part of X's drill press under paragraph (i)(3) of this section. X is not required to capitalize the costs to replace the power switch assembly under paragraph

(i)(1)(vi) of this section because the replacement, by itself, does not constitute the replacement of a part or a combination of parts that comprise a major component or substantial structural part of X's drill press. But see section 263A and the regulations thereunder for the requirement to capitalize indirect costs that directly benefit or are incurred by reason of production activities.

Example 12. Replacement of major component or substantial structural part; roof. X owns a large retail store. X discovers a leak in the roof of the store and hires a contractor to inspect and fix the roof. The contractor discovers that a major portion of the sheathing and rafters has rotted, and recommends the replacement of the entire roof. X pays the contractor to replace the entire roof with a new roof. Under paragraph (e)(2)(ii) of this section, if the amount paid results in a restoration of the building structure or any building system, X must treat the amount as an improvement to the building. The roof is part of the building structure under paragraph (e)(2)(ii)(A) of this section and comprises a major component or substantial structural part of X's building structure under paragraph (i)(4) of this section. Under paragraph (i)(1)(vi) of this section, X must treat the amount paid to replace the roof as a restoration because X paid the amount to replace a major component or substantial structural part of X's building structure. Therefore, in accordance with paragraph (e)(2)(ii) of this section, X must treat the amount paid to restore the building structure as an improvement to the building and must capitalize the amount paid under paragraph (d)(2) of this section.

Example 13. Replacement of major component or substantial structural part; roof. Assume the same facts as *Example 12* except the contractor recommends replacement of a significant portion of the roof, but not the entire roof. Accordingly, X pays an amount to replace a large portion of the decking, insulation, and membrane of the roof of X's retail building. The portion of the roof replaced comprises a major component or substantial structural part of the building structure under paragraph (i)(4) of this section. Thus, under paragraph (i)(1)(vi) of this section, X must treat the amount paid for the roof work as a restoration of the building structure because X paid the amount to replace a major component or substantial structural part of the building structure. Therefore, in accordance with paragraph (e)(2)(ii) of this section, X must treat the amount paid as an improvement to the building and must capitalize the amount paid under paragraph (d)(2) of this section.

Example 14. Not replacement of major component or substantial structural part; roof membrane. X is in the business of manufacturing parts. X owns a factory facility in which the parts are manufactured. The roof over X's facility is comprised of structural elements, insulation, and a waterproof membrane. Over time, the waterproof membrane began to wear and leakage began to occur. Consequently, X pays an amount to replace the plant's worn roof membrane with a similar but new membrane. Under paragraph (e)(2)(ii) of this section, if the amount paid results in a restoration of the building structure or any building system, X must treat the amount as an improvement to the building. The roof, including the membrane, is part of the building structure as defined under paragraph (e)(2)(ii)(A) of this section. Although the roof membrane may affect the function of the building structure, it is not, by itself, a major component or substantial structural part of X's building structure under paragraph (i)(4) of this section. Because the roof membrane is not a major component or substantial structural part of the building structure, X is not required to treat the amount paid to replace the roof membrane as a restoration of the building structure under paragraph (i)(1)(vi) of this section. But see section 263A and the regulations thereunder for the requirement to capitalize indirect costs that directly benefit or are incurred by reason of production activities.

Example 15. Replacement of major component or substantial structural part; HVAC system. X owns a building in which it operates an office that provides medical services. The building contains one HVAC system, which is comprised of a furnace, an air conditioning unit, and duct work that runs throughout the building to distribute the heat or air conditioning throughout the building. The furnace in X's building breaks down and X pays an amount to replace it with a new furnace. Under paragraph (e)(2)(ii) of this section, if the amount paid results in a restoration of the building structure or any building system, X must treat the amount as an improvement to the building. The heating and air conditioning system, including the furnace, is a building system under paragraph (e)(2)(ii)(B)(*1*) of this section. The furnace performs a discrete and critical function in the operation of the HVAC system, and is therefore a major component or substantial structural part of the building system under paragraph (i)(4) of this section. Because the furnace comprises a major component or substantial structural part of a building system, X must treat the amount paid to replace the furnace as a restoration of the building system under paragraph (i)(1)(vi) of this section. Therefore, in accordance with paragraph (e)(2)(ii) of this section, X must treat the amount paid as an improvement to the building and must capitalize the amount paid under paragraph (d)(2) of this section.

Example 16. Replacement of major component or substantial structural part; HVAC system. X owns a large office building in which it provides consulting services. The building contains one HVAC system, which is comprised of one chiller unit, one boiler, pumps, duct work, diffusers, air handlers, outside air intake and a cooling tower. The chiller unit includes the compressor, evaporator, condenser, and expansion valve, and functions to cool the water used to generate air conditioning throughout the building. X pays an amount to replace the chiller with a more energy efficient unit. Under paragraph (e)(2)(ii) of this section, if the amount paid results in a restoration of the building structure or any building system, X must treat the amount as an improvement to the building. The HVAC system, including the chiller unit, is a building system under paragraph (e)(2)(ii)(B)(*1*) of this section. The chiller unit performs a discrete and critical function in the operation of the HVAC system and is therefore a major component or substantial structural part of the HVAC system under paragraph (i)(4) of this section. Because the chiller unit comprises a major component or substantial structural part of a building system, X must treat the amount paid to replace the chiller unit as a restoration to a building system under paragraph (i)(1)(vi) of this section. Therefore, in accordance with paragraph (e)(2)(ii) of this section, X must treat the amount paid as an improvement to the building and must capitalize the amount paid under paragraph (d)(2) of this section.

Example 17. Not replacement of major component or substantial structural part; HVAC system. X owns an office building that it uses to provide services to customers. The building contains an HVAC system that incorporates ten roof-mounted units that provide heating and air conditioning for different parts of the building. The HVAC system also consists of controls for the entire system and duct work that distributes the heated or cooled air to the various spaces in the building's interior. X begins to experience climate control problems in various offices throughout the office building and consults with a contractor to determine the cause. The contractor recommends that X replace two of the roof-mounted units. X pays an amount to replace the two specified units. No work is performed on the other roof-mounted heating/cooling units, the duct work, or the controls. Under paragraph (e)(2)(ii) of this section, if the amount paid results in a restoration of the building structure or any building system, X must treat the amount as an improvement to the building. The HVAC system, including the two-roof mounted units, is a building system under paragraph (e)(2)(ii)(B)(*1*) of this section. The two roof-mounted heating/cooling units, by themselves, do not comprise a large portion of the physical structure of the HVAC system or perform a discrete and critical function in the operation of the system. Therefore, under paragraph (i)(4) of this section, the two units do not constitute a major component or substantial structural part of the building system. Accordingly, X is not required to treat the amount paid to replace the two roof-mounted heating/cooling units as a restoration of a building system under paragraph (i)(1)(iv) of this section.

Example 18. Replacement of major component or substantial structural part; fire protection system. X owns a building that it uses to operate its business. X pays an amount to replace the sprinkler system in the building with a new sprinkler system. Under paragraph (e)(2)(ii) of this section, if the amount paid results in a restoration of the building structure or any building system, X must treat the amount as an improvement to the building. The fire protection and alarm system, including the sprinkler system, is a building system under paragraph (e)(2)(ii)(B)(*6*) of this section. The sprinkler system performs a discrete and critical function in the operation of the fire protection and alarm system and is therefore

a major component or substantial structural part of the fire protection and alarm system under paragraph (i)(4) of this section. Because the sprinkler system comprises a major component or substantial structural part of a building system, X must treat the amount paid to replace the sprinkler system as a restoration to a building system under paragraph (i)(1)(vi) of this section. Therefore, in accordance with paragraph (e)(2)(ii) of this section, X must treat the amount paid as an improvement to the building and must capitalize the amount paid under paragraph (d)(2) of this section.

Example 19. Replacement of major component or substantial structural part; electrical system. X owns a building that it uses to operate its business. X pays an amount to replace the wiring throughout the building with new wiring that meets building code requirements. Under paragraph (e)(2)(ii) of this section, if the amount paid results in a restoration of the building structure or any building system, X must treat the amount as an improvement to the building. The electrical system, including the wiring, is a building system under paragraph (e)(2)(ii)(B)(*3*) of this section. The wiring performs a discrete and critical function in the operation of the electrical system and is therefore a major component or substantial structural part of the electrical system under paragraph (i)(4) of this section. Because the wiring comprises a major component or substantial structural part of a building system, X must treat the amount paid to replace the wiring as a restoration to a building system under paragraph (i)(1)(vi) of this section. Therefore, in accordance with paragraph (e)(2)(ii) of this section, X must treat the amount paid as an improvement to the building and must capitalize the amount paid under paragraph (d)(2) of this section.

Example 20. Replacement of major component or substantial structural part; plumbing system. X owns a building in which it conducts a retail business. The retail building has three floors. The retail building has men's and women's restrooms on two of the three floors. X decides to update the restrooms by paying an amount to replace the plumbing fixtures in all of the restrooms, including the toilets, sinks, and associated fixtures, with modern style plumbing fixtures of similar quality and function. X does not replace the pipes connecting the fixtures to the building's plumbing system. Under paragraph (e)(2)(ii) of this section, if the amount paid results in a restoration of the building structure or any building system, X must treat the amount as an improvement to the building. The plumbing system, including the plumbing fixtures, is a building system under paragraph (e)(2)(ii)(B)(*2*) of this section. The plumbing fixtures in all the restrooms perform a discrete and critical function in the operation of the plumbing system and comprise a large portion of the physical structure of plumbing system. Therefore, under paragraph (i)(4) of this section, the plumbing fixtures comprise a major component or substantial structural part of the plumbing system, and X must treat the amount paid to replace all of the plumbing fixtures as a restoration of a building system under paragraph (i)(1)(vi) of this section. As a result, in accordance with paragraph (e)(2)(ii) of this section, X must treat the amount paid to restore the plumbing system as an improvement to the building and must capitalize these amounts under paragraph (d)(2) of this section.

Example 21. Not replacement of major component or substantial structural part; plumbing system. Assume the same facts as *Example 20* except that X does not update all the bathroom fixtures. Instead, X only pays an amount to replace three of the twenty sinks located in the various restrooms because these sinks had cracked. The three replaced sinks, by themselves, do not comprise a large portion of the physical structure of the plumbing system nor do they perform a discrete and critical function in the operation of the plumbing system. Therefore, under paragraph (i)(4) of this section, the sinks do not constitute a major component or substantial structural part of the building system. Accordingly, X is not required to treat the amount paid to replace the sinks as a restoration of a building system under paragraph (i)(1)(iv) of this section.

Example 22. Replacement of major component or substantial structural part; remodel. (i) X owns and operates a hotel building. X decides that to attract customers and to remain competitive, it needs to update the guest rooms in its facility. Accordingly, X pays amounts to replace the bathtubs, toilets, sinks, plumbing fixtures, and to repair, repaint, and retile the bathroom walls and floors, which was necessitated by the installation of the new plumbing components. The replacement bathtubs, toilets, sinks, plumbing fixtures, and tile are new and in a different style, but are similar in function and quality to the replaced items. X also pays amounts to replace certain section 1245 property, such as the guest room furniture, carpeting, drapes, table lamps, and partition-walls separating the bathroom area. X completes this work on two floors at a time, closing those floors and leaving the rest of the hotel open for business. In Year 1, X pays amounts to perform the updates for eight of the twenty hotel room floors, and expects to complete the renovation of the remaining rooms over the next 2 years.

(ii) Under paragraph (e)(2)(ii) of this section, if the amount paid results in a restoration of the building structure or any building system, X must treat the amount as an improvement to the building. The plumbing system, including the bathtubs, toilets, sinks, and plumbing fixtures, is a building system under paragraph (e)(2)(ii)(B)(*2*) of this section. All the bathtubs, toilets, sinks, and plumbing fixtures in the hotel building perform a discrete and critical function in the operation of the plumbing system and comprise a large portion of the physical structure of plumbing system. Therefore, under paragraph (i)(4) of this section, these plumbing components comprise major components or substantial structural parts of the plumbing system, and X must treat the amount paid to replace these plumbing components as a restoration of a building system under paragraph (i)(1)(vi) of this section. In addition, under paragraph (f)(3)(i) of this section, X must treat the costs of repairing, repainting, and retiling the bathroom walls and floors as improvement costs because these costs directly benefit and are incurred by reason of the improvement to the plumbing system. Further, under paragraph (f)(4) of this section, X must treat the costs incurred in Years 1, 2, and 3 for the bathroom remodeling as improvement costs, even though they are incurred over a period of several taxable years, because they are part of the aggregate of related amounts paid to improve the plumbing system. Therefore, in accordance with paragraph (e)(2)(ii) of this section, X must treat the amounts it paid to improve the plumbing system as the costs of improving the building and must capitalize the amounts under paragraph (d)(2) of this section. In addition, X must capitalize the amounts paid to acquire and install each section 1245 property under § 1.263(a)–2T of the regulations.

Example 23. Not replacement of major component or substantial structural part; windows. X owns a large office building that it uses to provide office space for employees that manage X's operations. The building has 300 exterior windows. In Year 1, X pays an amount to replace 30 of the exterior windows that had become damaged. At the time of these replacements, X has no plans to replace any other windows in the near future. Under paragraph (e)(2)(ii) of this section, if the amount paid results in a restoration of the building structure or any building system, X must treat the amount as an improvement to the building. The exterior windows are part of the building structure as defined under paragraph (e)(2)(ii)(A) of this section. The 30 replacement windows do not comprise a large portion of the physical structure of the office building structure and, by themselves, do not perform a discrete and critical function in the operation of X's building structure. Therefore, under paragraph (i)(4) of this section, the replacement windows do not constitute major components or substantial structural parts of the building structure. Accordingly, X is not required to treat the amount paid to replace the windows a restoration of a building system under paragraph (i)(1)(iv) of this section.

Example 24. Replacement of major component or substantial structural part; windows. Assume the same facts as *Example 23* except that X replaces 200 of the 300 windows on the building. In addition, as a result of damage caused during the window replacements, X also pays an amount to repaint the interior trims associated with the replaced windows. The 200 replacement windows comprise a large portion of the physical structure of X's building and perform a discrete and critical function in the operation of the building structure. Therefore, under paragraph (i)(4) of this section, the 200 windows comprise a major component or substantial structural part of the building structure, and X must treat the amount paid to replace the windows as a restoration of the building structure under paragraph (i)(1)(vi) of this section. As a result, in accordance with paragraph (e)(2)(ii) of this section, X must treat the amounts paid to restore the building structure as an improvement to the building and must capitalize the amounts under paragraph (d)(2) of this section.

Example 25. Not replacement of major component or substantial structural part; floors. X owns and operates a hotel building. X decides to refresh the appearance of the hotel lobby by replacing the floors in the lobby. The hotel lobby comprises a small portion of the entire hotel building. X pays an amount to replace the wood flooring in the lobby with new wood flooring. X did not replace any other flooring in the building. Assume that the wood flooring constitutes section 1250 property. Under paragraph (e)(2)(ii) of this section, if the amount paid results in a restoration of the building structure or any building system, X must treat the amount as an improvement to the building. The wood flooring is part of the building structure under paragraph (e)(2)(ii)(A) of this section. The replacement wood flooring in the lobby of the building does not comprise a large portion of the physical structure of the hotel building or perform a discrete and critical function in the operation of the hotel building structure. Therefore, under paragraph (i)(4) of this section, the wood flooring does not a constitute major component or substantial structural part of the hotel building structure. Accordingly, X is not required to treat the amount paid to replace the wood flooring in the hotel lobby as a restoration under paragraph (i)(1)(vi) of this section.

Example 26. Replacement of major component or substantial structural part; floors. Assume the same facts as *Example 25* except that X decides to refresh the appearance of all the public areas of the hotel building by replacing the floors. To that end, X pays an amount to replace all the wood floors in all the public areas of the hotel building with new wood floors. The public areas include the lobby, the hallways, the meeting rooms, and other public rooms throughout the hotel interiors. The replacement wood floors in all the public areas comprise a large portion of the physical structure of the hotel building structure and perform a discrete and critical function in the operation of X's hotel building structure. Therefore, under paragraph (i)(4) of this section, replacement wood floors comprise a major component or substantial structural part of the building structure, and X must treat the amount paid to replace the floors as a restoration of the building structure under paragraph (i)(1)(vi) of this section. As a result, in accordance with paragraph (e)(2)(ii) of this section, X must treat the amounts paid to restore the building structure as an improvement to the building and must capitalize the amounts under paragraph (d)(2) of this section.

(j) *Capitalization of amounts to adapt property to a new or different use*—(1) *In general.* Taxpayers must capitalize amounts paid to adapt a unit of property to a new or different use. In general, an amount is paid to adapt a unit of property to a new or different use if the adaptation is not consistent with the taxpayer's intended ordinary use of the unit of property at the time originally placed in service by the taxpayer.

(2) *Adapting buildings to new or different use.* In the case of a building, an amount is paid to adapt the unit of property to a new or different use if it adapts to a new or different use any of the properties designated in paragraphs (e)(2)(ii), (e)(2)(iii)(B), (e)(2)(iv)(B), or (e)(2)(v)(B) of this section.

(3) *Examples.* The following examples illustrate solely the rules of this paragraph (j). Even if capitalization is not required in an example under this paragraph (j), the amounts paid in the example may be subject to capitalization under a different provision of this section or another provision of the Internal Revenue Code (for example, section 263A). Unless otherwise stated, assume that X has not properly deducted a loss for any unit of property, asset, or component of a unit of property that is removed and replaced.

Example 1. New or different use. X is a manufacturer and owns a manufacturing building that it has used for manufacturing since Year 1, when X placed it in service. In Year 30, X pays an amount to convert its manufacturing building into a showroom for its business. To convert the facility, X removes and replaces various structural components to provide a better layout for the showroom and its offices. X also repaints the building interiors as part of the conversion. None of the materials used are better than existing materials in the building. Under paragraph (e)(2)(ii) of this section, if the amount paid adapts the building structure to a new or different use, X must treat the amount as an improvement to the building. Under paragraph (j)(1) of this section, the amount paid to convert the manufacturing facility into a showroom adapts the building structure to a new or different use because the conversion is not consistent with X's intended ordinary use of the building structure at the time it was placed in service. Therefore, in accordance with paragraph (e)(2)(ii) of this section, X must treat the amount paid for the adaptation of the building structure as an amount that improves the building. Accordingly, X must capitalize the amount as an improvement under paragraph (d)(3) of this section.

Example 2. Not a new or different use. X owns a building consisting of twenty retail spaces. The space was designed to be reconfigured; that is, adjoining spaces could be combined into one space. One of the tenants expands its occupancy to include two adjoining retail spaces. To facilitate the new lease, X pays an amount to remove the walls between the three retail spaces. Assume that the walls between spaces are part of the building and its structural components. Under paragraph (e)(2)(ii) of this section, if the amount paid adapts the buildings structure to a new or different use, X must treat the amount as an improvement to the building. Under paragraph (j)(1) of this section, the amount paid to convert three retail spaces into one larger space for an existing tenant does not adapt X's building structure to a new or different use because the combination of retail spaces is consistent with X's intended, ordinary use of the building structure. Therefore, the amount paid by X to remove the walls does not improve the building under paragraph (d)(3) of this section.

Example 3. Not a new or different use. X owns a building consisting of twenty retail spaces. X decides to sell the building. In anticipation of selling the building, X pays an amount to repaint the interior walls and to refinish the hardwood floors. Under paragraph (e)(2)(ii) of this section, if the amount paid adapts the buildings structure to a new or different use, X must treat the amount as an improvement to the building. Preparing the building for sale does not constitute a new or different use for the building structure under paragraph (j)(1) of this section. Therefore, the amount paid to prepare the building structure for sale does not improve the building under paragraphs (d)(3) of this section.

Example 4. New or different use. X owns a parcel of land on which it previously operated a manufacturing facility. Assume that the land is the unit of property. During the course of X's operation of the manufacturing facility, the land became contaminated with wastes from its manufacturing processes. X discontinues manufacturing operations at the site, and decides to sell the property to a developer that intends to use the property for residential housing. In anticipation of selling the land, X pays an amount to cleanup the land to a standard that is required for the land to be used for residential purposes. In addition, X pays an amount to regrade the land so that it can be used for residential purposes. Amounts that X pays to cleanup wastes that were discharged in the course of X's manufacturing operations do not adapt the land to a new or different use, regardless of the extent to which the land was cleaned. Therefore, X is not required to capitalize the amount paid for the cleanup under paragraph (j)(1) of this section. However, the amount paid to regrade the land so that it can be used for residential purposes adapts the land to a new or different use that is inconsistent with X's intended ordinary use of the property at the time it was placed in service. Accordingly, the amounts paid to regrade the land must be capitalized as improvements under paragraphs (j)(1) of this section.

(k) *Optional regulatory accounting method*—(1) *In general.* This paragraph (k) provides an optional simplified method (the regulatory accounting method) for regulated taxpayers to determine whether amounts paid to repair, maintain, or improve tangible property are to be treated as deductible expenses or capital expenditures. A taxpayer that uses the regulatory accounting method described in paragraph (k)(3) of this section must use that method for property subject to regulatory accounting instead of determining whether amounts paid to repair, maintain, or improve property are capital expenditures or deductible expenses under the general principles of sections 162(a), 212, and 263(a). Thus, the capitalization rules in paragraph (d) (and the routine maintenance safe

harbor described in paragraph (g)) of this section do not apply to amounts paid to repair, maintain, or improve property subject to regulatory accounting by taxpayers that use the regulatory accounting method under this paragraph (k). However, section 263A continues to apply to costs required to be capitalized to property produced by the taxpayer or to property acquired for resale.

(2) *Eligibility for regulatory accounting method.* A taxpayer that is engaged in a trade or business in a regulated industry may use the regulatory accounting method under this paragraph (k). For purposes of this paragraph (k), a taxpayer in a regulated industry is a taxpayer that is subject to the regulatory accounting rules of the Federal Energy Regulatory Commission (FERC), the Federal Communications Commission (FCC), or the Surface Transportation Board (STB).

(3) *Description of regulatory accounting method.* Under the regulatory accounting method, a taxpayer must follow its method of accounting for regulatory accounting purposes in determining whether an amount paid improves property under this section. Therefore, a taxpayer must capitalize for Federal income tax purposes an amount paid that is capitalized as an improvement for regulatory accounting purposes. A taxpayer must not capitalize for Federal income tax purposes under this section an amount paid that is not capitalized as an improvement for regulatory accounting purposes. A taxpayer that uses the regulatory accounting method must use that method for all of its tangible property that is subject to regulatory accounting rules. The method does not apply to tangible property that is not subject to regulatory accounting rules. The method also does not apply to property for the taxable years in which the taxpayer elected to apply the repair allowance under § 1.167(a)–11(d)(2).

(4) *Examples.* The rules of this paragraph (k) are illustrated by the following examples:

Example 1. Taxpayer subject to regulatory accounting rules of FERC. X is an electric utility company that operates a power plant that generates electricity and that owns and operates network assets to transmit and distribute the electricity to its customers. X is subject to the regulatory accounting rules of FERC and X chooses to use the regulatory accounting method under paragraph (k) of this section. X does not capitalize on its books and records for regulatory accounting purposes the cost of repairs and maintenance performed on its turbines or its network assets. Under the regulatory accounting method, X must not capitalize for Federal income tax purposes amounts paid for repairs performed on its turbines or its network assets.

Example 2. Taxpayer not subject to regulatory accounting rules of FERC. X is an electric utility company that operates a power plant to generate electricity. X previously was subject to the regulatory accounting rules of FERC but, for various reasons, X is no longer required to use FERC's regulatory accounting rules. X cannot use the regulatory accounting method provided in this paragraph (k).

Example 3. Taxpayer subject to regulatory accounting rules of FCC. X is a telecommunications company that is subject to the regulatory accounting rules of the FCC. X chooses to use the regulatory accounting method under this paragraph (k). X's assets include a telephone central office switching center, which contains numerous switches and various switching equipment. X capitalizes on its books and records for regulatory accounting purposes the cost of replacing each switch. Under the regulatory accounting method, X is required to capitalize for Federal income tax purposes amounts paid to replace each switch.

Example 4. Taxpayer subject to regulatory accounting rules of STB. X is a Class I railroad that is subject to the regulatory accounting rules of the STB. X chooses to use the regulatory accounting method under this paragraph (k). X capitalizes on its books and records for regulatory accounting purposes the cost of locomotive rebuilds. Under the regulatory accounting method, X is required to capitalize for federal income tax purposes amounts paid to rebuild its locomotives.

(l) *Methods of accounting authorized in published guidance.* A taxpayer may use a repair allowance method of accounting or any other method of accounting that is authorized in published guidance in the **Federal Register** or in the Internal Revenue Bulletin (see § 601.601(d)(2)(ii)(*b*) of this chapter).

(m) *Treatment of capital expenditures.* Amounts required to be capitalized under this section are capital expenditures and must be taken into account through a charge to capital account or basis, or in the case of property that is inventory in the hands of a taxpayer, through inclusion in inventory costs. See section 263A for the treatment of direct and indirect costs of producing property or acquiring property for resale.

(n) *Recovery of capitalized amounts.* Amounts that are capitalized under this section are recovered through depreciation, cost of goods sold, or by an adjustment to basis at the time the property is placed in service, sold, used, or otherwise disposed of by the taxpayer. Cost recovery is determined by the applicable Internal Revenue Code and regulation provisions relating to the use, sale, or disposition of property.

(o) *Accounting method changes.* Except as otherwise provided in this section, a change to comply with this section is a change in method of accounting to which the provisions of sections 446 and 481, and the regulations thereunder apply. A taxpayer seeking to change to a method of accounting permitted in this section must secure the consent of the Commissioner in accordance with § 1.446–1(e) and follow the administrative procedures issued under § 1.446–1(e)(3)(ii) for obtaining the Commissioner's consent to change its accounting method.

(p) *Effective/applicability date.* This section applies to taxable years beginning on or after January 1, 2012. For the applicability of regulations to taxable years beginning before January 1, 2012, see § 1.263(a)–3 in effect prior to January 1, 2012 (§ 1.263(a)–3 as contained in 26 CFR part 1 edition revised as of April 1, 2011).

(q) *Expiration date.* The applicability of this section expires on of before December 23, 2014.

■ **Par. 31.** Section 1.263(a)–6T is added to read as follows:

§ 1.263(a)–6T Election to deduct or capitalize certain expenditures (temporary).

(a) *In general.* Under certain provisions of the Internal Revenue Code, taxpayers may elect to treat capital expenditures as deductible expenses or as deferred expenses, or to treat deductible expenses as capital expenditures.

(b) *Election provisions.* The sections referred to in paragraph (a) of this section include:

(1) Section 173 (circulation expenditures);

(2) Section 174 (research and experimental expenditures);

(3) Section 175 (soil and water conservation expenditures; endangered species recovery expenditures);

(4) Section 179 (election to expenses certain depreciable business assets);

(5) Section 179A (deduction for clean-fuel vehicles and certain refueling property);

(6) Section 179B (deduction for capital costs incurred in complying with environmental protection agency sulfur regulations);

(7) Section 179C (election to expense certain refineries);

(8) Section 179D (energy efficient commercial buildings deduction);

(9) Section 179E (election to expense advanced mine safety equipment);

(10) Section 180 (expenditures by farmers for fertilizer);

(11) Section 181 (treatment of certain qualified film and television productions);

(12) Section 190 (expenditures to remove architectural and transportation

barriers to the handicapped and elderly);

(13) Section 191 (tertiary injectants);

(14) Section 194 (treatment of reforestation expenditures);

(15) Section 195 (start-up expenditures);

(16) Section 198 (expensing of environmental remediation costs);

(17) Section 198A (expensing of qualified disaster expenses);

(18) Section 248 (organization expenditures of a corporation);

(19) Section 266 (carrying charges);

(20) Section 616 (development expenditures); and

(21) Section 709 (organization and syndication fees of a partnership).

(c) *Effective/applicability date.* This section applies to taxable years beginning on or after January 1, 2012. For the applicability of regulations to taxable years beginning before January 1, 2012, see § 1.263(a)–3 in effect prior to January 1, 2012 (§ 1.263(a)–3 as contained in 26 CFR part 1 edition revised as of April 1, 2011). For the effective dates of the enumerated election provisions, see those Internal Revenue Code sections and the regulations thereunder.

(d) *Expiration date.* The applicability of this section expires on of before December 23, 2014.

■ **Par. 32.** Section 1.263A–1 is amended by:

■ 1. Adding paragraph (b)(14).

■ 2. Revising paragraph (c)(4).

■ 3. Revising paragraph (e)(2)(i)(A).

■ 4. Revising paragraph (e)(3)(ii)(E).

■ 5. Revising paragraph (l).

■ 6. Adding paragraph (m).

The additions and revisions read as follows:

§ 1.263A–1 Uniform capitalization of costs.

* * * * *

(b) * * *

(14) [Reserved]. For further guidance, see § 1.263A–1T(b)(14).

(c) * * *

(4) [Reserved]. For further guidance, see § 1.263A–1T(c)(4).

* * * * *

(e) * * *

(2) * * *

(i) * * *

(A) [Reserved]. For further guidance, see § 1.263A–1T(e)(2)(i)(A).

* * * * *

(3) * * *

(ii) * * *

(E) [Reserved]. For further guidance, see § 1.263A–1T(e)(3)(ii)(E).

* * * * *

(l) [Reserved]. For further guidance, see § 1.263A–1T(l).

(m) [Reserved]. For further guidance, see § 1.263A–1T(m).

■ **Par. 33.** Section 1.263A–1T is added to read as follows:

§ 1.263A–1T Uniform capitalization of costs (temporary).

(a) through (b)(13) [Reserved]. For further guidance, see § 1.263A–1(a) through (b)(13).

(14) *Property subject to de minimis rule.* Section 263A does not apply to the costs of property produced by a taxpayer to which the taxpayer properly applies the de minimis rule under § 1.263(a)–2T(g). However, the cost of property to which a taxpayer properly applies the de minimis rule under § 1.263(a)–2T(g) may be required to be capitalized to other property as a cost incurred by reason of the production of the other property that is subject to section 263A.

(c)(1) through (c)(3) [Reserved]. For further guidance, see § 1.263A–1(c)(1) through (c)(3).

(4) *Recovery of capitalized costs.* Except as provided in § 1.162–3T(a)(2) (amounts paid to produce incidental materials and supplies), costs that are capitalized under section 263A are recovered through depreciation, amortization, cost of goods sold, or by an adjustment to basis at the time the property is used, sold, placed in service, or otherwise disposed of by the taxpayer. Cost recovery is determined by the applicable Internal Revenue Code and regulation provisions relating to use, sale, or disposition of property.

(d)(1) through (e)(2)(i) [Reserved]. For further guidance, see § 1.263A–1(d)(1) through (e)(2)(i).

(A) *Direct material costs. Direct materials costs* include the cost of those materials that become an integral part of specific property produced and those materials that are consumed in the ordinary course of production and that can be identified or associated with particular units or groups of units of property produced. For example, a cost described in § 1.162–3T, relating to the cost of a material or supply, may be a direct material cost.

(e)(2)(i)(B) through (e)(2)(ii)(D) [Reserved]. For further guidance, see § 1.263A–1(e)(2)(i)(B) through (e)(2)(ii)(D).

(E) *Indirect material costs.* Indirect material costs include the cost of materials that are not an integral part of specific property produced and the cost of materials that are consumed in the ordinary course of performing production or resale activities that cannot be identified or associated with particular units of property. Thus, for example, a cost described in § 1.162–3T, relating to the cost of a material or supply, may be an indirect cost.

(e)(2)(ii)(F) through (k)(5) [Reserved]. For further guidance, see § 1.263A–1(e)(2)(ii)(F) through (k)(5).

(l) *Change in method of accounting for de minimis costs.* A change in the treatment of amounts paid for property subject to the de minimis rule to comply with paragraph (b)(14) of this section is a change in method of accounting to which the provisions of sections 446 and 481, and the regulations thereunder apply. A taxpayer seeking to change to a method of accounting permitted in paragraph (b)(14) of this section must secure the consent of the Commissioner in accordance with § 1.446–1(e) and follow the administrative procedures issued under § 1.446–1(e)(3)(ii) for obtaining the Commissioner's consent to change its accounting method.

(m) *Effective/applicability date.* (1) Paragraphs (h)(2)(i)(D), (k), and (m)(1) of this section apply for taxable years ending on or after August 2, 2005.

(2) Paragraph (b)(14), the introductory phrase of paragraph (c)(4), the last sentence of paragraphs (e)(2)(i)(A) and (e)(2)(ii)(E), paragraph (l), and paragraph (m)(2) of this section apply to amounts paid or incurred (to acquire or produce property) in taxable years beginning on or after January 1, 2012. For the applicability of § 1.263A–1 to taxable years beginning before January 1, 2012, see § 1.263A–1 in effect prior to January 1, 2012 (§ 1.263A–1 as contained in 26 CFR part 1 edition revised as of April 1, 2011).

(3) *Expiration date.* The applicability of this section expires on December 23, 2014.

■ **Par. 34.** Section 1.1016–3 is amended by:

■ 1. Revising paragraphs (a)(1)(ii) and (j)(1).

■ 2. Adding paragraph (j)(3).

The addition and revision read as follows:

§ 1.1016–3 Exhaustion, wear and tear, obsolescence, amortization, and depletion for periods since February 13, 1913.

(a) * * *

(1) * * *

(ii) [Reserved]. For further guidance, see § 1.1016–3T(a)(1)(ii).

* * * * *

(j) * * *

(1) *In general.* [Reserved]. For further guidance, see § 1.1016–3T(j)(1).

* * * * *

(3) *Application of § 1.1016–3T(a)(1)(ii).* [Reserved]. For further guidance, see § 1.1016–3T(j)(3).

■ **Par. 35.** Section 1.1016–3T is added to read as follows:

§ 1.1016–3T Exhaustion, wear and tear, obsolescence, amortization, and depletion for periods since February 13, 1913 (temporary).

(a)(1)(i) [Reserved]. For further guidance, see § 1.1016–3(a)(1)(i).

(a)(1)(ii) The determination of the amount properly allowable for exhaustion, wear and tear, obsolescence, amortization, and depletion must be made on the basis of facts reasonably known to exist at the end of the taxable year. A taxpayer is not permitted to take advantage in a later year of the taxpayer's prior failure to take any such allowance or the taxpayer's taking an allowance plainly inadequate under the known facts in prior years. In the case of depreciation, if in prior years the taxpayer has consistently taken proper deductions under one method, the amount allowable for such prior years must not be increased even though a greater amount would have been allowable under another proper method. For rules governing losses on retirement or disposition of depreciable property, including rules for determining basis, see § 1.167(a)–8T, § 1.168(i)–1T, or § 1.168(i)–8T, as applicable. The application of this paragraph is illustrated by the following example:

Example. On July 1, 2011, A, a calendar-year taxpayer, purchased and placed in service ''off-the-shelf'' computer software at a cost of $36,000. This computer software is not an amortizable section 197 intangible. Pursuant to section 167(f)(1), the useful life of the computer software is 36 months. It has no salvage value. For 2011, A elected not to deduct the additional first year depreciation deduction provided by section 168(k). A did not deduct any depreciation for the computer software for 2011 and deducted depreciation of $12,000 for the computer software for 2012. As a result, the total amount of depreciation allowed for the computer software as of December 31, 2012, was $12,000. However, the total amount of depreciation allowable for the computer software as of December 31, 2012, is $18,000 ($6,000 for 2011 + $12,000 for 2012). As a result, the unrecovered cost of the computer software as of December 31, 2012, is $18,000 (cost of $36,000 less the depreciation allowable of $18,000 as of December 31, 2012). Accordingly, depreciation for 2013 for the computer software is $12,000 (unrecovered cost of $18,000 divided by the remaining useful life of 18 months as of January 1, 2013, multiplied by 12 full months in 2013).

(a)(2) through (i) [Reserved]. For further guidance, see § 1.1016–3(a)(2) through (i).

(j)(1) *In general.* Except as provided in paragraphs (j)(2) and (j)(3) of this section, this section applies on or after December 30, 2003. For the applicability of regulations before December 30, 2003, see § 1.1016–3 in effect prior to December 30, 2003 (§ 1.1016–3 as contained in 26 CFR part 1 edition revised as of April 1, 2003).

(2) [Reserved]. For further guidance, see § 1.1016–3(j)(2).

(3) *Application of § 1.1016–3T(a)(1)(ii).* Paragraph (a)(1)(ii) of this section applies to taxable years beginning on or after January 1, 2012. For the applicability of § 1.1016–3(a)(1)(ii) to taxable years beginning before January 1, 2012, see § 1.1016–3(a)(1)(ii) in effect prior to January 1, 2012 (§ 1.1016–3(a)(1)(ii) as contained in 26 CFR part 1 edition revised as of April 1, 2010).

(4) *Expiration date.* The applicability of this section expires on December 23, 2014.

Steven T. Miller,

Deputy Commissioner for Services and Enforcement.

Approved: December 5, 2011.

Emily S. McMahon,

(Acting) Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. 2011–32024 Filed 12–23–11; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–168745–03]

RIN 1545–BE18

Guidance Regarding Deduction and Capitalization of Expenditures Related to Tangible Property

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking by cross-reference to temporary regulations, notice of public hearing, and withdrawal of previously proposed regulations.

SUMMARY: Appearing elsewhere in this issue of the **Federal Register**, the IRS is issuing temporary regulations that provide guidance on the application of sections 162(a) and 263(a) of the Internal Revenue Code (Code) to amounts paid to acquire, produce, or improve tangible property. The temporary regulations clarify and expand the standards in the current regulations under sections 162(a) and 263(a), and provide certain bright-line tests (for example, a de minimis rule for certain acquisitions) for applying these standards. The temporary regulations also provide guidance under section 168 regarding the accounting for, and dispositions of, property subject to section 168. The temporary regulations also amend the general asset account regulations. The temporary regulations will affect all taxpayers that acquire, produce, or improve tangible property. The text of the temporary regulations published in the Federal Regulations also serves as the text of these proposed regulations. This document also provides notice of public hearing on these proposed regulations and withdraws the proposed regulations published in the **Federal Register** on March 10, 2008 (73 FR 47).

DATES: Written and/or electronic comments and requests for a public hearing must be received by March 26, 2012. Requests to speak and outlines of topics to be discussed at the public hearing scheduled for April 4, 2012 at 10 a.m., must be received by March 21, 2012.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–168745–03), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–168745–03), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC 20224, or sent electronically, via the Federal eRulemaking Portal at *www.regulations.gov* (IRS REG–168745–03). The public hearing will be held in the IRS Auditorium, Internal Revenue Building, 1111 Constitution Avenue NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations under sections 162 and 263, Merrill D. Feldstein and Alan Williams, Office of Associate Chief Counsel (Income Tax and Accounting) (202) 622–4950; concerning the proposed regulations under sections 165, 167, 168, 263A, and 1016, Kathleen Reed and Patrick Clinton, Office of Associate Chief Counsel (Income Tax and Accounting) (202) 622–4930; and concerning submission of comments, the hearing, and/or to be placed on the building access list to attend the hearing, *Richard.A.Hurst@irscounsel.treas.gov*.

SUPPLEMENTARY INFORMATION:

Background and Explanation of Provisions

Temporary regulations appearing elsewhere of this issue of the **Federal Register** amend the Income Tax Regulations (26 CFR part 1) relating to sections 162, 165, 167, 168, 263(a), 263A, and 1016. The temporary regulations set forth rules relating to amounts paid to acquire, produce, or improve tangible property. The temporary regulations also provide guidance regarding the accounting for, and dispositions of, property subject to section 168. The temporary regulations also amend the general asset account regulations. The text of the temporary regulations also serves as the text of these proposed regulations. The preamble to the temporary regulations explains the temporary regulations and these proposed regulations.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866, as supplemented by Executive Order 13563. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and, because the regulation does not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f), this regulation has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments (a signed original and eight (8) copies) or electronic comments that are submitted timely to the IRS. Comments are requested on all aspects of the proposed rules. In addition, the IRS and Treasury Department specifically request comments on the clarity of the proposed rules and how they may be made easier to understand. All comments will be available for public inspection and copying.

A public hearing has been scheduled for April 4, 2012, beginning at 10 a.m. in the IRS Auditorium, Internal Revenue Building, 1111 Constitution Avenue NW., Washington, DC. Due to building security procedures, visitors must enter at the Constitution Avenue entrance. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 30 minutes before the hearing starts. For information about having your name placed on the building access list to attend the hearing, see the **FOR FURTHER INFORMATION CONTACT** section of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing must submit electronic or written comments and an outline of the topics to be discussed and the time to be devoted to each topic (signed original and eight (8) copies) by March 21, 2012. A period of 10 minutes will be allotted to each person for making comments. An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

Drafting Information

The principal authors of these regulations are Merrill D. Feldstein and Katherine Reed, Office of the Associate Chief Counsel (Income Tax and Accounting). However, other personnel from the IRS and Treasury Department participated in their development.

Withdrawal of Proposed Amendments to the Regulations

Accordingly, under the authority of 26 U.S.C. 7805, the notice of proposed rulemaking (REG–168745–03) published

in the **Federal Register** on March 10, 2008, (73 FR 46) is withdrawn.

Proposed Amendment to the Regulations

Accordingly, 26 CFR Part 1 is proposed to be amended as follows:

PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 is amended by adding an entry in numerical order to read as follows:

Authority: 26 U.S.C. 7805 * * *

Section 1.168(i)–1T also issued under 26 U.S.C. 168(i)(4). * * *

Par. 2. Section 1.162–3 is revised to read as follows:

§ 1.162–3 Materials and Supplies.

[The text of the proposed amendments to § 1.162–3 is the same as the text of § 1.162–3T(a) through (i) published elsewhere in this issue of the **Federal Register**].

Par. 3. Section 1.162–4 is revised to read as follows:

§ 1.162–4 Repairs.

[The text of the proposed amendments to § 1.162–4 is the same as the text of § 1.162–4T(a) through (c) published elsewhere in this issue of the **Federal Register**].

§ 1.162–6 [Removed]

Par. 4. Section 1.162–6 is removed.

Par. 5. Section 1.162–11 is amended by:

1. Revising paragraph (b).
2. Adding paragraph (c).

The revision and addition reads as follows:

§ 1.162–11 Rentals.

* * * * *

(b) [The text of the proposed amendments to § 1.162–11(b) is the same as the text of § 1.162–11T(b) published elsewhere in this issue of the **Federal Register**].

(c) [The text of the proposed amendments to § 1.162–11(c) is the same as the text of § 1.162–11T(c) published elsewhere in this issue of the **Federal Register**].

Par. 6. Section 1.165–2 is amended by:

1. Revising paragraph (c).
2. Adding paragraph (d).

The addition and revision read as follows:

§ 1.165–2 Obsolescence of nondepreciable property.

* * * * *

(c) [The text of the proposed amendments to § 1.165–2(c) is the same as the text of § 1.165–2T(c) published elsewhere in this issue of the **Federal Register**].

(d) [The text of the proposed amendments to § 1.165–2(d) is the same as the text of § 1.165–2T(d) published elsewhere in this issue of the **Federal Register**].

Par. 7. Section 1.167(a)–4 is revised to read as follows:

§ 1.167(a)–4 Leased property.

[The text of the proposed amendments to § 1.167(a)–4 is the same as the text of § 1.167(a)–4T(a) through (b)(4) published elsewhere in this issue of the **Federal Register**].

Par. 8. Section 1.167(a)–7 is amended by adding paragraphs (e) and (f) to read as follows:

§ 1.167(a)–7 Accounting for depreciable property.

* * * * *

(e) [The text of the proposed amendments to § 1.167(a)–7(e) is the same as the text of § 1.167(a)–7T(e) published elsewhere in this issue of the **Federal Register**].

(f) [The text of the proposed amendments to § 1.167(a)–7(f) is the same as the text of § 1.167(a)–7T(f) published elsewhere in this issue of the **Federal Register**].

Par. 9. Section 1.167(a)–8 is amended by adding paragraphs (g) and (h). The addition reads as follows:

§ 1.167(a)–8 Retirements.

* * * * *

(g) [The text of the proposed amendments to § 1.167(a)–8(g) is the same as the text of § 1.167(a)–8T(g) published elsewhere in this issue of the **Federal Register**].

(h) [The text of the proposed amendments to § 1.167(a)–8(h) is the same as the text of § 1.167(a)–8T(h) published elsewhere in this issue of the **Federal Register**].

Par. 10. Section 1.168(i)–0 is amended by:

1. Adding entries in the table of contents for paragraphs (b)(5), (b)(6), and (c)(3).
2. Redesignating the entry in the table of contents for paragraph (d)(2) as the entry for paragraph (d)(4) and adding paragraphs (d)(2) and (d)(3).
3. Redesignating the entry in the table of contents for paragraph (e)(2)(v) as the entry for (e)(2)(ix), and adding a new paragraph (e)(2)(v) and paragraphs (e)(2)(vi), (vii), and (viii).
4. Redesignating the entry in the table of contents for paragraph (e)(3)(vi) as the entry for paragraph (e)(3)(vii) and adding a new paragraph (e)(3)(vi).
5. Redesignating the entry in the table of contents for paragraph (h)(2) as the entry for paragraph (h)(3) and adding new paragraph (h)(2).
6. Removing the entries in the table of contents for paragraphs (l)(1), (2), and (3) and redesignating the entries in the table of contents for paragraphs (k)(1), (2), and (3) as the entries for paragraphs (l)(1), (2), and (3), respectively.
7. Redesignating the entry in the table of contents for paragraph (j) as the entry for paragraph (k) and redesignating the entry in the table of contents for paragraph (i) as paragraph (j), and adding a new paragraph (i).
8. Adding paragraph (m).

The additions read as follows:

§ 1.168(i)–0 Table of contents for the general asset account rules.

* * * * *

§ 1.168(i)–1 General asset accounts.

* * * * *

(b) * * *

(5) and (6) [The entries in the table of contents for the proposed amendments to § 1.168(i)–1(b)(5) and (6) are the same as the entries in the table of contents for § 1.168(i)–1T(b)(5) and (6) published elsewhere in this issue of the **Federal Register**].

(c) * * *

(3) [The entry in the table of contents for the proposed amendments to § 1.168(i)–1(c)(3) is the same as the entry in the table of contents for § 1.168(i)–1T(c)(3) published elsewhere in this issue of the **Federal Register**].

(d) * * *

(2) and (3) [The entries in the table of contents for the proposed amendments to § 1.168(i)–1(d)(2) and (d)(3) are the same as the entries in the table of contents for § 1.168(i)–1T(d)(2) and (3) published elsewhere in this issue of the **Federal Register**].

* * * * *

(e) * * *

(2) * * *

(v) through (viii) [The entries in the table of contents for the proposed amendments to § 1.168(i)–1(e)(2)(v) through (viii) are the same as the entries in the table of contents for § 1.168(i)–1T(e)(2)(v) through (viii) published elsewhere in this issue of the **Federal Register**].

* * * * *

(e)(3) * * *

(vi) [The entry in the table of contents for the proposed amendments to § 1.168(i)–1(e)(3)(vi) is the same as the entry in the table of contents for § 1.168(i)–1T(e)(3)(vi) published elsewhere in this issue of the **Federal Register**].

* * * * *

(h) * * *

(2) [The entry in the table of contents for the proposed amendments to § 1.168(i)–1(h)(2) is the same as the

entry in the table of contents for § 1.168(i)–1T(h)(2) published elsewhere in this issue of the **Federal Register**].

* * * * *

(i) [The entry in the table of contents for the proposed amendments to § 1.168(i)–1(i) is the same as the entry in the table of contents for § 1.168(i)–1T(i) published elsewhere in this issue of the **Federal Register**].

* * * * *

(m) [The entry in the table of contents for the proposed amendments to § 1.168(i)–1(m) is the same as the entry in the table of contents for § 1.168(i)–1T(m) published elsewhere in this issue of the **Federal Register**].

Par. 11. Section 1.168(i)–1 is amended by:

1. Revising paragraphs (a) through (l)(1); and
2. Adding paragraph (m).

The revisions and additions read as follows:

§ 1.168(i)–1 General asset accounts.

(a) through (l)(1) [The text of the proposed amendments to § 1.168(i)–1(a) through (l)(1) is the same as the text of § 1.168(i)–1T(a) through (l)(1) published elsewhere in this issue of the **Federal Register**].

* * * * *

(m) [The text of the proposed amendments to § 1.168(i)–1(m) is the same as the text of § 1.168(i)–1T(m) published elsewhere in this issue of the **Federal Register**].

Par. 12. Section 1.168(i)–7 is added to read as follows:

§ 1.168(i)–7 Accounting for MACRS property.

[The text of the proposed amendments to § 1.168(i)–7 is the same as the text of § 1.168(i)–7T published elsewhere in this issue of the **Federal Register**].

Par. 13. Section 1.168(i)–8 is added to read as follows:

§ 1.168(i)–8 Dispositions of MACRS property.

[The text of the proposed amendments to § 1.168(i)–8 is the same as the text of § 1.168(i)–8T published elsewhere in this issue of the **Federal Register**].

Par. 14. Section 1.263(a)–0 is amended by:

1. Revising the section headings to the table of contents for §§ 1.263(a)–2 and 1.263(a)–3.
2. Adding entries to the table of contents for §§ 1.263(a)–1, 1.263(a)–2, and 1.263(a)–3.

The revisions and additions read as follows:

§ 1.263(a)–0 Table of contents.

* * * * *

§ 1.263(a)–1 Capital expenditures; in general.

(a) through (g) [The entries in the table of contents for the proposed amendments to § 1.263(a)–1(a) through (g) are the same as the entries in the table of contents for § 1.263(a)–1T(a) through (g) published elsewhere in this issue of the **Federal Register**].

§ 1.263(a)–2 Amounts paid to acquire or produce tangible property.

(a) through (k) [The entries in the table of contents for the proposed amendments to § 1.263(a)–2(a) through (k) are the same as the entries in the table of contents for § 1.263(a)–2T(a) through (k) published elsewhere in this issue of the **Federal Register**].

§ 1.263(a)–3 Amounts paid to improve tangible property.

(a) through (p) [The entries in the table of contents for the proposed amendments to § 1.263(a)–3(a) through (p) are the same as the entries in the table of contents for § 1.263(a)–3T(a) through (p) published elsewhere in this issue of the **Federal Register**].

* * * * *

Par. 15. Section 1.263(a)–1 is revised to read as follows:

§ 1.263(a)–1 Capital expenditures; in general.

[The text of the proposed amendments to § 1.263(a)–1 is the same as the text of § 1.263(a)–1T published elsewhere in this issue of the **Federal Register**].

Par. 16. Section 1.263(a)–2 is revised to read as follows:

§ 1.263(a)–2 Amounts paid to acquire or produce tangible property.

[The text of the proposed amendments to § 1.263(a)–2 is the same as the text of § 1.263(a)–2T published elsewhere in this issue of the **Federal Register**].

Par. 17. Section 1.263(a)–3 is revised to read as follows:

§ 1.263(a)–3 Amounts paid to improve tangible property.

[The text of the proposed amendments to § 1.263(a)–3 is the same as the text of § 1.263(a)–3T published elsewhere in this issue of the **Federal Register**].

Par. 18. Section 1.263(a)–6 is added to read as follows:

§ 1.263(a)–6 Election to deduct or capitalize certain expenditures.

[The text of the proposed amendments to § 1.263(a)–6 is the same as the text of § 1.263(a)–6T published elsewhere in this issue of the **Federal Register**].

Par. 19. Section 1.263A–1 is amended by:

1. Adding paragraph (b)(14).
2. Revising paragraph (c)(4).
3. Revising paragraph (e)(2)(i)(A).
4. Revising paragraph (e)(3)(ii)(E).
5. Revising paragraph (l).
6. Adding paragraph (m).

The additions and revisions read as follows:

§ 1.263A–1 Uniform capitalization of costs.

* * * * *

(b) * * *

(14) [The text of the proposed amendments to § 1.263A–1(b)(14) is the same as the text of § 1.263A–1T(b)(14) published elsewhere in this issue of the **Federal Register**].

* * * * *

(c) * * *

(4) [The text of the proposed amendments to § 1.263A–1(c)(4) is the same as the text of § 1.263A–1T(c)(4) published elsewhere in this issue of the **Federal Register**].

* * * * *

(e) * * *

(2) * * *

(i) * * *

(A) [The text of the proposed amendments to § 1.263A–1(e)(2)(i)(A) is the same as the text of § 1.263A–1T(e)(2)(i)(A) published elsewhere in this issue of the **Federal Register**].

* * * * *

(3) * * *

(ii) * * *

(E) [The text of the proposed amendments to § 1.263A–1(e)(3)(ii)(E) is the same as the text of § 1.263A–1T(e)(3)(ii)(E) published elsewhere in this issue of the **Federal Register**].

* * * * *

(l) [The text of the proposed amendments to § 1.263A–1(l) is the same as the text of § 1.263A–1T(l) published elsewhere in this issue of the **Federal Register**].

(m) [The text of the proposed amendments to § 1.263A–1(m) is the same as the text of § 1.263A–1T(m) published elsewhere in this issue of the **Federal Register**].

Par. 20. Section 1.1016–3 is amended by:

1. Revising paragraphs (a)(1)(ii) and (j)(1).
2. Adding paragraph (j)(3).

The addition and revision read as follows:

§ 1.1016–3 Exhaustion, wear and tear, obsolescence, amortization, and depletion for periods since February 13, 1913.

(a) * * *

(1) * * *

(ii) [The text of the proposed amendments to § 1.1016–3(a)(1)(ii) is the same as the text of § 1.1016–3T(a)(1)(ii) published elsewhere in this issue of the **Federal Register**].

* * * * *

(j) * * *

(1) [The text of the proposed amendments to § 1.1016–3(j)(1) is the same as the text of § 1.1016–3T(j)(1) published elsewhere in this issue of the **Federal Register**].

* * * * *

(3) [The text of the proposed amendments to § 1.1016–3T(j)(3) is the same as the text of § 1.1016–3T(j)(3) published elsewhere in this issue of the **Federal Register**].

Steven T. Miller,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 2011–32246 Filed 12–23–11; 8:45 am]

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FEDERAL REGISTER

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Part IV

Department of Transportation

Federal Motor Carrier Safety Administration

49 CFR Parts 385, 386, 390, *et al.*
Hours of Service of Drivers; Final Rule

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

49 CFR Parts 385, 386, 390, and 395

[Docket No. FMCSA–2004–19608]

RIN 2126–AB26

Hours of Service of Drivers

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Final rule.

SUMMARY: FMCSA revises the hours of service (HOS) regulations to limit the use of the 34-hour restart provision to once every 168 hours and to require that anyone using the 34-hour restart provision have as part of the restart two periods that include 1 a.m. to 5 a.m. It also includes a provision that allows truckers to drive if they have had a break of at least 30 minutes, at a time of their choosing, sometime within the previous 8 hours. This rule does not include a change to the daily driving limit because the Agency is unable to definitively demonstrate that a 10-hour limit—which it favored in the notice of proposed rulemaking (NPRM)—would have higher net benefits than an 11-hour limit. The current 11-hour limit is therefore unchanged at this time. The 60- and 70-hour limits are also unchanged. The purpose of the rule is to limit the ability of drivers to work the maximum number of hours currently allowed, or close to the maximum, on a continuing basis to reduce the possibility of driver fatigue. Long daily and weekly hours are associated with an increased risk of crashes and with the chronic health conditions associated with lack of sleep. These changes will affect only the small minority of drivers who regularly work the longer hours.

DATES: *Effective date:* February 27, 2012.

Compliance date: The rule changes that affect Appendix B to Part 386—Penalty Schedule; Violations and Monetary Penalties; the oilfield exemption in § 395.1(d)(2); and the definition of on-duty time in § 395.2 must be complied with on the effective date. Compliance for all the other rule changes is not required until July 1, 2013.

FOR FURTHER INFORMATION CONTACT: Mr. Thomas Yager, Chief, Driver and Carrier Operations Division, Federal Motor Carrier Safety Administration, U.S. Department of Transportation, 1200 New Jersey Avenue SE., Washington, DC 20590 (202) 366–4325.

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I. Summary

A. Overview

The goal of this rulemaking is to reduce excessively long work hours that increase both the risk of fatigue-related crashes and long-term health problems for drivers. A rule cannot ensure that drivers will be rested, but it can ensure that they have enough time off to obtain adequate rest on a daily and weekly basis. The objective of the rule, therefore, is to reduce both acute and chronic fatigue by limiting the maximum number of hours per day and week that the drivers can work.

The 2003 hours-of-service (HOS) rule shortened the driving window to 14 consecutive hours and increased the off-duty period from 8 to 10 hours, but increased driving time from 10 to 11 hours and allowed drivers to restart their duty time calculations whenever they took at least 34 consecutive hours off. Limiting the driving window and increasing the daily off-duty period reduced the risk that a driver would be driving so long after the start of the duty day that acute fatigue would be extreme. It also moved drivers toward a 24-hour daily clock, which is people's normal pattern, reducing the risk of fatigue caused from continually changing sleep periods. The 2003 rule, however, allowed drivers to work 14 hours without a break and to work 80 or more hours a week, a substantial increase from the previous rule, which allowed about 60 hours in 7 days.

Since the 2003 rule was promulgated, new research studies have demonstrated that long work hours, both daily and weekly, lead to reduced sleep and, in the absence of sufficient recovery time, chronic fatigue. Fatigued drivers have slowed reaction times and a reduced ability to assess situations quickly. The research has also shown that commercial motor vehicle (CMV) drivers (like most other people) are unable to assess their own fatigue levels accurately and are, therefore, often unaware that their performance has degraded. When driving an 80,000-pound CMV at highway speeds, any delay in reacting to a potentially dangerous situation can be deadly. In addition to the safety concerns, recent research has linked long work hours and the resulting curtailment of sleep to a range of serious health effects, particularly when combined with a job that is basically sedentary, like truck driving. These health conditions—including obesity, high blood pressure, other cardiovascular diseases, diabetes, and sleep apnea—not only shorten drivers' lives, but also can result in substantial ongoing medical costs and put drivers' medical certifications at risk. CMV drivers suffer from these conditions at a higher rate than the population as a whole.

Today's rule will reduce the risk of fatigue and fatigue-related crashes and the harm to driver health in several ways. While the rule allows a driver flexibility in when to take a mandatory 30 minute break, it prohibits a driver from driving if more than 8 hours have passed since the driver's last off-duty or sleeper berth break of at least 30 minutes; research indicates that such breaks alleviate fatigue and fatigue-related performance degradation. Because research has shown that long weekly work hours are associated with a higher risk of crashes, sleep loss, and negative health effects, the rule also limits the use of the restart to once a week, which, on average, will cut the maximum work week from 82 to 70 hours. The provision allows drivers to work intensely for one week, but will

require them to compensate by taking more time off in the following week. Research has long demonstrated that daytime sleep is shorter in duration and lower in quality than nighttime sleep. The rule requires any driver working long enough to need a restart to take off at least 34 consecutive hours that include 2 periods between 1 a.m. and 5 a.m., the window of circadian low. This provision will give those drivers who both routinely work at night and put in very long work weeks an opportunity to overcome the chronic fatigue that can build up when working nights.

FMCSA has been engaged in long-term rulemaking related to its hours of service regulations for commercial truck drivers. Like the Federal Aviation Administration (FAA), FMCSA is working to address the universality of factors that lead to fatigue. However, the FAA has taken a different approach in addressing fatigue risk among pilots than FMCSA has with respect to commercial truck drivers. This is because the two industries operate differently both in terms of the likely number of days the affected individuals work per month and the respective operating environments. For example, pilots regularly cross multiple time zones in a very short period time—something that is simply not possible in other modes of transportation. Additionally, pilots may work several days that are very long, but then be off for an extended period of time, a practice that naturally imposes a non-regulatory restorative rest opportunity. Finally, the nature of commercial flying is such that under typical conditions, the actual operation is likely to require intense concentration primarily during take-offs and landings, with a constant, but generally predictable level of concentration required for other phases of flight.

In contrast, commercial truck drivers face an environment where they are required to share the highways with drivers who have not received specialized training nor are they subject to the same regulatory constraints that pilots are subject to. This environment could logically lead to a regulatory approach with different fatigue mitigators for daytime operations on congested highways, compared to nighttime operations, where the roads are less crowded but the risk of fatigue is greater.

In summary, the final rule will reduce the likelihood of driver fatigue, fatigue-related crashes, and fatigue-related health effects. Although crash rates have been falling, thousands of people are still injured and killed in truck crashes each year, including hundreds of truck drivers. This rule will address one of the causes of those crashes. The Agency estimates that the benefits of the rule (reduction in crashes and improved driver health) will outweigh the costs. The cost of the rule represents a small fraction of one percent of trucking industry revenues and is the cost-equivalent of less than a 3 cent-a-gallon increase in the price of diesel fuel to the long-haul industry.

B. Proposed Rule

On December 29, 2010, FMCSA published a notice of proposed rulemaking (NPRM) to revise the HOS rules (75 FR 82170). The Agency sought comment on both a 10- and an 11-hour daily driving limit. The NPRM proposed to retain the 34-hour restart, but with two qualifications: The restart must include two consecutive periods between midnight and 6 a.m. and could be used only once every 168 hours (7 days). It also proposed that drivers be limited to 13 hours on duty in each 14-hour driving window. Many drivers would be required to take at least one half-hour break during their work shift. FMCSA also proposed that twice a week, drivers would be allowed to extend the driving window to 16 hours, but could not work more than a maximum of 13 hours in that time. FMCSA also proposed changing the definition of on-duty time to allow team drivers to log 2 hours in the passenger seat before or after an 8-hour period in the sleeper berth as off-duty time and to allow drivers resting in a parked CMV to count that time as off duty. FMCSA would also have clarified the oilfield exemption and proposed a provision to allow, but not require, FMCSA to impose maximum penalties if the driving-time limit was exceeded by 3 hours. The NPRM included a long discussion of the research on fatigue and on issues related to long hours, fatigue, and health.

On May 9, 2011, FMCSA reopened the comment period to accept comments on four studies related to the HOS proposal (76 FR 26681).

C. Final Rule

Although the NPRM proposed both a 10- and an 11-hour daily driving limit, the Agency stated that it favored a 10-hour limit. However, this final rule does not adopt any change in the limit on daily driving time; the current 11-hour limit therefore remains unchanged.

In the course of this rulemaking, FMCSA examined many studies on the relationship between work hours and health and safety, both in trucking and other industries; reviewed the comments and information submitted to the docket, mostly in opposition to a 10-hour driving limit; and completed elaborate analyses in accordance with Presidential Executive Order 13563, issued January 18, 2011, '' Improving Regulation and Regulatory Review,'' [76 FR 3821, January 21, 2011] of the costs and benefits to health and safety of 9-, 10-, and 11-hour driving limits.

1. *9-Hour Driving Limit.* The Agency found that a 9-hour driving limit generally has negative net benefits (*i.e.,* its costs exceed its benefits). In most cases the 11-hour limit has positive net benefits. For these reasons, the Agency has not adopted a 9-hour driving limit.

2. *10-Hour Driving Limit.* The 10-hour limit has positive benefits in approximately half the cases, with the 11-hour limit having substantially higher net benefits than the 10-hour limit in most cases. A 10-hour limit, on the other hand, might save more lives and prevent more crashes than an 11-hour limit, but at a higher cost.

The research literature on fatigue in the motor carrier industry generally shows that crash risk increases with work hours, both daily and weekly. The available data, however, are not sufficiently robust to yield a statistically significant distinction between the crash risk associated with any two adjacent hours of work.

In the absence of compelling scientific evidence demonstrating the safety benefits of a 10-hour driving limit, as opposed to an 11-hour limit, and confronted with strong evidence that an 11-hour limit could well provide higher net benefits, the Agency has concluded that adequate and reasonable grounds under the Administrative Procedure Act for adopting a new regulation on this issue do not yet exist and that the current driving limit should therefore be allowed to stand for now. This is not to say that FMCSA is foreclosing the possibility of action on this subject; future research may provide a basis for reconsidering the daily driving limit. Consistent with Executive Order 13563, which directs agencies to ''measure, and seek to improve, the actual results of regulatory requirements,'' FMCSA is committed to conducting a comprehensive analysis of the relative crash risk by driving hour and the impact of the changes in the HOS provisions in today's final rule. The Agency plans to match data collected from driver logs with crash information to determine the level of crash risk by hours of driving. The Agency also plans to estimate, for similarly situated drivers, the difference between crash risk after restarts that include two nights and those that do not. Additionally, the Agency is committed to conducting

periodic driver surveys to longitudinally track how the changes in the HOS provisions, such as the two-night restart, have impacted sleep patterns and aspects of driver fatigue and performance. FMCSA will work with the Office of Management and Budget (OMB) on the methodologies of these new statistical data collections. These efforts will build on several planned and ongoing FMCSA driver fatigue-related studies such as the on-board monitoring field test/naturalistic data collection, split sleep study, driver recovery and napping study, and the planned new large truck crash causation study.

This decision also is consistent with the President's E.O. 13563 and his concurrent memorandum for the heads of executive departments and agencies entitled ''Regulatory Flexibility, Small Business, and Job Creation'' [76 FR 3827, January 21, 2011]. As the President stated in the latter document, ''My Administration is firmly committed to eliminating excessive and unjustified burdens on small businesses, and to ensuring that regulations are designed with careful consideration of their effects, including their cumulative effects, on small businesses.'' This order is particularly important for the trucking industry, which has a higher percentage of small businesses than many other segments of the U.S. economy.

3. *Thirty-Minute Break.* In response to commenters' concerns, FMCSA adopts a slightly modified form of the break proposed in the NPRM. Research with drivers and in other industrial sectors indicates that the risk of accidents falls substantially after a break, with off-duty breaks providing the greatest reduction in risk. The final rule requires that if more than 8 consecutive hours on duty—compared to 7 hours in the NPRM—have passed since the last off-duty (or sleeper-berth) period of at least half an hour, a driver must take a break of at least 30 minutes before driving. For example, if the driver started driving immediately after coming on duty, he or she could drive for 8 consecutive hours, take a half-hour break, and then drive another 3 hours, for a total of 11 hours. Alternatively, this driver could drive for 3 hours, take a half-hour break, and then drive another 8 hours, for a total of 11 hours. In other words, this driver could take the required break anywhere between the 3rd and 8th hour after coming on duty. A driver who plans to drive until the end of the 14th hour and wants to take only one break will need to take a break between the 6th and 8th hour after coming on duty. Drivers will have great flexibility in deciding when to take the break. By postponing the latest point at which the break can be taken from the 7th to the 8th hour, the rule will make it significantly easier for team drivers to fit the break into their schedules. To address an issue raised by commenters, FMCSA has also added an exception for drivers of CMVs carrying Division 1.1, 1.2, or 1.3 explosives to allow them to count on-duty time spent attending the CMV, but doing no other on-duty work, toward the break.

4. *14-Hour Driving Window.* The maximum driving window will continue to be 14 consecutive hours after coming on duty. To address commenters' concerns about complexity, FMCSA has dropped the proposed 13-hour limit for on-duty time within the 14 hours to simplify the rule. Because of the break provision, drivers will be able to work 13.5 hours in the 14 hour period (if they are driving after the 8th hour on duty).

5. *Mandatory Off-Duty Requirement at the End of the Driving Window.* FMCSA has not adopted the proposal that drivers be required to go off-duty at the end of the 14th hour. Neither the costs nor the benefits of the provision could be adequately analyzed.

6. *Twice Weekly Extension of the Driving Window.* FMCSA did not adopt the proposed extension of the duty period to 16 hours twice a week. The same new research on drivers since the NPRM was completed indicates this provision should not be adopted. (See Section IV. ''Discussion of All Comments'' D. ''New Research Studies'' below.) Driving in the 16th hour after coming on duty entails a sharply higher risk of crashes than driving in early hours of a duty day. In addition, industry commenters were divided on the provision and generally skeptical that the provision would be useful.

The final rule retains provisions in paragraphs (e)(2) and (o) of § 395.1, which apply to local and regional operations. The NPRM sought comments on eliminating these paragraphs because they might have caused confusion with the proposed 16-hour provision. Because FMCSA has dropped the proposed 16-hour provision, the concerns about confusion are moot.

7. *Restart Provisions.* The final rule adopts the restart provision with one variation. The restart must cover at least 34 consecutive hours and include at least two periods between 1 a.m. and 5 a.m., not two periods between midnight and 6 a.m. as proposed in the NPRM. Although both alternatives cover most estimates of when the window of circadian low occurs, the 4-hour period addresses concerns drivers raised in the comment period by giving drivers greater flexibility in ending and beginning the restart than the proposed 6-hour period. This provision does not affect day drivers, who always get two such periods in a 34-hour restart, but ensures that night drivers have an opportunity for 2 nights of restorative sleep when they are working longer hours. The 2-night provision does not affect drivers who are not using the restart to work extra hours. The Agency believes the costs are low compared to other provisions considered in this rulemaking. Only drivers who drive nights and work more than 60 or 70 hours in a week will be impacted. The nighttime operations of the major Less-than-Truckload (LTL) carriers should be minimally impacted, as their drivers generally receive 2 days off duty a week. Drivers who will be impacted by this provision work heavy and irregular schedules that include some nighttime driving.

FMCSA adopts the proposed provision to limit the use of the restart to once every 168 hours (7 days); this allows drivers to work long hours (81 hours) in 1 week but requires them to compensate in the subsequent week by taking extra time off. The limitation reduces maximum time during which a driver may drive up to an average of 70 hours in 7 days, a decrease from the 82-hour average allowed under the 2003 rule. The purpose of the rule change is to limit work to no more than 70 hours a week on average. Working long daily and weekly hours on a continuing basis is associated with chronic fatigue, a high risk of crashes, and a number of serious chronic health conditions.

This final rule adopts the definition of on-duty time as proposed except to add a reference to § 397.5. The final rule also adopts the clarification of the oilfield exemption and penalty provisions.

A more in-depth rationale for each of these provisions is presented in the responses to comments in Section IV ''Discussion of All Comments'' of this preamble.

D. Summary of Economic Impacts

The Regulatory Impact Analysis (RIA) analyzed three options beyond the baseline (no change) option. Option 3 has an 11-hour driving-time limit; it would require the driver to take a rest break during the day and reduce the weekly maximum driving and on-duty time theoretically achievable. Options 2 and 4 are identical to Option 3 in all respects except for the amount of driving time allowed. Option 2 has an 10-hour driving-time limit, while Option 4 has a 9-hour driving-time limit. Option 2 (10 hours) would have a productivity impact of approximately

2.7 percent. That is, we estimate that productivity in the industry would be reduced by 2.7 percent due to adoption of this option. Option 3 (11 hours) would have a productivity impact of 1.2 percent. The Agency's cost estimate for Option 3 is less than one third of one percent of industry revenues. Option 4 (9 hours) would involve much higher costs. Tables 1 and 2 provide a summary of the estimated costs, benefits, and net benefits at 3 and 7 percent discount rates. The RIA is discussed in Section VI ''Required Analyses'' A. ''Executive Order 12866 and Executive Order 13563'' of this preamble and is available in the docket.

The RIA also estimated the impacts of the HOS rule components individually. To estimate the impacts of the rule provisions, we consider the overlapping effects of the individual rule components to ensure that the impacts of one provision are not also attributed to a second provision. Because this analysis accounts for the individual impact of the rule provisions, the sum of the individual provisions is greater than the combined impact of the rule provisions. Table 3 summarizes these differences, rounded to the nearest million to demonstrate the similarity in net benefits for some of these alternatives. Option 3, with all three provisions analyzed as a package, is shown to have net benefits of $205 million. This calculation does not include the $40 million FMCSA has estimated for reprogramming costs. That package with the 2 night provision removed (that is, including only the 7 day restart provision and the 30 minute break) appears to have marginally greater net benefits, at $206 million. Not shown in the table, however, are the substantial unmonetized benefits the 2 night provision is expected to have due to the circadian advantages of nighttime sleep. As noted in Section 6.4 of the RIA, these additional benefits were too complex to be quantified and monetized reliably, but could only be beneficial both to driver health and to highway safety. They would almost certainly be large enough, though, to ensure that the net benefits of the rule are improved by the inclusion of the 2 night provision. Similarly, the net benefits of a package that excluded the 30 minute break provision appears to be slightly greater than the net benefits of the Option 3 package, at $206 million. Again, the 30 minute break provision is expected to provide very substantial crash reduction benefits that could not be included in the analysis. These benefits, as noted in Section 6.4, are related to the short-term reductions in crashes provided by the break's restorative effects on alertness. If these short-term benefits could be monetized and added to the break's effects on cumulative fatigue, they would almost certainly show it to be a cost-beneficial addition to the rule. Table 3 also presents the difference for each option when the provisions are considered separately or as a package.

These tables also make clear that under most assumptions about current sleep levels, moving to 10-hour driving time would result in lower net benefits, relative to an 11-hour driving time. Comparing Option 2 to Option 3, allowing only 10 hours of driving would increase costs substantially, without a commensurate increase in benefits.

TABLE 1—SUMMARY OF ANNUALIZED COSTS AND BENEFITS FOR RULE OPTIONS (7 PERCENT DISCOUNT RATE)

[Millions 2008$]

	Option 2: 10 hours of driving allowed	Option 3: 11 hours of driving allowed	Option 4: 9 hours of driving allowed
Total Costs	$1,000	$470	$2,290
Benefits with Low Sleep	1,410	910	2,240
Benefits with Medium Sleep	980	630	1,500
Benefits with High Sleep	550	350	770
Net Benefits with Low Sleep	400	440	−50
Net Benefits with Medium Sleep	−20	160	−790
Net Benefits with High Sleep	−450	−120	−1,520

Note: Totals do not add due to rounding.

TABLE 2—SUMMARY OF ANNUALIZED COSTS AND BENEFITS FOR RULE OPTIONS (3 PERCENT DISCOUNT RATE)

[Millions 2008$]

	Option 2: 10 hours of driving allowed	Option 3: 11 hours of driving allowed	Option 4: 9 hours of driving allowed
Total Costs	$1,000	$470	$2,290
Benefits with Low Sleep	1,690	1,130	2,620
Benefits with Medium Sleep	1,110	750	1,630
Benefits with High Sleep	530	370	630
Net Benefits with Low Sleep	690	660	340
Net Benefits with Medium Sleep	110	280	660
Net Benefits with High Sleep	−470	−90	−1,650

Note: Totals do not add due to rounding.

TABLE 3—COMPONENT AND INTERACTION COSTS, BENEFITS AND NET BENEFITS FOR OPTION 3 (11-HOUR DRIVING ALLOWED)

[Millions 2008$]

Change from current rule baseline	Costs *	Safety benefits (13 percent fatigue)	Health benefits (medium sleep level, 7 percent discounting)	Net benefits *
7-day restart alone	$342	$227	$318	$204
2-night restart alone	51	35	38	22
30-minute break alone	94	72	94	72
Sum of Option 3 provisions, taken separately	487	334	450	297
Option 3 analyzed as a package	426	282	349	205
Overlap among Option 3 provisions (difference between sum of separate provisions and package)	62	52	102	92
Sum of 7 day and 2 night provisions, taken separately	393	262	356	225
7 day and 2 night provisions, analyzed as a package	393	260	340	206
Overlap between 7 day and 2 night provisions (difference between sum of separate provisions and package)	0	2	17	19
Sum of 7 day and 30 minute provisions, taken separately	436	299	412	276
7 day and 30 minute provisions, analyzed as a package	374	253	328	206
Overlap between 7 day and 30 minute provisions (difference between sum of separate provisions and package)	62	47	84	69
Sum of 2 night and 30 minute provisions, taken separately	145	107	132	94
2 night and 30 minute provisions, analyzed as a package	145	95	127	76
Overlap between 2 night and 30 minute provisions (difference between sum of separate provisions and package)	0	12	5	17

* Does not include the $40 million in reprogramming costs.
Note: Totals do not add due to rounding.

E. Overview of Major Comments and Agency Responses

FMCSA held a public listening session and an online comment and question forum from noon to midnight on February 17, 2011, and accepted comments, until June 8, 2011, on the NPRM and on four studies later posted to the docket. The Agency received about 21,100 unique comments, mostly from drivers, carriers, and industry associations. After FMCSA reopened the comment period on May 9, 2011, it received 14 comments on the four studies discussed in that notice. A summary of the comments and the Agency's responses are presented in Section IV ''Discussion of All Comments'' of this preamble. Table 4 presents the data on the number and type of commenters. Table 5 presents the number of comments on each issue. As indicated in the table, no single rule provision drew comments from a majority of commenters.

TABLE 4—ANALYZED SUBMISSIONS BY COMMENTER TYPE

Commenter type	Number of unique submissions	Number of form letter copies	Total number of submissions
Drivers	18,875	2,209	21,084
Owner-Operators	273	3	276
Carriers	846	238	1,084
Individual Citizens	740	334	1,074
Other Industry	65	6	71
Trucking Associations	59	1	60
Other Trade Associations	62	1	63
Federal Agency	5	0	5
Federal Elected Official	21	2	23
State Government	4	0	4
Law Enforcement	5	0	5
Safety Advocacy Group	10	0	10
Other Advocacy Group	3	0	3
Anonymous	113	10	123
Other	25	2	27
Total	21,106	2,806	23,912

Note: Totals do not include 546 non-germane, non-responsive, or duplicate submissions.

TABLE 5—ISSUES ADDRESSED BY COMMENTERS

Issue	Number of unique submissions
Generally agree or disagree with the proposed rule:	
Agree (w/o substantive comment)	601
Disagree (w/o substantive comment)	8,028
Driving time	4,633
Breaks	2,569
Duty time	3,112
Driving window	598
Restart	4,776
On-duty definition:	
Support change to definition	109
Oppose change to definition	23
Other comments on definition of on-duty	30
Sleeper berth:	
Oppose current rule (want shorter splits)	594
Oppose current rule (oppose any splits)	14
Other comments on sleeper berth use	186
Penalties	66
Changes in § 395.1(e)(2) and (o):	
§ 395.1(e)(2)	13
§ 395(o)	4
Compliance dates	9
Cost-benefit analyses	388
Impacts on the economy	10,343
Comments on fatigue research presented	84
Comments on additional fatigue studies posted on May 6, 2011	14
Comments on health research presented	24
Comments beyond the scope of the rule:	
Parking	1,028
Payment by mile	184
Shippers	550
Electronic On-Board Recorders (EOBRs)	499
Other out-of-scope issues	785
Other comments	679
Request extension of comment period	2
Request public meetings/outreach	3
Oilfield exemption	44
10-hour off-duty time (shorter, longer)	205
One-size-fits-all (different rules for teams, locals, *etc.*)	442

The National Transportation Safety Board (NTSB), the National Institute of Occupational Safety and Health (NIOSH), and safety advocacy groups generally supported the rule, as did many of the citizens who commented. The industry, however, almost uniformly opposed the proposed changes. The industry commenters made two overarching arguments in opposing the provisions. First, they argued that the industry has never been safer, as indicated by the declines in crashes and crash rates and, therefore, that the 2003 rule has at least not made the industry less safe. Second, they stated that the rule changes would impose substantial costs on the industry, make night deliveries difficult, increase congestion, and lower driver incomes.

The industry also took the position that the 11th hour of driving time is used far less than FMCSA assumed in its economic analysis, that most drivers use the 34-hour restart provision to make recordkeeping easier and for flexibility, not to work the maximum number of hours, and that drivers already take breaks. The industry stated that the data do not support the claim that the 11th hour of driving represents a higher risk than the 10th.

FMCSA acknowledged the decline in crashes and crash rates in the NPRM, but stated then, and reiterates now, that the decline in crashes and crash rates for both trucks and cars started in the late 1970s and has continued for both types of vehicles. The declines tend to be sharper during periods of economic recession, but other factors, such as improved vehicle and road design, are generally considered to have contributed to reductions. Furthermore, the significant decrease in truck crashes may not necessarily translate into significant decreases in fatigue-related crashes. FMCSA believes that the 2003 rule, which limited the duty period and lengthened the off-duty period, has certainly not diminished safety, but the recent declines in crashes cannot be specifically attributed to that rule. More importantly, despite the improvement, 3,380 people were killed in truck crashes in 2009 (including 503 CMV drivers) and 74,000 were injured. Based on preliminary reports from the National Highway Traffic Safety Administration (NHTSA), the number of fatalities for truck-related crashes in 2010 rose by 8.7 percent to 3,675. Although historically low, the numbers are still far too high.

On the economic impact of the rule, industry comments and claims were internally contradictory (see Section IV. ''Discussion of All Comments,'' B. ''Economic Impacts'' of this preamble for a detailed discussion). The American Trucking Associations (ATA), other industry associations, carriers, and the economic analysis commissioned by ATA (Edgeworth) [1] argued that

[1] References to studies, reports, or other publications mentioned in this final rule use only

Continued

FMCSA's economic analysis had overstated the use of the 11th hour and restart provisions. ATA and other industry commenters argued that the low use of the provisions meant that fatigue was not a problem, but that changing the provisions would impose high costs. The Edgeworth study submitted by ATA, however, recognized that if the use of the provisions was less than FMCSA had estimated, both the costs and benefits of the rule would also be lower than FMCSA had estimated.

In September 2010, ATA submitted data to the HOS docket based on analyses of duty time for drivers. In the first sample, ATA looked at records for 3 months for over 118,000 drivers, mostly from the truckload sector; the data indicated that drivers were averaging 43.6 hours on duty in 7 days. In a smaller data set (149 drivers and records for 1 month), ATA reported that the drivers averaged 57.5 hours on duty in 8 days (which is the equivalent to 50.3 hours in 7 days). ATA concluded that drivers were using the restart not to maximize hours, but rather to take extended off-duty periods.[2] If drivers are working as little as the ATA data and other comments indicate, the changes to the restart provision will have little impact because the provision only affects drivers who are working longer hours week after week. The restart does not simplify bookkeeping. Unless a driver knows that he is working less than 60 hours a week (*e.g.,* a regular 10-hour day, 5 days a week), he must keep a running 7- or 8-day total of on-duty hours to be sure he is within the limits regardless of the restart provision or the changes this rule makes to it. If a driver takes 34 hours or more off, he simply has a new point from which to keep the total, but he still needs to keep track of his total hours if he could be pressing the limits. Many drivers do these calculations in their heads without needing to write them down. FMCSA believes that this provision will not result in a paperwork burden increase. If drivers are not using the restart to gain hours of work, their productivity will not be affected by today's rule. No one needs the restart to take the ''extended off-duty period'' cited by ATA; the restart is only useful for drivers who are trying to minimize their off-duty time. Even those drivers will not have their work seriously curtailed in a single week. Under today's rule, a driver will still be able to work up to 81 hours in a single week and will be able to average 70 hours of work a week over time.

Industry claims that the 2-night requirement for drivers would affect nighttime deliveries and increase congestion are also unsupported. Given ATA's data, the substantial majority of drivers do not need the restart and would not be subject to the requirement. These drivers can continue to work their usual schedules, including making deliveries at night 7 days a week. Even drivers who are working maximum schedules will still be able to drive and make deliveries at night 5 days a week.

In general, although many industry commenters stated that they would suffer substantial economic impacts, they submitted no data or explanations. The rule will reduce maximum weekly driving time by no more than 5 percent for the few drivers who drive longer hours. It is difficult to see how these provisions, if they are used as little as industry stated, could produce reductions in revenues of 10 to 40 percent as some commenters claimed, particularly given that drivers who do work the longest hours rarely are able to do so on a continuing basis. On the issue of driver incomes, only those drivers working the longest hours will lose income and then only if they have been able to drive long hours in consecutive weeks.

On the health benefits of the rule, ATA submitted the opinion of one researcher who disputed the Agency's use of data in a study that the researcher co-authored dealing with the effect on mortality of improvements in sleep (Cappuccio). The lead author of the same study, however, supported FMCSA's analysis and considered it conservative (Ferrie). Industry commenters did not otherwise attempt to address the issue of the health impacts of long work hours and sleep loss. FMCSA notes that the industry chose to ignore an ever increasing body of research that links long hours of work to sleep loss and an increased risk of obesity, diabetes, and cardiovascular diseases.

Similarly, on the risk of long hours in general, the industry dismissed the many studies, including the new research discussed below, that have found that risk increases with hours worked. Industry did not submit any statistically usable data on their own crash rates. NIOSH drew attention to the considerable body of research in other sectors that has also found that risk increases with hours worked. Like workers in other sectors, drivers are susceptible to fatigue, and, therefore, these other studies should be considered in weighing the evidence for increasing risk.

In summary, the motor carrier industry did not provide evidence to support the dire economic consequences it claimed would flow from the Agency's HOS proposal. FMCSA believes that the changes adopted today are clearly supported by the evidence on the risk of fatigue and fatigue-related crashes associated with long daily and weekly hours, on the loss of sleep associated with long work hours, and the health effects associated with sleep loss.

II. Legal Basis

This rule is based on the authority of the Motor Carrier Act of 1935 and the Motor Carrier Safety Act of 1984 (1984 Act). The Motor Carrier Act of 1935 provides that ''The Secretary of Transportation may prescribe requirements for (1) qualifications and maximum hours of service of employees of, and safety of operation and equipment of, a motor carrier; and, (2) qualifications and maximum hours of service of employees of, and standards of equipment of, a motor private carrier, when needed to promote safety of operation'' (section 31502(b) of Title 49 of the United States Code (49 U.S.C.)).

The HOS regulations promulgated today concern the ''maximum hours of service of employees of * * * a motor carrier'' (49 U.S.C. 31502(b)(1)) and the ''maximum hours of service of employees of * * * a motor private carrier'' (49 U.S.C. 31502(b)(2)). The adoption and enforcement of such rules were specifically authorized by the Motor Carrier Act of 1935. This rule rests on that authority.

The 1984 Act provides concurrent authority to regulate drivers, motor carriers, and vehicle equipment. It requires the Secretary of Transportation to ''prescribe regulations on commercial motor vehicle safety. The regulations shall prescribe minimum safety standards for commercial motor vehicles.'' Although this authority is very broad, the 1984 Act also includes specific requirements: ''At a minimum, the regulations shall ensure that (1) commercial motor vehicles are maintained, equipped, loaded, and operated safely; (2) the responsibilities imposed on operators of commercial motor vehicles do not impair their ability to operate the vehicles safely; (3) the physical condition of operators of commercial motor vehicles is adequate to enable them to operate the vehicles

the lead author's last name or another short descriptive reference that may be used by the reader to reference the material in the ''Bibliography'' in Section VII at the end of this preamble. The lead author's professional titles or degrees are not shown. For example, Edgeworth references a data source described fully in the bibliography section later in this final rule.

[2] Stephenson, B., ATA, email to Tom Yager, FMCSA, September 8, 2010. FMCSA–2004–19608–4026.

safely; and (4) the operation of commercial motor vehicles does not have a deleterious effect on the physical condition of the operators'' (49 U.S.C. 31136(a)). This rule would improve both highway safety and the health of CMV drivers.

This rule is also based on the authority of the 1984 Act and addresses the specific mandates of 49 U.S.C. 31136(a)(2), (3), and (4). Section 31136(a)(1) mainly addresses the mechanical condition of CMVs, a subject not included in this rulemaking. To the extent that the phrase ''operated safely'' in paragraph (a)(1) encompasses safe driving, this rule also addresses that mandate.

Before prescribing any regulations, FMCSA must also consider their ''costs and benefits'' (49 U.S.C. 31136(c)(2)(A) and 31502(d)). Those factors are also discussed in this rule.

III. Background and Description of the Trucking Industry

The history of the HOS regulations has been discussed at length in previous rulemakings and will not be repeated here. See the May 2, 2000, NPRM for a detailed history of the earlier provisions (65 FR 25540) and the December 29, 2010, NPRM of this final rule for the more recent history (75 FR 82170).

FMCSA held a total of five public listening sessions prior to publishing the NPRM as well as one session after publication to gather information and opinions. These listening sessions were webcast, the Agency accepted calls during the sessions, and the Agency held an online comment and question forum on February 17, 2011, from noon to midnight to give more people a chance to participate. Transcripts of the listening sessions and the online comment and question forum are in the docket.[3] As noted above, more than 21,000 comments were submitted to the docket. Each comment was read and the positions of commenters on each issue they addressed were logged.

Trucking Industry

The trucking industry is comprised of hundreds of thousands of carriers and millions of drivers moving goods locally or in long hauls between cities. The industry is diverse, and different sectors have different operational characteristics. The industry can be divided in a number of ways: Private versus for-hire; truckload versus less than truckload (LTL); long-haul versus short-haul. Private carriers are not trucking firms; they are manufacturers, distributors, or retailers that move their own goods among factories, distribution centers (warehouses), and retail outlets. Their drivers generally operate on a regular basis over routes set by the locations of their own facilities and those of their customers. For-hire carriers are in the transport business; they move goods for their customers. An LTL carrier usually picks up and delivers small shipments in a local area served by one of its terminals. Shipments are consolidated into loads for large trucks that make long (line-haul) runs to the firm's terminals in other areas. Moves between terminals are almost always overnight on regular routes. The goods moved overnight are delivered the next day by the local drivers at the destination terminal. The dominant pattern for line-haul drivers in LTL operations is driving five nights a week with the weekend (or at least 2 consecutive days) at home. Some firms will have one group of drivers working Monday through Friday nights and another group working Sunday through Thursday nights. Daytime driving sometimes occurs when, for example, a trailer is to be moved to a terminal that cannot be reached in a single, overnight run.

The truckload carriers typically pick up a full load from a shipper and move it directly to the receiver of the goods. Some of their business is regular and predictable under contracts or less formal agreements. Much of their business is almost random in nature, transportation from one place to another being booked and sold on a daily basis. Drivers in random service may not know where they will be at the end of each day. Their runs are often made by day, but many also require nighttime driving. Short-haul drivers operate within a local area; most are not exclusively nighttime drivers. Their routes may vary day by day, but they are always in the same general area. They may spend a good part of each day loading and unloading at multiple locations. Although there are exceptions, most long-haul drivers do not load or unload the cargo.

The various sectors are affected by different parts of the HOS rules. Most short-haul carriers do not use all of the allowable driving hours because they spend a good part of each day loading and unloading the truck to make local deliveries. These drivers also generally work 5 days per week and less than 12 hours a day, which makes the restart unnecessary. The local part of LTL operations has a similar work pattern. The line-haul LTL runs are between terminals located at the outer edges of metropolitan areas or in smaller cities. Like local drivers, except in peak season, they usually work 5 days a week. Private carriage is almost always limited to trips of less than 500 miles or 10 hours of driving. There are far more long runs in the truckload sector, but even this sector moves much of its cargo less than 500 miles. The carriers most affected by the HOS rules are the truckload carriers that operate most or all of the time on a random basis, picking up a load for delivery without knowing where the next load will be.

IV. Discussion of All Comments

FMCSA received more than 20,000 comments, but no single provision of the NPRM drew responses from a majority of the commenters. About 4,000 commenters addressed driving time and the restart; about 3,000 addressed breaks and duty time limits (most of these wanted a return to the pre-2003 cumulative duty time); approximately 200 commented on the on-duty definition, and about 100 commented on the penalty provision. Most people who took the time to comment opposed some part of the proposal. About 8,000 comments expressed general opposition to the rule.

The primary arguments made by the commenters were limited and applied to the three main provisions of the NPRM—driving time, the restart, and breaks. To avoid redundancy, in this section the overarching arguments will be discussed first, incorporating specific points related to the provisions. The arguments that apply to a single provision will then be presented. Comments on the economic analysis are addressed in Section VI ''Required Analyses'' of this preamble.

The motor carrier industry argued that the declining fatality rate for truck-involved crashes since 2004 demonstrates that the current HOS rule is safe and should not be changed. The main industry argument, however, was that changing the rule would produce serious economic consequences for carriers, drivers, shippers, receivers, and consumers. On other issues, the industry generally disagreed with the

[3] Transcripts of the listening sessions and the online comment and question forum may be found in the online docket on *www.regulations.gov* at:

a. January 19, 2010 Listening Session—FMCSA–2004–19608–3854.

b. January 22, 2010 Listening Session—FMCSA–2004–19608–3860.

c. January 25, 2010 Listening Session—FMCSA–2004–19608–3855.

d. January 28, 2010 Listening Session—FMCSA–2004–19608–3856.

e. March 26, 2010 Listening Session—FMCSA–2004–19608–3904.

f. February 17, 2011 Listening Session and Online Comment and Question Forum—FMCSA–2004–19608–9393.

notion that drivers are not getting sufficient sleep and that chronic fatigue is a problem. The industry's only argument on driver health benefits was to claim that the study used to estimate increased mortality had been misapplied, a claim that the study's lead author refuted in a comment to the docket. NTSB, NIOSH, and safety advocacy groups, all submitted comments to support the proposal in general, contradict industry arguments, and provide additional research. FMCSA asked for data on crash experience under the current rule, costs of the proposed rule, and related matters, but no carrier or association submitted information that proved to be useful.

A. Safety

Industry commenters made two principal arguments on safety. The first was a general statement on the improving crash rates of CMVs; the second was specific to the 11-hour driving limit. This section presents the comments and response to improving the crash rates. Section IV.''Discussion of All Comments'' E. ''Driving Time Limit'' discusses the 11-hour issue.

Comments. Many industry associations, carriers, and drivers stated that the 2003 rule has improved (or at least not reduced) safety and pointed, as proof, to the decline in truck crash rates that occurred from 2004 to 2009. ATA stated that truck vehicle miles traveled (VMT) increased during that period, countering any argument that the economy was the cause of the decline in crashes. Some carriers stated that their crash rates (variously reported as preventable, recordable, injury, or all crash rates) declined over similar periods. Two commenters noted that HOS compliance has improved as seen in roadside inspection data.

Advocates *et al.,* [4] the Insurance Institute for Highway Safety (IIHS), and another commenter pointed out that the crash rates began falling well before 2004 and that the passenger vehicle fatality rate has fallen faster than the truck fatality rate in recent years. IIHS stated that there was no apparent change in the long-term trend coincident with the 2003 rule change. IIHS also noted that there had been a general downward trend in CMV driver deaths, but that the number rose between 2003 and 2006, before dropping in 2007 and 2008.

FMCSA Response. Crash rates for trucks and passenger vehicles have been falling since the late 1970s. The reasons for the decline are complex and cannot be attributed to any single factor. It is very likely that improved vehicle safety design for cars and improved road design have contributed to the reduction. Injuries and fatalities have also decreased with greater use of seat belts by car and truck drivers. The rates have been steadily declining over a long period, well before the HOS rules changed.

Economic conditions do play a part in the number of crashes. The large decrease in truck-related fatality rates from 2007 to 2009 is not unprecedented; similar year-to-year percentage decreases in fatal crash rates occurred in 1980, 1982, 1991, 1992, and other periods of recession. ATA argued that the recent recession could not explain the decline in fatality rates because truck VMT actually increased despite the recession. The increase in truck VMT cited by ATA and others, however, is an artifact of a change in the definition [5] of ''truck'' used by the Federal Highway Administration (FHWA) in estimating VMT, which resulted in an addition of almost 1.9 million vehicles (about 370,000 combination vehicles and 1.5 million straight trucks) and their associated VMT to the ''truck'' population. In estimating the number of trucks, FHWA has defined that term to mean any vehicle other than a bus with a gross vehicle weight rating greater than 10,000 pounds. The population of ''trucks,'' therefore, now includes mobile homes, large pickups, cab chassis, and various other larger vehicles, most of which are not used by motor carriers, except for short-haul pickups and deliveries.[6] The changed definition increased the number of combination trucks by 17 percent and the number of single-unit trucks by about 22 percent (for 2008). The change increased 2008 VMT for combination trucks by about 28 percent and VMT for single-unit trucks by about 50 percent. FHWA revised VMT estimates for previous years to reflect its new methodology and allow year-to-year comparisons. These revised VMT numbers show that combination truck VMT peaked in 2007, fell slightly in 2008, and fell sharply in 2009. This pattern obviously reflects the decline in demand for transportation associated with the recent recession.

These drops in VMT are consistent with other data that reflect VMT for trucks. Diesel fuel sales for over-the-road-vehicles, which are primarily for trucks, dropped 14 percent from 2007 to 2009, according to data from the Energy Information Administration. The Census Bureau's Annual Survey of the Service sector indicated that the trucking industry revenues dropped by about 19 percent from 2008 to 2009 and VMT for for-hire carriers by 15 percent.[7] ATA's own trucking activity index (year 2000=100) lists the mileage index for truckload carriers in December 2003 as 100.4 seasonally adjusted; the index fell slightly (less than 10 percent) until the middle of 2008 when it began to fall sharply, reaching a low point of 71.3 in April 2009.[8]

A study conducted by the National Highway Traffic Safety Administration showed that large fatality declines (for all vehicles) tended to coincide with areas with higher increases in the unemployment rate, which limits driving, particular long-distance driving (Longthorne). A similar study conducted by the University of Michigan Transportation Research Institute attributed the decline to a number of factors (Sivak). The study noted that crashes (for all vehicles) had fallen more sharply on rural interstates than on other roads, which they stated was consistent with a decline in long-distance leisure travel. Similarly, crashes during rush hours dropped more than crashes at other times, consistent with reduced traffic. They noted that the decline in truck crashes was consistent with the decline in freight traffic.

The assumption in the industry argument is that fatigue-related crashes, which are the target of the HOS rules, have declined as sharply as crashes as a whole. The data from the Trucks Involved in Fatal Accident reports, however, indicated that the trend in fatigue-coded fatal crashes has not been as consistent as the decline in crashes. The highest percentage of fatigue-coded fatal crashes occurred before the 2003 rule in 1999 and 2000 (both 2.1 percent) followed by 2 percent in 1994 and 2007, before and after the rule; the lowest rate

[4] Comments for Advocates for Highway and Auto Safety, Public Citizen, Truck Safety Coalition, and the International Brotherhood of Teamsters, filed jointly.

[5] The FHWA 2009 VMT estimates and its revision of the estimates for 2000–2008 were posted in April 2011 in Table VM–1 of Highway Statistics (annual editions) (*http://www.fhwa.dot.gov/policyinformation/statistics.cfm*).

[6] A combination vehicle is any vehicle towing a trailer. Semi-trailers are combination trucks as are pick-ups, cars, or straight trucks towing a trailer; for example, a sport utility vehicle towing a boat is considered a combination vehicle.

[7] U.S. Census Bureau, ''Truck Transportation, Messenger Services, and Warehousing—NAICS 48/49 *http://www2.census.gov/services/sas/data/48/2009_NAICS48.pdf.*

[8] ATA, Economic Statistics Group, ATA Trucking Activity Report Historical Truckload Sector Database as of March 2011. Available online at *http://www.atabusinesssolutions.com/p-24-ata-trucking-activity-report-trac.aspx.*

occurred before the rule (1.4 percent in 2001) followed by 1.5 percent in 2002, 2004, and 2006, before and after the rule.

While the declines in crashes are welcome, they are not sufficient. The IIHS commented that driver deaths increased after the 2003 rule was implemented. FMCSA notes that drivers are far more likely to die in single-vehicle crashes than in multi-vehicle crashes and single-vehicle crashes are more often associated with driver fatigue. The more recent sharp drop in driver deaths may be the result of less general traffic and lower demand for trucking services, which may have reduced fatigue and trucks on the road, or other factors, such as carriers laying off their riskier drivers and significantly higher truck driver use of seat belts. It remains the case, however, that almost 300 CMV drivers died and 6,000 were injured in single-vehicle crashes in 2009. As noted above, 3,380 people died in truck crashes and 74,000 were injured in 2009. These numbers may be low historically, but they are still too high. Furthermore, preliminary reports from NHTSA indicate 3,675 people were killed in truck-related crashes in 2010, an increase of 8.7 percent over 2009.

B. Economic Impacts

Economic arguments formed the core of the comments on the proposed rule. This section discusses those arguments, both the general statements and the specific claims about individual provisions.

Comments on General Economic Impacts. Industry associations, carriers, and drivers stated in general that the rule as proposed would do the following:

- Reduce productivity of carriers.
- Reduce driver incomes.
- Affect shippers, receivers, and consumers.
- Increase demand for more drivers and put more inexperienced drivers on the road.
- Increase congestion.

The majority of commenters on these issues stated that the NPRM—particularly the 10-hour driving time, the 2-night requirement for, and the weekly availability of, the 34-hour restart—would have serious negative financial impacts on carriers and affect the reliability of the industry. Many commenters believed these provisions would reduce operating resources (drivers' hours) and increase the cost of goods sold (adding drivers, equipment, and operating costs), which could also result in delays in deliveries to customers and loss of business. Many commenters seemed to assume that the two-night limit on the restart would eliminate nighttime deliveries. Commenters generally claimed that, to accomplish the same amount of productivity, the proposed regulations would require carriers to add more equipment and drivers to offset the decrease in available hours per driver, which would also lead to increased fuel and maintenance costs. Carriers predicted varying degrees of loss—from 4.72 percent reduction in utilization to 25 to 33 percent decline in revenues—and increased costs ranging from $10,000 to $25,000 per truck. Carriers said that they would have to hire new drivers and buy new trucks; their estimates of the effect on revenues ranged from considerably less than 1 percent to 25 percent or more. Shippers and shipper associations emphasized the impact on supply chains, the need to reconfigure schedules and routes, and the costs associated with those changes.

FMCSA Response. The Agency relied on published data and reports from a range of sources for the NPRM and this final rule. These documents did not include any information indicating that the adverse economic outcomes described above were likely to occur. The Agency estimates that this rule would reduce productivity by 2.7 percent with a 10-hour driving limit, and by 1.2 percent with an 11-hour limit. In either case, this estimate is significantly lower than that of many industry commenters, but given that the Final Rule is functionally equivalent to Option 3 (11 hours), the lower impact of 1.2 percent applies. It is true that some carriers, depending on their operations, may experience greater impacts, but others will experience more moderate impacts. Our estimate for the total costs of the rule are also much lower than those claimed by the industry: we estimate that the total cost of the rule would equate to roughly one-third of one percent of industry revenue, not the 25 to 33 percent declines stated by the industry. To put this figure into context, a 3 cent rise in the price of diesel fuel would impose greater costs on the long-haul segment of the industry than this rule. Data submitted by ATA to the docket, while not complete enough to be used to re-estimate the costs of the rule, indicates that drivers may be working less intensely than the Agency assumed in conducting the analysis. If that is the case, the costs (and benefits) would be lower than the Agency estimates, as ATA's consultant acknowledged in its analysis.

Although commenters made a wide range of claims for the cost of the NPRM, they provided little data to support those claims and few explanations of how the rule changes could affect their operations to the degree claimed. A number of publicly traded motor carriers submitted cost estimates that, when compared to their reported revenues, were found to represent a small fraction of 1 percent of their revenues, which is much less than FMCSA had estimated in its economic analysis. None of the commenters provided an explanation of how a reduction in weekly driving hours of about 5 percent for those working the longest hours could produce revenue declines of the magnitude claimed.

Most of the claims seem to imply that every truck and driver is working the maximum hours every day. Commenters addressing other issues (including many of the same commenters) indicated that use of the 11th hour of driving is considerably lower than FMCSA estimated (on about 10 percent of the runs compared to the 21 percent FMCSA had estimated) and that restarts are generally longer than 34 to 40 hours. The critique of the RIA submitted by ATA and cited by many industry commenters claimed that FMCSA had overstated the number of drivers working long hours. Data submitted by ATA based on more than 118,000 drivers indicate average work weeks of less than 44 hours; a smaller sample of drivers that ATA submitted still averaged less than 58 hours in 8 days (or about 50 hours in 7 days). The industry, in effect, made two contradictory arguments—that the long hours allowed by the current rule are rarely used so that fatigue is not a problem and rule changes are not necessary, and that any reduction in those hours will have serious economic impacts. Both arguments cannot be true.

Any driver who is working less than 60 to 70 hours a week does not need a restart and thus is unaffected by the limitations on the restart requirement in this final rule. Revenues generated by those drivers will not be affected. The restart does not simplify bookkeeping. Unless a driver knows that he is working less than 60 hours a week (*e.g.,* a regular 10-hour day, 5 days a week), he must keep a running 7- or 8-day total of on-duty hours to be sure he is within the limits regardless of the restart provision or the changes this rule makes to it. If a driver takes 34 hours or more off, he simply has a new point from which to keep the total, but he still needs to keep track of his total hours if he could be pressing the limits. Many drivers do these calculations in their heads without needing to write them down. This calculation, at any rate, is

both simple (subtracting one day's hours from the running total, then adding another day's hours to the result) and can be conducted during waiting or refueling time, and so would result in de minimis effort and cost to the driver. Furthermore, any driver who only takes a restart once a week would not have to keep a tally of hours back beyond the previous restart, because that restart would reset the driver's cumulative available hours under the new rule, as it does under the current rule. Any driver who works relatively moderate hours would be unlikely to take multiple restarts in a week, or have to worry about violating the cumulative weekly hour limit.

The two-night requirement will not stop overnight deliveries; even a driver who is working maximum hours and needs a restart could still make nighttime deliveries 5 days a week. Drivers who are not working longer hours can continue to make nighttime deliveries every working night because they do not need a restart and are not subject to the 2-night requirement. This group of drivers includes local delivery drivers whose schedules may start in the early hours of the morning and LTL line-haul drivers. Long-haul truckload drivers, who may prefer to drive at night because there is less traffic, have schedules set by shippers and receivers and may not routinely drive at night. J.B. Hunt stated that 32 percent of its drivers occasionally drove at night; these drivers did so on average only 6 nights a month.

Industry comments claimed that the reliability of service would be affected, but provided no explanation of why this would occur. Reliability is the ability to predict when a shipment will arrive. Differing limits on work time may alter arrival times, but would not affect the ability to estimate an arrival time.

Carriers and drivers reiterated in comments on the NPRM that long-haul truckload drivers spend anywhere from 10 to 50 percent of their time each week waiting to be loaded and unloaded, time for which the drivers are not usually paid. The National Small Shipments Traffic Conference admitted that the 2003 rule's 14-hour consecutive duty limit had caused some receivers to unload the product before they needed the product for the store shelves or production line rather than letting the shipments sit in the truck until needed. In essence the association was confirming the drivers' claim that they are treated as moving (and free) warehouses. Carriers stated that the shortening of wait time or detention that occurred after the 2003 rule has eroded and that wait times have increased again. If the drivers and carriers are correct,[9] the supply chain includes inefficiencies that regularly absorb more of drivers' on-duty time than all of the changes adopted in this final rule. The relatively small impacts of the rule could be offset and the utilization of trucks and drivers improved if shippers and receivers set and kept appointments for loading and unloading instead of expecting drivers to put in long unpaid hours waiting. FMCSA has no obligation to allow drivers to work excessively long hours a week to compensate for delays in the supply chain.

Comments on Impact on the Number of Trucks. Commenters argued that taking an hour away from daily driving time would result in more trucks being used to move the same amount of freight. They stated that more trucks on the road would increase costs to carriers, and that those cost increases would be passed to shippers and ultimately to consumers in the form of higher prices. The National Association of Manufacturers, a trucking association, and a carrier noted that reducing the daily driving limit to 10 hours would also increase costs to manufacturers and retailers, as they would have to carry additional inventory, at additional costs, to ensure that they have products on their store shelves, since reliability of service could be interrupted. Commenters, including the Owner Operator Independent Drivers Association (OOIDA), also argued that changing the 11-hour driving time limit would increase transit time and reduce productivity and on-time deliveries because current distribution centers and routes are built around the current HOS rules. Five commenters that ship products with a limited shelf life or peak ripeness argued that the reduction of daily driving time to 10 hours would severely strain their ability to get fresh product to their customers by increasing days of transit time. A carrier that transports livestock expressed concern over increased livestock deaths that may result with a decrease in daily drive time, due to drivers being forced to stop to take their break without being able to provide the animals with water or relief from the summer heat. Commenters also argued that reducing daily driving time would reduce drivers' incomes.

FMCSA Response. FMCSA sees no reason why changing the daily driving limit from 11 hours to 10 hours, a limit that was in effect for more than 60 years before 2003, would reduce the reliability of motor carrier service. Reliability depends on the carrier's ability to estimate accurately how long a trip will take, which they can do regardless of the driving time limit. However, FMCSA acknowledges that some businesses have built their distributions systems to optimize driving times under the 11-hour limit and that they might face significant costs to maintain their current delivery times if limits were reduced. As discussed above, the Agency has not adopted a 10-hour limit at this time.

The concerns expressed by livestock haulers that a mandatory rest break of at least 30 minutes would increase the risk of livestock deaths seem overstated. Federal law allows carriers transporting animals to keep them confined for up to ''28 consecutive hours without unloading the animals for feeding, water, and rest'' (49 U.S.C. 80502(a)(1)), and there are exceptions even to that standard (§ 80502(a)(2)). This statute is obviously intended to protect animals during transportation. Under these circumstances, it is difficult to see how a half-hour break taken no later than 8 hours after the driver comes on duty—and presumably not much longer than that after the animals were loaded—could have dire consequences.

Comments on Congestion and Parking. Many commenters stated that a 10-hour driving limit would place more trucks on the road, increase congestion, and worsen an already existing truck parking shortage at truck stops. They also argued that the 11-hour driving limit is very important to them because they use the 11th hour to find safe parking where they can take their 10 hours off duty. Other commenters argued that the 11th driving hour is rarely used, but that it provides much-needed flexibility allowing drivers time to get home or find parking after unforeseen events during their shift, such as congestion, inclement weather, or the needs/demands of shipper, receiver, carrier or dispatch. Commenters also implied that night drivers would switch to day driving to shorten their restarts, which would increase congestion. Commenters stated that the proposed 2-night midnight to 6 a.m. period for restarts would result in

[9] See ''Commercial Motor Carriers: More Could Be Done to Determine Impact of Excessive Loading and Unloading Wait Times on Hours of Service Violations,'' U.S. Government Accountability Office, January 2011, Report No. GAO–11–198, *http://www.gao.gov/new.items/d11198.pdf* and the letter report, ''U.S. Department of Transportation Statement on Government Accountability Office (GAO) Report'' for Report No. on GAO–11–198, May 23, 2011, available in the docket. The DOT letter report was sent to the Office of Management and Budget (OMB) and four Congressional committees, stating that FMCSA is planning to examine the extent to which detention time contributes to drivers violating hours of service requirements and that it plans to initiate the study in Fiscal Year 2012, contingent on resource availability, in response to the GAO report.

more trucks entering the traffic stream at 6 a.m., thereby increasing congestion.

FMCSA Response. It is difficult to see how the change in the driving limit or the 2-night requirement would seriously affect the number of trucks on the road and, therefore, how the changes would increase congestion or the shortage of parking. Because the Agency is retaining the 11-hour driving limit, the commenters' concerns about increased congestion related to a need for more trucks will not be realized. An increase in rush hour traffic because of the 2-night provision is unlikely. Most drivers who routinely work at night (LTL and local delivery) do not work enough hours to require a restart and, therefore, would not need to change schedules. Truckload drivers do not drive at night regularly and have more ability to adjust start and stop time to minimize the impact of the provision on their operations. FMCSA has also narrowed the required period for those who are affected by the provision to allow earlier starts, which will further reduce effects on rush hours.

Most drivers who routinely drive at night are either LTL line-haul operators or work for local private carriers making deliveries. Neither of these is likely to switch to day driving nor is there any reason why they would need to. Drivers need to take a restart, and thus two full nights off, only if they have worked more than the cumulative hours allowed under the weekly duty limit (60 hours in 7 days or 70 hours in 8 days). Most of these drivers work few enough hours per week (less than 60) that, although nominally ''using the restart provision'' by virtue of taking off a day or a full weekend, they are not using the restart to gain any additional hours beyond the 60 hours that they would be allowed without the restart provision. Because they do not use the restart to increase the hours they are allowed to use, these drivers can maintain their preferred schedule while still complying with the HOS rule. In particular, they are not required to have 2 consecutive nights off (although they usually do). Long-haul truckload drivers may prefer to drive at night, but their schedules are irregular and determined by their appointment times. Even these drivers, according to ATA, do not routinely work enough hours to trigger the need for the restart. When they do work maximum hours, they can still drive at night 5 nights a week.

Congestion can, at times, be unexpected, but most congestion is predictable; any driver who will be driving around a major city during the rush hours knows he will encounter congestion and must therefore plan for it. Unforeseen weather conditions are covered by § 395.1(b), which can be used to take extra time.

Comments 34-Hour Restart Economic Impacts. On the restart, many commenters said that the NPRM provision would reduce productivity. In contrast, Schneider National said the proposal likely would not have a significant negative effect on productivity, because most drivers take breaks that are longer than the required off-duty period. However, it said the 2-night requirement would add costs for the carrier and inefficiencies for the supply chain, because many drivers will choose not to restart while on the road, requiring additional ''empty miles'' to get them home. A number of shipper associations stated that the provision would limit the ability to make deliveries overnight. Commenters, such as ATA, the National Solid Waste Management Association, United Parcel Service (UPS), and others, stated that the proposal would deprive drivers and carriers of scheduling and operational flexibility. ATA commented that flexibility under the current rule was especially important for long-haul and irregular route drivers who may not know their schedules in advance and have little control over scheduling. Carriers in the construction and fuel delivery industry also stated they would be adversely affected.

FMCSA Response. After considering numerous comments, FMCSA shortened the two nighttime periods that must be included in the restart to 1 a.m. to 5 a.m., which is the core portion of the window of circadian low for almost everyone. This will provide greater flexibility than the proposed rule while ensuring that drivers have the opportunity to obtain 2 nights of sleep while allowing drivers to stop an hour later than proposed at the beginning of the restart period and to start an hour earlier than proposed after the restart period. FMCSA acknowledges that this revised restart provision will slightly reduce the flexibility available under the previous rule, but recent research has suggested that 2 consecutive nights off duty would be necessary to ensure that the drivers who take a restart are adequately rested when they resume driving.

Schneider National argued that its drivers would not take a restart with 2 nights on the road and stated that its drivers' restarts averaged 62 hours, which is more than enough time to cover 2 nights. Perhaps the largest group of regular night drivers is the LTL line-haul drivers, who generally work a 5-day week and whose weekend would normally cover two consecutive nights as a matter of course.

As for general productivity impacts, drivers are still subject to the 60-hour and 70-hour limits but will still be able to use a 34-hour restart once a week. A driver working the longest hours will be able to use a restart to work those hours, but will then have to take more time off in the next week to compensate. Although this will limit his or her ability to work maximum hours every week, the commenters suggest that very few drivers do this. Local fuel delivery drivers are probably not working enough hours to need a restart as most local drivers work 5-day weeks. The construction industry is not subject to the restrictions because it observes a statutorily mandated 24-hour restart (49 CFR 395.1(m)).

Comments on Economic Impact of Breaks. ATA and others stated that because there is little or no evidence that drivers are not taking breaks during the course of the workday, requiring breaks at specific times only reduces flexibility and productivity. Drivers, carriers, the American Moving and Storage Association (AMSA), and others, argued that the break provision can decrease efficiency and productivity, prevent on-time deliveries, and create a longer workday; commenters cited the difficulty of finding a place to park. FedEx commented that a 30-minute rest break by the 7th hour after coming on duty would further hinder local package pickup and delivery drivers operating under § 395.1(e)(1).

FMCSA Response. After considering numerous comments about the breaks, primarily from team drivers, the Agency extended by one hour the window in which a break must be taken. The final rule provides that driving is not permitted if more than 8 consecutive hours on duty—compared to 7 hours in the NPRM—have passed since the last off-duty (or sleeper-berth) period of at least 30 minutes, a driver must take a break of at least 30 minutes before driving. For example, if the driver started driving immediately after coming on duty, he or she could drive for 8 consecutive hours, take a half-hour break, and then drive another 3 hours, for a total of 11 hours. Conversely, this driver could drive for 3 hours, take a half-hour break, and then drive another 8 hours, for a total of 11 hours. In other words, this driver could take the required break anywhere between the 3rd and 8th hour after coming on duty. A driver who plans to drive until the end of the 14th hour and wants to take only one break will need to take a break between the 6th and 8th hour after

coming on duty. Drivers will have great flexibility in deciding when to take the break. By postponing the latest point at which the break can be taken from the 7th to the 8th hour, the rule will make it significantly easier for team drivers to coordinate their sleeper-berth periods and may enable drivers who do not drive late into their work shift to dispense with a break altogether. FMCSA has also added an exception for drivers of CMVs carrying Division 1.1, 1.2, or 1.3 explosives to allow them to count on-duty time spent attending the CMV as required by § 397.5 but doing no other on-duty work, toward the break.

If, as the data ATA and others submitted indicated, drivers are averaging less than 50 hours of driving a week, it is difficult to understand how a half hour break that can be taken sometime between the 2nd and 8th hour in a 10-hour day could cause any delays unless the industry is saying that these drivers never stop for a meal or a rest break during that time. FedEx stated that its drivers average less than 9 hours of driving a day except in peak periods when the average is slightly less than 10 hours. It seems unlikely that drivers work essentially non-stop. FMCSA recognizes that drivers on the road may have to find a safe place to park, but even the drivers working to the end of the 14-hour window have a 2-hour window in which to take a break (between the 6th and 8th hour after coming on duty), assuming they take just one. Drivers working shorter days have progressively longer windows in which to take the break and meet the requirement. That should be adequate time to find a safe place to park.

Comments on Economic Impact on Drivers. A large number of commenters stated that the NPRM would reduce drivers' incomes because they would be able to drive fewer miles and would lose loads. ATA claimed that it could cause an income loss of 20 percent in peak season. Carriers estimated driver losses at anywhere from 8 percent to 40 percent. Two large carriers, however, indicated that the result would be an increase in driver pay rates to offset the lost hours.

FMCSA Response. A driver who is regularly working the longest hours will lose hours under the final rule; that is the intention of the rule changes. Drivers will still be able to average 70 hours a week, however, which is longer than most people work and, if the industry data are accurate, longer than most drivers are working. A driver on the 70-hour/8-day schedule working the maximum hours allowed under the 2003 rule would lose one shift every 2 weeks (11 instead of 12 14-hour shifts in 14 days). According to the ATA data, very few drivers are working that hard; those few who do so are apparently not doing it consistently. The income of drivers who are averaging less than 60 hours a week, let alone less than 50 hours, will not be affected by the provisions of this final rule. For the drivers working the longest hours, a reduction in waiting time could enable the drivers to have more opportunities to drive weekly. The rule reduces the maximum number of on-duty hours more than it reduces the maximum number of driving hours (a maximum of 82 hours on duty on average to 70 hours versus a maximum of about 74 hours of driving time to 70 hours).

An underlying assumption in many of these claims of lost income is that most shipments are time-critical and that shippers will shift to teams to ensure delivery. The long waiting times that shippers and receivers often impose (2–18 hours according to drivers) indicate that this is not true, as do reports from drivers and others that drivers will generally try to arrive the night before a pick-up or delivery so they can be sure to make their appointment times. Teams represent a relatively small part of the industry, which indicates that most shippers do not believe the arrival time is so critical that they are willing to pay the higher rates associated with teams. Shipper surveys indicate that reliability, not transit time, is more important to shippers. A 2009 report on trucking stated that ''freight buyers are more willing now to sacrifice a day or three in transit, at a lower cost, as long as they and their customers know when shipments will arrive'' (O'Reilly (2009)). For the 2010 survey, 90 percent of surveyed shippers identified reliability as their most important criterion when selecting carriers (O'Reilly (2010)).

Finally, as two carriers stated and as the industry has been saying in press reports and, for publicly held companies, reported in their SEC filings, regardless of the rule changes, driver wage rates are likely to have to rise to attract new drivers to the industry and to retain the current workforce. A National Transportation Institute survey found that 80 percent of the carriers that responded expected to increase driver pay (Cassidy (2010); Isidore). Pay increases may partially or wholly offset income losses for the limited number of drivers working the longest hours. FMCSA concedes that the hardest working drivers may lose income if they drive fewer miles under the revised rule.

Comments on the Economic Impact on Consumer Prices. Some commenters expressed concern that the proposed regulations would lead to consumers paying a higher price for shipped goods, including food products, because higher costs to carriers would be passed on to receivers and customers. Other commenters cited concerns about higher prices from the costs of adjusting scheduling systems and training staff.

FMCSA Response. If carriers have to raise rates to cover additional costs, those costs will eventually be passed on to consumers. FMCSA notes, however, that transportation costs represent a relatively small part of the cost of any consumer item and that the largest contributor to variability in transportation costs is the price of diesel fuel. As stated in the NPRM and Regulatory Impact Analysis (RIA), the cost of the rule changes to the industry is the equivalent of an increase of less than $0.03 per gallon of diesel for the long-haul segment of the industry. The U.S. Department of Agriculture indicates that transportation represents only 2 to 6 percent of each food and beverage dollar, a percentage which has declined over time (USDA Economic Research Service). Even if the rule increased transportation costs by 10 percent, that would add less than a penny per dollar to food and beverage costs. If, as the RIA projects, transportation costs will increase by less than 0.25 percent, the increase in the price of each food item will be a very small fraction of a penny. The one-time costs of adjusting scheduling systems and related items will not add to the long-term cost of consumer items.

Comments on the Driver Shortage. Commenters stated that the rule changes would require carriers to hire more drivers at a time when carriers cannot fill positions and that more inexperienced drivers, who are less safe, would be on road.

FMCSA Response. FMCSA recognizes that the rule may lead to more driver positions. Whether the driver shortage that commenters cited is real is a matter of considerable debate in the industry. OOIDA has been quoted as saying ''The industry purged itself of 30 percent of its drivers in the last two years. They're everywhere, but they are not coming back to work for you if you're not going to pay them anything'' (Dills). An etrucker.com survey asked about the causes of the driver shortage; 40 percent of respondents attributed it to low pay, but 24 percent said there was no shortage (Dills). Industry press reports indicate that carriers have many more applications than they have positions.

FMCSA is aware that new drivers have a higher crash rate than more experienced drivers, but the industry

adds a large number of new drivers every year. The number added because of today's rule will be relatively small in comparison to the annual influx for an industry where turnover, until the recent recession, was 100 percent or more in the truckload sector. The real issue for the industry is that many of the new drivers leave the industry within a few months because of long hours, the weeks away from home, and low pay (Burks (2007)).

C. Sleep Loss and Chronic Fatigue

Comments. A number of commenters, including the major trucking associations, questioned FMCSA's assumption that drivers are not obtaining adequate sleep. They stated that 10 consecutive hours a day off duty should provide sufficient rest. ATA stated that FMCSA's data indicate that drivers get 6.2 to 7 hours of sleep a day, which is enough. The Minnesota Trucking Association argued that 6.5 to 7.5 hours of sleep is enough. The National Association of Manufacturers said manufacturers did not agree that sleep between midnight and 6 a.m. is different from sleep at any other period. Others, including drivers, claimed that they were naturally able to stay up all night and sleep during the day. One carrier reported that its night drivers said they maintained their daytime sleep patterns on days off. ATA and others argued that the 34-hour restart, without restrictions, provides sufficient rest to restore performance.

FMCSA Response. The claim that 6.2 to 7 hours of sleep is enough is not supported by sleep research. As discussed in the NPRM, a study by Belenky (2003) found that drivers getting less than 7 hours in bed a night suffer degraded performance. The research indicated that someone who is totally deprived of sleep for one night recovers more quickly than someone who chronically obtains 6 to 7 hours of sleep. The VTTI study (Hanowski (2007)) did not show that drivers were getting even 6.2 hours of sleep on work days; that figure was the weekly average including 2 days off. On working days, sleep averaged below 6 hours for drivers who were not, in general, working the longest hours, but who were mostly night drivers. The sleep data in the 2005 fatigue management study (slightly less than 7 hours) was self-reported sleep, which has been generally found to be overstated by 30 to 60 minutes; this study also focused on a population of drivers who often drove at night.

Sleep research has for decades shown that humans find it difficult to get enough sleep during daylight hours even if put in dark, quiet rooms. Few people can obtain as much as 6 hours of sleep during the day and that sleep is of lower quality than nighttime sleep; Åkerstedt (2003) found day sleep of night shift workers was 2 to 4 hours shorter than night sleep of day shift workers. The one group studied that seemed to overcome this problem worked in enclosed spaces with no external indications of day or night. Truck drivers do not fit that pattern.

The window of circadian low varies somewhat among individuals. Some people, if they can choose their own times, routinely sleep between 9 p.m. and 5 a.m. while others may sleep from 2 a.m. to 10 a.m., but virtually every healthy person is sleepy between 1 a.m. and 5 a.m. Sleep at that time is longer, less prone to interruptions, deeper, and more restorative (Van Dongen & Dinges (2005)).

As several commenters noted, someone who gets 10 hours of rest a day should not build up sleep debt, but 10 hours off duty does not translate to 10 hours of rest. Research on drivers and others has shown that people who work 14 hour days do not get adequate sleep; 10 hours off usually produces less than 7 hours of sleep, often less than 6 hours because the drivers generally attend to family matters, eating, and showering for the other time the drivers spend off duty. And for the reasons discussed above, those attempting to sleep during the day usually only get 4 to 6 hours of poor quality sleep. The shorter sleep that night workers obtain may explain the higher risk of crashes and lower productivity that Åkerstedt and Wright (2009) found when comparing night shifts with day and swing shifts. Drivers who sleep during the day on their days off would not be getting adequate recovery sleep. A driver who sleeps during the day every day is building up sleep debt from week to week.

The drivers who are working the long daily and weekly hours needed to make a restart necessary may build a sleep debt that the limited time off allowed by the restart might reduce only slightly. These drivers are more likely to be chronically fatigued, with the performance deficits associated with fatigue, and are subject to a range of health effects linked to sleep loss.

D. New Research Studies

As discussed in the overview in Section I, on May 9, 2011, FMCSA posted to the docket four studies that had been recently completed and that addressed some of the issues of concern to this rulemaking. Fourteen organizations submitted comments on the studies. Advocates and New York State Department of Transportation (NYDOT) stated that the studies supported the proposed rule.

Blanco

In April 2011, Virginia Tech Transportation Institute (VTTI) completed a naturalistic driving study, *i.e.,* a study of actual over-the-road drivers and operations, that examined the activities performed in the 14-hour workday and investigated the relationship between safety-critical events (SCEs) (such as driver errors and lane tracking deviations) and driving hours, work hours, and breaks (referenced here as Blanco). The study's methodology was similar to that which VTTI has employed in other studies conducted in support of HOS rulemaking and driver fatigue research. The data acquisition system was composed of five main components: An encased unit that housed the computer and external hard drive; dynamic sensors; vehicle network; incident box; and five video cameras. VTTI developed a custom state-of-the-art lane-tracking system and included it in the data acquisition system. The lane-tracking system consisted of a single analog black-and-white camera, a personal computer with a frame grabber card, and an interface-to-vehicle network for obtaining road speed. The system reported the distance from center of truck to left and right lane markings (average error less than 2 inches). The system accurately and reliably measured and stored data when the vehicle crossed the dashed or solid highway lines. Lane tracking has historically been shown in the research to be a good measure of functional impairment due to driver fatigue.

VTTI's previous naturalistic driving research had not shown a time-on-task effect; these studies looked exclusively at driving time. Blanco looked at both driving and duty time and found a statistically significant positive relationship between driving time and the number of SCEs. The Blanco study supports the time on task function that the Agency used in the RIA. Blanco showed that naturalistic driving research no longer contradicts other types of driving time research conducted using different methodologies. The studies are all now consistent in showing that as the number of driving hours increases, there is a general upward trend in the number of crashes or SCEs. However, the study also compared the risk of driving in the 11th hour and failed to find a statistically significant difference between the 11th hours and the 7th, 8th, 9th, or 10th hours.

Blanco also showed that when non-driving activities (both work- and rest-related) were introduced during the driver's shift—creating a break from the driving task—these breaks significantly reduced the risk of being involved in a SCE during the 1-hour window after the break. The benefits of breaks from driving ranged from a 30 percent reduction in the risk of SCEs up to a 50-percent reduction (depending on the type of break from driving), with the greatest benefit occurring for off-duty (non-working) breaks.

Blanco evaluated driving hours based on whether the hour occurred at the beginning, middle, or end of an on-duty shift. The first 5 hours after coming on duty were categorized as the beginning of the on-duty shift. By definition, any hour after the 5th hour of driving could not fall within this work period. Hours 6–9 were categorized as the middle shift hours, and hours 10–14 were categorized as the end of shift hours. Driving hours 10 and beyond could occur only during end of shift hours, by definition. The first hours of driving (hours 1–5) could occur in any shift period depending on how much on-duty not driving and break time a driver incorporated into a day. For example, if a driver spent 7 hours loading a truck at the beginning of a day, the 1st hour of driving would be in the middle shift hours; if that driver drove 3 hours, the third hour would be in the end of shift hours.

Analysis of SCEs showed that, in general, the same hour of driving had more SCEs if it occurred at the end of a shift than if it occurred at the beginning or middle of a shift. For example, if the 5th hour of driving occurred at the beginning of a shift, it had 0.11 SCEs per unit of exposure. This same hour of driving had 0.20 SCE per hour of exposure if it occurred in the middle of a shift, and 0.21 SCEs if it occurred at the end of a shift. If the 8th and 9th hours of driving occurred in the middle of a shift, they had 0.09 and 0.10 SCE per unit of exposure, respectively. At the end of the shift, by comparison, the 8th and 9th hours of driving had 0.22 SCE and 0.18 SCE per unit of exposure respectively. This finding indicates that the interaction of total shift length and driving time impairs safety performance later in the day, suggesting that safety would be negatively affected by duty periods in excess of 14 hours.

Jovanis (2011)

In April 2011, Pennsylvania State University (PSU) completed a quantitative study of the safety implications of driver HOS using a case-control time-dependent logistic regression methodology (referred to here as Jovanis (2011)). It is important to note that alone, time-dependant logistic regression identifies an association, it does not prove causation. The PSU team completed a similar study in 2005. At that time, the Agency had concerns regarding the sample size, particularly in the 11th hour of driving. The new study was designed to address those concerns. The PSU study team collected data from the logs of drivers who were in crashes that involved either a fatality, an injury requiring medical treatment away from the scene of the crash, or a tow-away. The drivers' logs covered a period of 2 weeks prior to the crash and were compared to a random sample (two drivers) of non-crash-involved drivers selected from the same company, terminal, and month using a case-control logistic regression formulation. The team collected data from 1,564 drivers. The methodology employed by the team had been peer-reviewed in many previous research studies (*i.e.,* Jovanis (1991); Kaneko and Jovanis (1992); Lin (1993); and Lin (1994)). The team separated the data into truckload and LTL analyses because previous research indicated differences in the factors contributing to crashes for these two segments of the trucking industry. In total, the team analyzed 878 drivers (318 crash-involved and 560 controls) in truckload operations and 686 drivers (224 crash-involved and 462 controls) in LTL operations. The study produced counter-intuitive and somewhat contradictory findings. For the LTL operations, Jovanis (2011) found that as driving time increased so did the odds of being in a crash. Analysis of LTL data showed a strong and consistent pattern of increases in crash odds as driving time increases. The highest odds are in the 11th hour. For truckload drivers the study found no consistent trend relating crash odds to hours driving. The study team stated that the crash-odds increase in the last hour is in need of further analysis because the increase in odds may be attributable to the low sample size of observations (9 crashes of 318 truckload crashes in the data). Given the nature of the type of operations, one might expect truck load drivers to exhibit greater crash risk due to fatigue.

Two Sando Studies

In April 2011, the Agency placed in the docket two additional studies that it became aware of after publication of the NPRM. These two studies were conducted by the School of Engineering at the University of North Florida. The first study, Sando (2010a), examined the influence of bus operator driving hours on the occurrence of preventable collisions by employing data from incident reports and operator schedules to evaluate the correlation between driving hours and operator involvement in collisions. The results showed a discernable pattern of an increased propensity for collision involvement with an increase in weekly driving hours. Based on the analysis, drivers involved in preventable collisions had driven an average of over 6 hours more per week than the general bus driving population.

The second study, Sando (2010b), examined the safety impacts of the existing State operator hours of duty policies in Florida. The researchers used questionnaire surveys, incident data archived by transit agencies, and bus driver schedules to determine the relationship between crash involvement and operator schedules. Factors of interest in this study were the influence of shift pattern (start and end time), schedule pattern (split or non-split schedule), and time spent driving. Split schedules occur when a driver works in the morning, takes a long break, then works again in the later afternoon or evening. The study revealed that operators working split schedules were more susceptible to fatigue than those working straight schedules. The group of operators working split schedules indicated less sleep time, long driving hours, and early starting/late ending schedule patterns. These are characteristics of a fatiguing work schedule. There was also a strong statistical significance attached to the association between crash occurrence and fatigue condition as measured by a fatigue assessment tool. The tool predicted the likelihood that a driver was fatigued on a given shift by analyzing driver multi-day schedules. The analysis of incident data and fatigue level found that total crash likelihood increased significantly for drivers who were coded as highly likely to be seriously fatigued.

Although transit bus operators are governed by different HOS rules than interstate CMV truck drivers, the Sando studies show that cumulative work begins affecting bus driver performance well within the limits of the current HOS rules for truck drivers. In addition, less than 3 percent of the transit operator sample worked on schedules that exceeded 14 hours from the start of a duty day to the end of the driver's last shift. In essence, the schedules of the vast majority of drivers studied were within the limits of the HOS rules that govern interstate truck drivers. The study showed that cumulative fatigue

begins affecting driver crash performance for drivers averaging more than 45–50 hours of total shift time per week, inclusive of split driving schedules. The study found that crash risk increased for drivers averaging 9 or more hours of driving per day. In addition, the study examined driver schedules and determined that longer working hours are associated with fewer hours of nightly sleep, on average.

It must be noted that transit bus operators work in a different environment from most over-the-road, but not local, truck drivers. Transit bus operators primarily drive on city streets in an urban environment, whereas over-the-road truck drivers spend far more of their time driving on interstate highways and rural roads. Nevertheless, these transit bus studies do examine safety performance in an occupation that involves long hours of driving. These studies corroborate the cumulative fatigue and work-sleep relationships used by the Agency in analyzing the impacts of the new HOS rules, providing further evidence that long daily and weekly working hours affect both the amount of sleep drivers get and their risk of crashing.

Comments on Blanco. The ATA submitted an analysis prepared at its request by Ronald Knipling that provided the following comments regarding the Blanco study:

- Naturalistic driving studies may not provide an adequate test bed for driver fatigue studies.
- The study would have been improved if the study team had disaggregated the data into fatigue related SCEs, at-fault vs. not-at-fault events, single-vehicle vs. multi-vehicle, and divided vs. undivided road ways.
- The study is based on SCEs such as unintentional lane deviations, but not ''real harm.'' Only 4 of the 2,197 SCEs in the study were actual crashes.
- A definitive link between critical incidents and crash risk has not yet been established.
- The few drivers who contributed disproportionately to the number of SCEs should have been excluded.
- The sample of drivers is not nationally representative of all CMV drivers.

FMCSA Response. The Blanco naturalistic driving study was focused on better understanding the activities drivers perform in the 14-hour workday, and investigating the relationship between SCEs and driving hours, work hours, and breaks. The Agency disagrees with ATA's contention that naturalistic driving studies do not provide an adequate basis for conclusions about driver fatigue and crash risk. Naturalistic driving studies are one of the best means to assess driver performance. By reviewing video records and other data from the instrumented vehicle, analysts are more likely to be able to pinpoint the actual cause of a crash than through any other research methodology.

FMCSA is unable to accept several aspects of the analysis of the Blanco study submitted by Knipling/ATA. This submission argues that drowsiness may actually reduce the number of distraction-related SCEs. This argument is based on a study that defined fatigue as visible signs of drowsiness. Only a small number of SCEs would have involved visible signs of fatigue, yet no one denies that long work hours lead to errors in judgment, lack of response, or degradation in lane tracking even if visible signs of fatigue are absent. In the long history of time-on-task research, many investigators have measured errors, or in this case SCEs, to study degradation of driver performance over many work days. The purpose of these studies is to gain a better understanding of the relationship between fatigue and work hours or driving time.

The conclusions on fatigue and distraction depended on a limited definition of fatigue—*i.e.,* that fatigue is only present when visible signs of difficulty staying awake are present. ''Fatigue'' is defined as ''a non-pathologic state resulting in a decreased ability to maintain function or workload due to mental or physical stress'' (Caldwell). The term is used to describe a range of experiences from sleepy, or tired, to exhausted. There are three major physiological phenomena that have been demonstrated to create fatigue: sleep loss, circadian rhythm disruption, and time-on-task. Time-on-task fatigue describes fatigue that is accumulated during the working period and affects performance at different times during the shift. Performance declines the longer a person is engaged in a task, gradually during the first few hours and more steeply toward the end of a long period at work. Some of the consequences of fatigue are visible. These include eyes going in and out of focus; involuntary eyelid closure and head bobs; and persistent yawning. Other consequences of fatigue are not visibly apparent, such as wandering or poorly organized thoughts, spotty near term memory, missed or erroneous performance of routine procedures, degradation of control accuracy, impaired judgment, and looking but not seeing.

While some recent studies have found that SCEs are not associated with visible fatigue, they may be associated with non-visible manifestations of fatigue. In addition, there are several studies that have found that fatigue is associated with an increase in SCEs. A Synthesis Report prepared by the Transportation Research Board of the National Academies, of which Knipling was the principal author (Knipling (2004)), examined the literature relating driving risk to several different potential factors. In the fatigue section of that report, Knipling discusses a 2001 Dingus report on sleeper berth usage that found a moderate correlation between high drowsiness episodes and SCEs. In addition, in that same report Knipling also cited a Hanowski (2000) report which found a positive correlation between SCEs and fatigue. Several researchers, such as Mast (1989), found that lane-tracking ability decreases as the time on task increases. Skipper (1984) found that measures related to vehicle lane position could be used to detect drowsiness. Variables such as the number of lane deviations, the standard deviation of lane position, and the maximum lane deviation were found to be highly correlated with eye closures. According to Dingus (1987), lane deviation showed good potential as a drowsiness indicator. Stein (1995) studied the effect of impairment on driving performance in truck drivers. Using data from a simulator experiment, Stein found that the standard deviation of lane position increased remarkably after the driver was fatigued. Pilutti and Ulsoy (1997) performed experiments on the Ford driving simulator at the Ford Research Laboratory. The results, reported by the authors, indicated that lane position showed significant change and corresponded well with Percent of Eye Closure (PERCLOS) model. PERCLOS is the only validated measure of driver fatigue.

Within the context of the Blanco study, it is not particularly important whether fatigue or other factors cause a rise in SCEs late in the driving day—what matters is whether driving performance declines (for whatever reason) over the course of long hours of daily work. Whether this decline in performance is caused by fatigue or some other factor such as inattention or distraction does not change the basic conclusion that driving performance suffers later in the duty day. ATA suggested that the Agency should have parsed all of the SCEs detected by Blanco, and used only those SCEs where visible signs of fatigue were present. Knipling, however, did not provide any research citation where time-on-task research was conducted in this manner, and FMCSA knows of no such research.

The Agency does not believe that it is necessary to disaggregate SCEs by fault or by type of vehicle or by type of roadway. The main question that the Blanco study addressed was whether time-on-task effect exists in a truck environment, as it does in virtually every other work setting.

Additionally, ATA commented that there was no harm from certain types of SCEs, such as lane deviations and, therefore, they should not be included in the analysis. A well established fact in transportation safety research is that crashes are caused by the interaction and convergence of many factors. In Knipling's 2009 and previous work, Knipling used the term ''crash trifecta'' to explain the complex and convergent nature of crashes. The ''crash trifecta'' concept asserts that crash genesis can be traced to three separate, but converging events. These include unsafe pre-incident behavior, transient driver inattention, and an unexpected traffic event. Not every element in the trifecta occurs in every crash. However, the probability of a crash given the three crash-trifecta elements is greater than the probability of a crash given only one of the crash-trifecta elements. Unintentional lane deviations are unsafe driving practices that may not always result in crashes. However, based on the ''crash trifecta'' concept, an unintentional lane deviation when compounded by fatigue/transient driver inattention and an unexpected traffic event significantly escalates the risk of a crash. To discount or ignore unintentional lane deviations simply because they do not always result in crashes is a simplistic argument that belies the complex nature of crash causation. It is also a contradiction of a principle and concept that Knipling has always championed.

ATA commented that a definitive link between critical incidents and crash risk has not yet been established. FMCSA noted this issue in the NPRM and has sponsored a study that addresses it indirectly. A report entitled ''Distraction in Commercial Trucks and Buses: Assessing Prevalence and Risk in Conjunction with Crashes and Near-Crashes'' by Hickman, (2010), was placed in the docket of the Agency's NPRM on ''Drivers of CMVs: Restricting the Use of Cellular Phones'' [75 FR 80014, December 21, 2010, Docket No. FMCSA 2010–0096–0004]. ATA submitted detailed comments on that NPRM on February 22, 2011. FMCSA assumes ATA was aware of the Hickman study. The report, based on a combined dataset of 2,421 crashes, concluded that ''[t]he results in this study were similar to the results found by Olson (2009) regarding SCE risk and performing a tertiary task while driving.'' The Olson study evaluated odds risk ratios of driver distraction tasks by generally examining SCEs. When these events were compared to the Hickman study, the results did not differ significantly. These findings thus provide broad confirmation of the link between critical incidents and crash risk, making them a reasonable surrogate for crashes. In addition, the Agency has long argued that SCEs are an indication of decreases in driving performance and an indication of an increased crash risk. The question is not whether SCEs are related to crash risk, but how large an increase in crash risk is associated with a given increase in SCEs. For instance, if a particular factor increases the risk of SCEs by 30 percent, does this imply that crash risk also increases by 30 percent, or by a lesser or greater amount? The size of the link has not been established, although it is generally accepted that there is a link between driver performance, as measured by SCEs, and crash risk.

ATA also commented on whether drivers with a disproportionate risk of SCEs should have been omitted from the data. Knipling noted that ''if the scientific goals of the VTTI study were narrow—determining the associations between work schedules parameters and SCEs—then this decision was correct.'' In addition, Knipling notes that he has ''never encountered a study of driver risk that did not contain compelling evidence of extreme individual differences among drivers.'' Since these differences are common to all driver samples, it seems reasonable to conclude that drivers exhibiting high SCE risk differentials are not particularly rare within the larger CMV driver population. As a result, data describing the driving performance of these drivers should not be ignored or omitted if the goal is to examine work schedule parameters and how they affect rates of SCEs. The Agency agrees with Knipling that it was appropriate for Blanco to retain data for these drivers in their analysis.

ATA pointed out that the drivers in the VTTI study were not randomly selected and are not nationally representative of all CMV drivers. This is correct; the sample represents 97 drivers who volunteered to participate in the study and whose performance was tracked using instrumented vehicles for 4 weeks. The naturalistic driving data were collected from four for-hire trucking companies—long-haul and line-haul segments of the trucking industry. The final project data set consisted of approximately 735,000 miles of driving data. Study participants also completed a daily activity register that provided a detailed account of the tasks that CMV drivers performed during their workday. The combination of naturalistic driving data and activity registers makes this study one of the largest data sets ever collected for studying driver activities, behaviors, and fatigue. The study team acknowledged in its report that participants may not be representative of the entire population of commercial drivers, but the Agency knows of no systematic biases in the composition of the sample that would distort or invalidate the conclusions drawn by the researchers. Identifying and securing the cooperation of a large group of drivers who are truly representative of the extraordinarily diverse motor carrier industry would be cost prohibitive, even if it was feasible. The Blanco study represents that best science that is currently available to examine driver fatigue issues.

Comments on Jovanis (2011). ATA/Knipling provided the following comments regarding the Jovanis (2011) study:

- There was no description of crash characteristics (other than drivers' associated work schedules) provided;
- There was no distillation of the crash dataset to exclude non-preventable crashes;
- The researchers did not perform validation tests of study conclusions via disaggregation of the crash dataset by prominent fatigue-related factors; *i.e.,* single-vehicle vs. multi-vehicle crashes, or other crash characteristics;
- Inadequate attention was paid to time-of-day as a potential confound;
- The study employed an inter-subject design rather than intra-subject design;
- There were a relatively small number of 11th hour crashes and exposure hours;
- The study sample may be unrepresentative due to apparent inclusion of truck tractors not equipped with sleeper berths.

FMCSA Response. Knipling and the National Industrial Transportation League (NITL) stated that Jovanis provided no description of crash characteristics (other than their patterns of work schedules) and no distillation of the crash dataset to exclude non-preventable crashes. These comments are correct; the study team was tasked by the Agency to investigate the crash risk by hour of driving, not to investigate either fatigue-only crashes or crashes deemed preventable. The team was interested in all crashes and their association with driving hours of

service. The study did not adopt a ''fatigue'' or fault perspective used by others because the researchers did not want to inject personal judgment about individual crashes into the analysis.

Knipling commented that the Penn State team did not perform validation tests of study conclusions via disaggregation of the crash dataset by prominent fatigue-related factors (*e.g.,* single-vehicle vs. multi-vehicle crashes and other crash characteristics). Again, this research was a study of the time-on-task effects as they relate to crash risk for evaluation of the drivers' hours of service. Disaggregation of the data into the various categories suggested by ATA is neither necessary nor warranted in the context of determining crash risk as a function of driving hour. The underlying methodology used for this study has been employed over the last 25 years, and related studies based on this methodology have appeared in peer-reviewed journals, papers and proceedings and presentations to the Transportation Research Board of the National Academies.

Knipling claimed that the Penn State team did not pay sufficient attention to time-of-day as a confounding factor. Time of day is discussed at great length in the report. The study carefully included multiday driving in the models, by grouping drivers with similar daily and weekly work and driving schedules together. Within each group, drivers started their duty day at approximately the same times on the same days, and drove for roughly the same number of hours. Drivers were also grouped based on where in the week their extended off-duty or restart fell. Because drivers in each schedule grouping drove at roughly the same time, and for the same duration, on a daily basis, their exposure at a particular time of day was similar. These groupings, therefore, partially controlled—although imperfectly—for time of day and circadian effects.

Knipling commented the study employed an inter-subject design rather than intra-subject design. That is, the study compared drivers who had a crash to two drivers who did not rather than comparing the crash driver to him- or herself over a period in which there was no crash. This is correct, and the study team did so for good reason: including only an intra-subject design removes all non-crash involved drivers from the analysis. The Agency believes it makes sense to build a model representing all drivers on the road, not just those involved in crashes in any one year.

Knipling noted that relatively few 11th-hour crashes and exposure hours were included in the study. This is also true. One of the reasons the Agency commissioned this study was to collect data on a larger number of drivers who drove into the 11th hour. However, even with this larger data set, which combined the 2005 data set and new information collected specifically for this study, the Penn State team found that many drivers simply are not using the 11th hour of driving.

Comments on Relation of Blanco and Jovanis Results. OOIDA commented that the two new studies Blanco and Jovanis (2011) provided inconsistent results. ATA pointed out that the overall driving effects in the Blanco study were not significant.

FMCSA Response. OOIDA correctly pointed out that the Blanco study was done using a naturalistic driving study perspective, while the Jovanis (2011) research was based upon a review of driver logbooks and electronic on-board recorder (EOBR) records and involved a comparison between the portion of logs of drivers reflecting trips where a crash occurred and the logs of other drivers where no crash occurred. Using these two very different methodologies, both studies showed a statistically significant time-on-task effect—as the number of hours increased so did the number of SCEs (Blanco) or crashes (Jovanis (2011)). The study by Blanco significantly qualifies the previous work by Hanowski (2008), which detected no difference in the crash risk between the 10th and 11th hour of driving. Although the new study is still unable to pinpoint a statistical difference between those two hours or between the 11th hours and the 7th, 8th, 9th, or 10th hours, it shows a time-on-task effect that the more narrowly focused 2008 study did not. As a result, all major drive-time research is generally consistent in finding that longer work hours increase the risk of a crash. The primary reason for this development is that the latest VTTI study was able to reliably capture lane deviations. With any impairment such as fatigue or loss of vigilance, one of the first indications is the driver's inability to keep the vehicle within a particular lane. Lane tracking is the first and one of the best indicators for loss of vigilance or driver fatigue.

Blanco and her colleagues conducted numerous statistical tests on their data. The NYDOT commented that the study:

> Contains some data manipulations that may be questionable. Table 11, which summarize the raw data, shows 11th hour as having the highest SCE rate per hour. To accommodate certain statistical analysis methods the SCE data was collapsed to be binary variable which resulted over 42 percent of the over-all SCE data, and over 59 percent of the SCE data for the 11th hour of driving to be discarded. Through a series of further data manipulations the researchers arrive at Table 22 (the data used to calculate the odds ratios in comparing driving hours), which shows 11th hour to be the safest hour in terms of SCE rate per shift. Some justifications for these data manipulations were presented, but they are not very compelling.

The Agency agrees with NYDOT's characterization of some of the analytical techniques used in the study. The Blanco study took continuous data and converted them to a binary function. While this may be necessary for calculating odds ratios, it can also conceal useful information. For example, a driver who becomes fatigued and has difficulty maintaining vigilance is more likely to have multiple SCEs. Given the analytical approach used by Blanco, a driver's lane incursions in a given hour would be coded as ''yes'' (meaning there was an SCE in that hour), irrespective of the actual number of incursions. Increasingly frequent SCEs are probably indicative of increasing fatigue, but converting them to a binary function eliminates that information. This analytical technique makes it much more difficult to show statistically significant differences.

OOIDA also commented and reiterated that the Blanco study did not find statistically significant differences between the 10th and the 11th hour of driving. This is true, but again given the data procedure discussed above and the fact, as OOIDA pointed out, that many of the drivers in this study did not drive into the 11th hour, the sample size was substantially reduced. These factors have a great effect on statistical significance.

Comments from NY DOT and Advocates. The NYDOT stated that the Blanco and Jovanis (2011) findings supported reducing driving time to 10 hours and requiring breaks. It stated that Jovanis (2011) and Sando (2010a and b) supported the changes to the restart provision. Advocates stated that the studies supported the 10-hour driving limit, the mandatory break, and a 13-hour driving window. It concluded that the studies contradicted the proposal to allow drivers to extend the driving window to a 16-hour day twice a week.

FMCSA Response. FMCSA agrees that the studies show a general increase in crash risk with longer work hours. However, confronted with strong evidence that an 11-hour limit could provide higher net benefits, the Agency has concluded not enough data exists for adopting a new regulation on this issue and that the current driving limit should therefore be allowed to stand for now. As discussed elsewhere in this

preamble, however, based on the cost, an 11-hour driving limit is the most reasonable regulatory choice.

Comments on Sando Studies. ATA and Knipling criticized the applicability to the trucking industry of the transit bus studies by Sando (2010a and 2010b). The main criticisms were that transit bus drivers work in a different operating environment than over-the-road truck drivers and under different HOS rules. Other commenters on these studies made these same two arguments. In addition, Knipling criticized some aspects of the methodology used and suggested refinements that might have improved the study. He argued that the study failed to distinguish between multi-vehicle and single-vehicle crashes, and that the study omitted preventable crashes that were perceived as having been caused by factors other than fatigue.

FMCSA Response. The Agency agrees that transit bus operators generally drive in a different environment from over-the-road truck drivers. The former generally operate in an urban environment on city streets, while the latter operate on highways and rural roads and spend limited time driving in urban areas. In addition, transit bus operators drive during peak commuting periods, when traffic volumes are heavy, while truck drivers often adjust their schedules to avoid large urban areas during rush hour if possible. Finally, transit buses are not equipped with sleeper berths, and there are not always good places for transit bus operators to take breaks and rest during shifts. While these are legitimate reasons to use caution in applying the results of these studies to truck drivers, their findings cannot be totally ignored. Despite the differences in operating environments, both transit bus and over-the-road truck drivers spend the majority of their work time driving large motor vehicles. Furthermore, there is no reason to believe that truck and bus driver populations respond differently to long work hours.

Florida transit bus operators are governed by different rules than interstate truck drivers. They are allowed a maximum duty window of 16 hours, are required to take only an 8-hour break between shifts, and can drive 12 hours per day. Their maximum work hours are capped at 72 hours in 7 days. Knipling and others argue that these different rules make the application of the transit bus study findings to the trucking industry questionable. However, a look at the transit bus operator schedule data in Sando 2010b shows the average weekly hours worked by the operators included in the study. Drivers generally averaged between 50 and 55 hours of work per week, and the maximum weekly hours for any one driver was 85.67, which is barely over the maximum number of hours a truck driver can work under the current HOS rules. In essence, the vast majority of drivers included in the study were complying with the weekly on duty hour limits that apply to truck drivers. Although governed by different hours of service rules, the fact that almost all of the drivers in the study were working schedules that would comply with the current HOS rule for truck drivers makes the findings of the study somewhat applicable.

The other criticisms of these studies involved minor methodological issues. The authors excluded crashes that were deemed to have a cause that was not fatigue-related. While this filtering of the data may have affected certain findings, especially those related to crashes during windows of circadian low, when fatigue would be a larger problem, it is unclear how this filter could invalidate the findings related to cumulative fatigue and long daily average working hours. Presumably drivers working long hours would be involved in non-fatigue-related crashes at rates similar to other drivers. If one accepts this reasonable assumption, finding that their risk of fatigue-involved crashes increases would logically mean that their overall crash risk is also higher. While it would have been helpful for the authors to look at all preventable crashes, the fact that they excluded some preventable crashes from the analysis does not invalidate the findings that long average daily work and excessive hours of weekly work increase the risk of a crash.

Knipling also claims that the authors should have looked at multi-vehicle and single-vehicle crashes separately. We see no reason why a study cannot look at crashes as a whole rather than segmenting them by the number of vehicles involved. True, multi-vehicle crashes have a different crash factor profile than single-vehicle crashes, but the same factor can increase the risk of either type of crash. In short, while the suggestions for methodological improvements are helpful, the authors' failure to conduct these extra analyses does not appear to invalidate or seriously compromise the findings of the studies.

ATA and others have argued that the Agency ''has no basis'' for claiming safety benefits associated with changes to the HOS rules. One of the primary safety impacts claimed by the NPRM was that long weekly work hours are associated with an increase in the risk of a crash—*i.e.,* that long hours over successive days result in cumulative fatigue, and cumulative fatigue results in increased crash risk. The transit bus operator studies analyzed the association between weekly working hours and preventable crash involvement and found a cumulative fatigue impairment effect that is stronger than that used by the Agency in evaluating the rule adopted today. While the Agency does not believe it would be valid to apply the cumulative fatigue impact of these transit bus operator studies to a rule governing over-the-road truck drivers, the studies do confirm that long hours of working per week are associated with decrements in driving performance and pose a safety hazard. The studies therefore provide further evidence that it may be wise to limit the amount of weekly work allowed to truck drivers.

In addition, the transit bus studies corroborate another effect used by the Agency in analyzing the impacts of the HOS rules: Long working hours are associated with fewer average hours of sleep per night. FMCSA used the relationship between work and sleep to estimate the health benefits associated with reductions in allowable daily and weekly work. The transit bus studies provide further evidence that long daily and weekly work hours are associated with sleep deficits. Chronic sleep deficits are associated with fatigue-impairment and long term adverse health consequences. Insufficient sleep therefore affects both public health and safety. Corroboration of the Agency's position that increases in work result in decreases in nightly sleep lends support to FMCSA decision to reduce the hours drivers can work.

E. Driving Time Limits

Beyond the arguments on the economic impact of the 11th hour, industry commenters generally stated that FMCSA had no data that demonstrate that the 11th hour is riskier than the 10th. NTSB, NIOSH, and the safety groups supported reducing driving time to 10 hours.

Comments on the Safety of the 11th Driving Hour. Less than 10 percent of the commenters on this issue supported reducing the permissible driving time from 11 to 10 hours. Most of these commenters asserted that the reduction to a 10-hour driving time limit would improve safety. NTSB and NIOSH stated that the reduction to 10 hours would promote adequate sleep periods. NTSB stated that reducing driving time to 10 hours would also reduce time on task. Six commenters argued that the scientific evidence supports a 10-hour

driving time limit. The joint comments filed by Advocates *et al.* cited numerous studies to support their contention that the 10-hour driving time limit is supported both by ''data on driver sleep patterns under the current, 11-hour limit and by the reduction in added driving exposure at the highest level of crash risk that would be eliminated.'' Three commenters, including Advocates *et al.,* cited research that they asserted shows that crash risk increases well before the 11th hour of driving. NTSB and Advocates *et al.* cited studies that they stated show that extended periods of time awake and time on task have been associated with fatigue-related performance decrements and increased crash risk. NTSB argued that because at least some statistics indicate that the 11th hour of driving is more dangerous than any of the first 10, in the absence of completely relevant scientific data, FMCSA should err on the side of caution and reduce the driving time limit to 10 hours.

Advocates *et al.* stated that in the 2003 HOS final rule, FMCSA acknowledged that performance begins to degrade after the 8th hour on duty, but justified increasing the driving time limit to 11 hours by stating that other changes in the rule would make up for the added consecutive driving time at the highest rate of crash risk. They stated that ''no evidence supports the supposition that increases in other aspects of the off-duty time provided under the current rule reduce the crash risk or driver fatigue experienced in the 11th consecutive hour of driving.'' They noted that the appellate court that rejected the 2003 HOS rule cited this lack of support for the trade-off. Advocates *et al.* asserted that maintaining the 11-hour limit would constitute arbitrary and capricious agency action since FMCSA still lacks evidence that driving during the 11th consecutive hour is safer than, or at least as safe as, the truck crash risk experienced during driving hours prior to the 8th consecutive hour of operation.

Finally, Advocates *et al.* presented arguments to counter assertions that there is no new research data to support an FMCSA decision to adopt a 10-hour limit. They argued that the 11th hour limit was always unsupported by research, so no new evidence is necessary to rescind it. Further, they stated that there actually are data showing that, as of 2006, drivers are not getting any more rest than they were before the rule took effect in 2004. They argued that since scientific evidence indicates that the amount of sleep drivers are currently getting is less than the amount necessary to restore driver performance levels, revising the HOS rule is both necessary and appropriate.

ATA and most industry commenters argued that data and fatigue research do not show that a quantifiable safety benefit would result from reducing daily driving time from 11 to 10 hours, or that there is an increase in crash risk between the 10th and 11th hour of driving. Several commenters cited research studies that they asserted show that hours of driving is not a strong or consistent predictor of observed fatigue. These studies include the 2007 VTTI naturalistic driving study discussed in the NPRM (Hanowski (2007)), which ATA and others cited as showing no increase in crash risk between the 10th and 11th hours of driving. ATA asserted that although FMCSA expressed concerns about the VTTI study in the NPRM, the Agency has used that study in other rulemakings and has used other studies in the HOS rulemaking that had more severe sample size and composition flaws. Commenters, including ATA, also cited data that they asserted show that more crashes occur during the first few hours of driving, which they argued supports retaining the 11-hour daily driving limit.

FMCSA Response. A new study conducted by the same VTTI researchers whose work was cited in the NPRM, and using the same approach praised by ATA and other commenters, has found that the risk of SCEs rises with the hours since coming on duty (Blanco).

Although Blanco found some increase in risk in the 11th hour, the effect is not significant. A stronger effect is related to hours worked each day and week. Given the high cost of eliminating the 11th hour and the ambiguous data, FMCSA has decided that it does not have an adequate basis to change the driving limit. The rule also substantially reduces the maximum weekly work time and ensures that drivers cannot work the maximum number of hours every week while giving the flexibility to do so occasionally. Some of the safety benefits and most of the health benefits derive from limiting long work hours.

Comments on the Use of the 11th Hour. About 35 commenters submitted some information on the use of the 11th hour. Although one small carrier and a shipper association stated that most drivers maximize hours, many commenters, including ATA and other trucking associations, indicated that the 11th hour is used primarily for flexibility to account for unforeseen events. Some LTL carriers stated that some routes (often called ''lanes'') have been rearranged to take advantage of the longer distances possible with 11 hours of driving time. Several large carriers submitted information on the frequency with which their drivers use the 11th hour—the percentages reported were 6 percent, 7 percent, 9 percent, 9.5 percent, 11 percent, and 15.26 percent.

A private carrier stated that one division uses the 11th hour 85 percent of the time, while the rest use it 10 percent of the time. Another private carrier stated that its drivers rarely reach the 11th hour. OOIDA reported that two thirds of the respondents to its on-line survey said they use it 1 to 4 times a week. Individual drivers and smaller carriers reported higher use of the 11th hour, although again it was not always possible to determine whether they were reporting the percentage of daily periods with a full 11 hours of driving or the percentage of drivers who used the 11th hour at some point over the period examined.

FMCSA Response. None of the commenters provided data that could be used to estimate the actual level of use of the 11th hour, but in any case, FMCSA has not adopted a 10-hour limit.

Other Comments on Driving Limits. Finally, a few commenters suggested alternative driving rules. OOIDA suggested that the 10-hour limit apply only to new drivers; another commenter suggested that drivers using paper logs be limited to 10 hours. Two commenters said that as the first hour is the most dangerous, FMCSA should require drivers to be on duty for one hour before driving to be sure they are awake.

FMCSA Response. It is difficult to see how limiting a 10-hour rule to new drivers could be enforced. It is also not clear that new drivers are more prone to fatigue-related crashes than experienced drivers. The suggestion that drivers be on duty for an hour before driving is based on the assumption that the factors that lead to a high number of crashes in the first hour (which some studies do not show) are related to fatigue and sleep inertia. Fatigue may play a part in some of these crashes, but driving on secondary roads and the simple fact that all drivers drive the first hour are likely to be larger factors in first-hour crashes than fatigue. It is not clear why using paper logs would make longer driving times more fatiguing.

F. 30-Minute Break Provision

Comments. A few commenters supported mandated breaks. NIOSH and NTSB supported a required break to reduce continuous time on task. Advocates *et al.* thought breaks were temporarily helpful, but not adequate to reduce fatigue.

Commercial Vehicle Safety Alliance (CVSA) and a few other commenters stated that required breaks would

complicate enforcement. A trucking association and others warned that the proposed requirement could cause conflicts for drivers transporting Department of Defense (DOD) shipments of security-sensitive materials that require continuous attendance. ATA, OOIDA, and others expressed similar concerns about conflicts with hazardous materials transportation requirements. The Truckload Carriers Association (TCA) and OOIDA added that the provision would undermine the ability of team operations to keep the freight moving with minimal stops and to have someone in charge of the shipment for the duration of the trip.

A few commenters suggested longer or shorter breaks. Many drivers misunderstood the rule and assumed that it required a break at 7 hours. Some argued that drivers would wait until 6.5 or 7 hours to take the break so they would not have to take another break. Two commenters supported a break from driving, but not from being on duty.

FMCSA Response. FMCSA has revised the break provision in response to comments. If a driver wants to continue driving after 8 rather than 7 hours on duty as proposed, driving is not permitted if more than 8 hours have passed since the end of the driver's last off-duty or sleeper-berth period of at least 30 minutes. In other words, driving is prohibited if more than 8 consecutive hours have passed since a driver's last off-duty or sleeper-berth break of at least 30 minutes; after taking such a break (or a longer one), the driver may resume driving, provided he or she does not exceed the 11-hour driving limit. This change will make the break provision consistent with the sleeper-berth rule and address the concerns of team drivers that a break at the 7th hour will be disruptive. It will also mean that a driver working a full 14-hour day will be able to continue driving after the 8th hour on duty if he/she takes a single break between the 6th and 8th hour.

For a driver who is on a long-haul run that involves nothing but driving for the duty period, any break of at least 30 minutes taken between 3 and 8 hours on duty will meet the requirement. If a driver spends 2 hours loading at the beginning of the day, then has a 10-hour drive ahead of him, he can take a half-hour or more break at some point between the 4th and 8th hours after coming on duty, and then complete the rest of his 10 hours of driving without another break. If, as ATA and others argued, drivers are already taking breaks, the final rule should allow most of those breaks to be used to meet the requirement.

The Blanco and Jovanis (2011) studies demonstrate that breaks reduce the risk of crashes after the break, findings that are consistent with research on the impact of breaks on accident risks in other industrial sectors. Blanco analyzed SCEs in the hour preceding and after a break. This research found that any break from driving reduces risk in the hour following the break, but off-duty breaks produced the largest reduction. This study also showed that when non-driving activities (both work- and rest-related) were introduced during the driver's shift—creating a break from the driving task—these breaks significantly reduced the risk of being involved in an SCE during the 1-hour window after the break. The benefits of breaks from driving ranged from a 30- to 50-percent reduction in risk of SCEs (depending on the type of break from driving), with the greatest benefit occurring for off-duty (non-working) breaks.

Jovanis (2011) studied the effect of breaks from driving on crash risk. That analysis was unable to distinguish between on-duty breaks from driving and off-duty breaks. The analysis looked at the effects of one, two, or three breaks from driving in a day on the likelihood of crash involvement. The inclusion of any break was found to reduce the risk of a crash, and the effect of two breaks was found to be statistically significant.

In addition, O'Neill (1999) found that breaks improve performance on driving simulators. The study examined driver simulation performance following active breaks in which loading and unloading of a vehicle was simulated, and rest breaks. The study found that loading and unloading had mixed effects on driving performance, but that off-duty breaks improved performance. The driving simulations showed a decrease in simulator performance from the start of a driving period to the point at which a break was taken. After a break from driving, performance was restored temporarily, and then began to decline as the length of time since the last break increased.

To address the concerns raised about carriers of hazardous materials, FMCSA has added a new paragraph § 395.1(q) to allow drivers who are attending a motor vehicle transporting Division 1.1–1.3 explosives, but performing no other work, to log at least a half hour of the time spent attending the CMV toward the break. This time continues to be on-duty, so the driver will have to annotate his log to indicate when the break was taken. This exception will allow the driver to meet the requirements of 49 CFR 397.5 ''Attendance and surveillance of motor vehicles'' in the driving and parking rules for the transportation of hazardous materials to attend the vehicle at all times without violating the break requirement. FMCSA notes that Blanco found that such on-duty breaks provide some risk reduction in the hour following the break.

On the issue of enforcement, any new requirement makes enforcement more complex, but breaks are an easy concept to comprehend.

G. Restart

General Comments on the Restart. NIOSH, Advocates *et al.,* and one carrier supported the changes to the restart provisions because they would help address fatigue issues for drivers operating at, near, or beyond the maximum permissible hours of service and would not affect compliance, given that many drivers already take weekends off. OOIDA, FedEx, TCA, and two carriers added that the current rule provided sufficient rest and sleep for drivers, regardless of whether the driver engaged in daytime, nighttime, or both types of operations. ATA referenced earlier published statements from the Agency in asserting that the 34-hour period was adequate. ATA argued that FMCSA should require long periods of ''idle time'' only if there is evidence that the current restart provisions may exacerbate problems with fatigue. Referring to fatigue associated with long driving hours, OOIDA said that the current rule allows drivers to return to their homes sooner than was possible under the old rule. OOIDA said that the proposed restart changes, based on FMCSA concerns of long duty hours resulting in fatigue, were unnecessary in light of anecdotal evidence regarding the actual use of the 34-hour restart. ATA stated that drivers do not use the restart to maximize hours, but for ease of recordkeeping and scheduling flexibility. OOIDA, citing the FMCSA Field Study data reported in the interim final rule published on December 17, 2007, stated that 67 percent of drivers take restarts of 44 hours or more. Schneider said that only 1.73 percent of its drivers had restarts between 34–40 hours; the average restart was 62 hours. A private carrier reported that 95 percent of its drivers' restarts exceeded 34 hours and 50 percent exceeded 58 hours.

FMCSA Response. Most industry commenters argue that changes to the restart are not necessary because drivers are not using it to maximize hours. FMCSA agrees with ATA that some drivers do not use the restart to maximize hours, but for ease of recordkeeping and scheduling flexibility. If that is the case, then the

changes will have little impact. Only drivers who work more than 60 hours in 7 days or 70 hours in 8 days need the restart to obtain extra hours. Drivers who do not need the restart but who only use it to simplify bookkeeping will not lose work hours as a result of the changes because they can already work as many hours as they prefer without using the restart provision. Any driver who is taking two consecutive days off a week will not be affected. If drivers, in fact, average 44 to 52 hours on duty a week as ATA's data showed, these drivers will not be affected. A driver who only occasionally works maximum hours will not be affected because the rule will allow that driver to use the 34-hour restart once, with a longer break at the end of the subsequent week. Repeating what we said earlier on this subject, unless a driver knows that he is working less than 60 hours a week (*e.g.,* a regular 10-hour day, 5 days a week), he must keep a running 7- or 8-day total of on-duty hours to be sure he is within the limits regardless of the restart provision or the changes this rule makes to it. If a driver takes 34 hours or more off, he simply has a new point from which to keep the total, but he still needs to keep track of his total hours if he could be pressing the limits. Many drivers do these calculations in their heads without needing to write them down. This calculation, at any rate, is both simple (subtracting one day's hours from the running total, then adding another day's hours to the result) and can be conducted during waiting or refueling time, and so would result in de minimus effort and cost to the driver. Furthermore, any driver who only takes a restart once a week would not have to keep a tally of hours back beyond the previous restart, because that restart would reset the driver's cumulative available hours under the new rule, as it does under the current rule. Any driver who works relatively moderate hours would be unlikely to take multiple restarts in a week, or have to worry about violating the cumulative weekly hour limit.

When used to maximize hours, the 34-hour restart adopted in 2003 allows a driver to work as many as 84 hours in 7 days. Over time, drivers could average 82 hours a week. It is important to note that for a driver to work these long hours he/she must be working close to 14 hours a day 6 days out of 7. The final rule reduces the maximum weekly hours by only 3 hours for 1 week, but over time the average maximum hours per week will be about 70 hours in 7 days. Despite the reduction in the weekly work hours, drivers will retain significant operational flexibility because they will still be able to work long hours in 1 week, while balancing those periods with shorter subsequent work weeks to obtain more rest.

Comments on the 2–Night Requirement. NTSB, Advocates, a safety official for a carrier, and about 80 other commenters supported the proposal that each restart include two nighttime periods.

The majority of commenters on this issue opposed the requirement. CVSA's comments were a summary of points raised by other opposition comments. CVSA said the proposal would reduce driver flexibility, unduly burden carrier operations that included driving time from midnight to 6 a.m., and add more CMVs to an already overburdened highway system at peak hours. Further, CVSA said it was difficult to determine whether driver health benefits would result from the change. CVSA claimed the 2-night requirement would disrupt regular weekly rest cycles for some drivers, leading to more driver performance issues and falsification of driver records of duty status (RODS). CVSA proposed a consecutive 48-hour restart period (a position not shared by other opponents of the proposal).

Some commenters stated that the two-night requirement could extend the restart up to 52 to 63 hours (commenters offered differing estimates of the shortest period necessary to comply with the proposal). One association stated that the 2003 rule allows team drivers to be idle for only 24 hours, but the 2-night requirement would extend that time period to 41 hours.

Commenters also stated that the provision would unfairly affect nighttime drivers. The California Highway Patrol (CHP) stated that the actual requirement would vary for drivers on cross-country trips because their time is determined based on their home terminal, so that the 12 a.m. to 6 a.m. period might be either 9 p.m. to 3 a.m. if a driver from an east-coast terminal took a restart in the Pacific time zone or 3 a.m. to 9 a.m. if a west-coast driver needed a restart in the Eastern time zone.

FMCSA Response. As discussed above, FMCSA has shortened the 2 nighttime periods the driver must be off duty to 1 a.m. to 5 a.m. The impact of the 2-night requirement on the restart length will vary with the time a driver goes off duty and the time he resumes work. For drivers who work a regular schedule that starts at night, the 2-night provision will generally require the driver to take 2 plus days off to maintain the regular work schedule. For example, a long-haul driver who normally drives at night may start at 11 p.m. and work until 10 a.m. 6 days a week; the driver will need to take 2 days plus 13 hours off to obtain the 2 night periods and be able to return to work for an 11 p.m. start. For drivers who work at night irregularly, the restart length may be considerably shorter because the driver may be able to stop in time to get 2 nights into a shorter time frame; a driver who can stop between 7 p.m. and 1 a.m. can take the minimum 34 hours off while obtaining 2 periods that include 1 a.m. to 5 a.m.

Some teams do currently manipulate the restart to shorten it to 24 hours; the non-driving team member counts his 10-hour off-duty time while the other driver is driving toward the 34-hour restart, both drivers are then off duty for 24 hours, and the driver with 34 hours off duty starts driving while the second driver obtains another 10 hours off. Exactly how much longer the 2-night requirement will make the restart will depend on stopping time and whether teams overlap restarts. At a minimum, stopping a truck driven by a team for the 28 hours between 1 a.m. one morning and 5 a.m. the next morning would provide two consecutive nighttime rest periods for both drivers. Both drivers could meet the 34-hour off-duty requirement for a restart if one of them was off-duty (while the other drove) for at least 6 hours before the truck stopped, and if the other stayed off-duty for at least another 6 hours after the truck started again. As a specific example, suppose the first team member drives from 5 p.m. until 1 a.m. Saturday, during which time the second team member is off-duty in the sleeper berth, and then both drivers go off-duty for 28 hours until 5 a.m. Sunday. Because this time off includes both Saturday from 1 a.m. to 5 a.m. and Sunday from 1 a.m. to 5 a.m., both drivers comply with the 2-night rule. By 5 a.m. on Sunday, the second team member will have been off-duty for a total of 36 hours (8 hours in the sleeper berth plus 28 hours while the truck is stopped), more than meeting the minimum 34-hour off-duty requirement for a restart. Thus, the second team member will be eligible to start driving. The first team member will, by that point, have had only 28 hours off-duty, but will meet the 34-hour requirement so long as he or she remains off-duty for at least the first 6 hours after the truck starts moving.

The time that the truck would have to remain stopped for both drivers to meet the restart requirements would depend on the time that the truck stopped. If it stopped at midnight instead of 1 a.m., for example, the team would have to be off-duty for 29 hours instead of 28 for

both drivers to be off-duty for two consecutive periods between 1 a.m. and 5 a.m.; similarly, if the truck stopped at 10 p.m., it would have to remain at rest for 31 hours to reach 5 a.m. a second time, and so forth. The earlier the truck stopped, the longer it would have to remain stopped; but the time could be minimized by planning on the part of the team.

It should be noted that teams can do two cross-country runs before needing a restart. If they average 50 mph, they can drive cross country in 50 hours; at the end of the trip, one driver will have used 20 hours of driving time and the other 30. Even allowing for loading and unloading, both drivers will have enough hours to make a return trip before approaching the point when a restart is needed. Many teams might not have multi-week schedules that rely on short restarts.

As for the possibility that night drivers will ''flip'' their sleep schedule during a restart (*i.e.,* change from daytime to nighttime sleep), it is likely that they do so regardless of the restart length, particularly when taking a restart at home; otherwise they would have minimal time to spend with their (day-oriented) families. Because daytime sleep is shorter and of lower quality, switching to a night sleep helps to at least attenuate the sleep debt a driver working maximum hours builds up (Åkerstedt 2003), (Hossain). Research consistently indicates that it is difficult to get more than 4 to 6 hours of sleep during the day; sleeping during the day on days off, therefore, simply increases the driver's sleep debt. With respect to CVSA's question about whether there was a health impact of the 2-night provision, these health effects are in part related to the increase in weekly sleep; the main health impact of the restart provision, however, is the result of the reduced maximum hours a driver can work over time.

The Agency knows of no reason why drivers would stop driving at night, putting more trucks on the road during rush hours, to avoid the extra hours that may be needed to meet the 2-night requirement. As discussed previously, most drivers who regularly drive overnight do not work enough hours to need a restart and, therefore are not subject to the 2-night requirement. Pick-up and delivery times are, in any case, set by shippers and receivers, not by the drivers. Drivers and carriers will have to adjust the hours worked for those working the longest hours, rather than change driving patterns.

CVSA's concern about concealment of HOS violations is reasonable, but mandatory use of EOBRs, if adopted by the Agency as proposed in a separate rulemaking proceeding on February 1, 2011, would make cheating more difficult because the driver would not be able to mislabel driving time.

On the issue raised by CHP about the basis for determining the 1 a.m. to 5 a.m. period, drivers' logs are based on the time zone of their home terminal. The 2-night periods are, therefore, set by the time at the home terminal. This approach will make it easier for drivers and schedulers and not introduce new complexity to the rule. Based on comments, it appears that many and perhaps most drivers prefer to use their restart periods at home. To the extent that drivers are in other time zones during their restart, basing the time on their terminal time zone will also ease the concern expressed by commenters that all drivers would be returning to duty at the same time (*i.e.,* 5 a.m.).

Comments on the Washington State University (WSU) Study. Commenters criticized studies on which the Agency relied in formulating its 2-night requirement. ATA referenced studies indicating that the proposal likely would result in drivers transitioning to nighttime rest during the restart period, although that transition was ineffective at mitigating sleep loss and might contribute to driver impairment during the post-restart period. Several commenters also argued that the WSU study (Van Dongen (2010a and 2010b)) on which FMCSA based the changes to the restart was flawed. OOIDA criticized the WSU study as a laboratory exercise that had only 27 subjects in phase I and 12 in phase II, had no truck driver participants, and involved a 58-hour restart. J.B. Hunt offered a survey of 249 nighttime drivers (who operated between midnight and 6 a.m.); 79 percent of the survey participants who had scheduled night shifts reported that they do not change their sleep schedules *when at home* for time off. Hunt stated that this finding was contrary to the WSU study presumptions. The carrier added that drivers who get 10 hours of rest when off duty should not accumulate sleep debt.

FMCSA Response. To study the effectiveness of the 2-night restart provision, FMCSA has employed a process of testing in a controlled sleep lab environment. This is done under the premise that if a provision is not effective in the lab, it certainly will not be effective in a field-related environment. That is, if people cannot obtain adequate sleep in the best-case environment (a dark, quiet room, with no possibility of interruption), they will not be able to obtain adequate sleep in a normal environment, let alone in a sleeper berth at a truck stop or beside a road. The first phase of the WSU study found that the 34-hour restart was effective at mitigating sleep loss and consequent performance impairment for daytime drivers, but not effective for nighttime drivers (Van Dongen (2010a)). The second phase tested a 2-night recovery period for nighttime drivers (Van Dongen (2010b). The study found that the 2-night provision works better than 1-night to mitigate driver fatigue in nighttime drivers. The findings of the WSU study could be conservative and could be likely to understate the effect of night work on performance. In the WSU study, the subjects did not work more than half of the full 14-hour work period and had 58 hours off between weeks. The impact on drivers who are working twice as much and attempting to start work again in a shorter period is likely to be more severe than the study indicated. The subjects in the WSU study were young healthy adults with no apparent sleep disorders. If the study had been conducted in an uncontrolled field environment with actual truck drivers who sleep in a sleeper berth, the findings of performance degradation could be even more pronounced than were found in the WSU study.

As noted in previous responses, if the carrier's survey respondents sleep during the day on their days off, they are adding to their sleep debt rather than reducing it. Monk (2000) found that married night workers with family commitments typically do not retain a day sleeping regimen during their off-duty (weekend type) break, as they want to interact with their day-oriented family rather than be awake when everyone else is asleep. In staying awake during the day, they experience powerful zeitgebers (*i.e.,* an environmental cue, such as daylight, given to a person's biological clock to reset the sleep-wake cycle), pulling them away from a nocturnal circadian orientation. Even permanent night workers typically show a day-oriented circadian rhythm (as indicated, for example, by the body temperature rhythm) on their return to duty after a ''weekend-type'' break. Thus, to a certain extent, even permanent night workers are often actually rotating between nighttime and daytime circadian orientations.

With regard to the issue of sample size used in the WSU study, FMCSA completed the power analysis to determine the minimum sample size needed to be able to determine whether there is statistically significant difference between two conditions—in this case taking 1 night versus 2 nights

off. The power calculation for the WSU study determined that the minimum sample size is 12. WSU did find a significant effect in the Phase II study—that is, the 2-night restart was a significant improvement over the 1-night restart in terms of the primary outcome variable. That makes the issue of statistical power and sample size (*i.e.,* the chance of not finding an effect that is actually there) a moot point.

The Agency also notes that a small sample size of only 12 is not unusual for sleep studies. Two of the most cited studies in the sleep literature are the ''Impact of Sleep Debt on Metabolic and Endocrine Function'' by R. Spiegel (1999), and ''The Cumulative Cost of Additional Wakefulness: Dose-Response Effects on Neurobehavioral Functions and Sleep Physiology from Chronic Sleep Restriction and Total Sleep Deprivation'' by H. Van Dongen, (2003). Both of these studies were based on a sample size of 12 or fewer participants per treatment and each of these studies has been cited more than 50 times per year since date of publication (more than 700 and 400 times total respectively), so they are taken seriously by the sleep research community. Also with respect to ATA's concern about the small sample size, the Agency notes that the original and only study used to justify the 34-hour restart provision had a sample size of 10 and was a laboratory-based study conducted by O'Neil (1999) for the American Trucking Research Institute.

Comments on the 168-Hour Limitation for Drivers Working 70 Hours in 8 Days. NTSB said that, with the other changes to the restart provisions, limiting how often drivers may use the restart should have the effect of increasing the amount of sleep drivers receive during the period and may encourage drivers to adopt more daytime oriented schedules. Although Advocates *et al.* endorsed the restart changes as an improvement, they argued that the limitations affected only those drivers operating 60 hours in 7 days. They said the Agency should apply similar restrictions to drivers who operate 70 hours in 8 days; that is, these drivers should be able to use the restart only once in 8 days. However, they considered the 168-hour limit to be a ''positive step for safety'' that would have a substantial impact on the portion of the driving population most at risk of driving while fatigued—drivers with very high-intensity work schedules.

FMCSA Response. FMCSA acknowledges that the 168-hour limitation has different effects on the two groups: The 60-in-7-day drivers are held to an average of 60 on-duty hours per week, while the 70-in-8-day drivers are held to 70 hours in 7 days. The goal of this limitation, however, is to rein in the dramatic increases in weekly hours that were allowed by the institution of the restart in 2004, and it will accomplish that goal as intended. Drivers working under the 70-in-8-day provisions before 2004 could work no more than 70 hours in any 8 days, which is an average of $70/8 \times 7$ or 61.25 hours per week. Under the 2003 HOS rules, a driver working 14 hours per day Monday through Friday could build up 70 on-duty hours before midnight on Friday. If that driver then took 34 hours off, the restart would allow for a new week of work starting Sunday morning—only 6 days after the start of the previous week. Continuing this pattern would mean 70 hours on-duty per 6 days, for an average of $70/6 \times 7$ or 81.67 hours per week. Thus, the restart allows these drivers to cut up to 2 full days off the 8-day period originally intended for their 70 on-duty hours. Put another way, prior to the current rule, a driver working 14-hour days could work 5 days out of 8; under the current rule, he could work 7 days out of 8. Taking into consideration the effects of cumulative fatigue [10] and impacts on driver health, FMCSA considers 81.67 hours per week to be excessive and has, therefore, instituted a limitation to keep these drivers from continuously working 70 hours every 6 days. The 168-hour limitation ensures that they can put in no more than an average of 70 hours per week—an increase over the average of 61.25 hours allowed under the pre-2003 rules, allowing for some improvements in productivity and a chance to spend more time at home, but a dramatic drop from the nearly 82 hours per week allowed now.

The situation is quite different for the 60-in-7-day drivers. To use the 60/7 provision, a carrier must operate only 6 days a week. These drivers, therefore, must always have at least one full day off every week (*i.e.,* the days when the motor carrier is not operating). Thus, the equivalent pattern to the one that allows the 70-in-8-day drivers to fit their work in a period 2 days shorter than before (namely a 60/7 driver working 56 hours in 4 days, taking 34-hours off, and beginning the next ''work week'' after only 5 days instead of 7) is not possible because their carrier's 6-work-day week would interfere. Because a driver using the 60-in-7-day provision cannot accumulate the long hours currently allowed for the 70-in-8 day drivers, the original restart provision did not allow nearly as great an increase in on-duty time for them as for the 70-in-8 day drivers. That is, for the 60-in-7 day drivers, the 2003 rule allowed an increase in average on-duty time per 7 days from 60 hours to 70 hours, which is a much smaller increase than the jump from 61 hours to 82 hours for the 70-in-8 day drivers.

From that perspective, though, the 168-hour limitation has roughly the same impact on both groups of drivers: The maximum of nearly 82 hours per week that could be accumulated by a 70-in-8-day driver is cut down to 70, a reduction of 14 percent and the maximum of 70 hours per week that could be accumulated by the 60-in-7-day driver is cut by 10 down to 60, which is also a reduction of 14 percent. But FMCSA expects that the drivers working under the 60-in-7-day provision are unlikely to be pressing the HOS limits hard enough for this limitation to be an issue: Because they are working for carriers that take a full day off every week, they are unlikely to be trying to get the absolute maximum of physical output from their resources. Many who felt too constrained by the 168-hour limit would have the option of switching to a 70-in-8-day pattern in any case.

Comment on the Impact of the 168-Hour Limit on Driving Time. A shipper association, a carrier, and an individual endorsed the 168-hour limit, provided the Agency eliminated the provision for two periods between midnight and 6 a.m. during the restart window. Advocates also claimed that the proposed changes to the restart provision will have almost no effect on the intensity of work for drivers who do nothing but drive. Advocates presented a numerical example in which a driver takes a 34-hour restart break, and then commences a period of alternating maximum driving and minimum resting until the 70-hour maximum cumulative on-duty limit is reached. If 11 hours of driving (broken up by a ½ hour break) is followed by a 10-hour off-duty break, then 70 hours of driving is reached prior to the end of 7 of these driving shifts, interspersed with 7 half-hour rest breaks and 6 rest periods of 10 hours each. Thus, a total of $[34 + 70 + (½ \times 7) + (6 \times 10)]$, or 167 hours will have elapsed since the beginning of the restart break. With a limit of one restart break every 168 hours, Advocates pointed out that the 168-hour provision would obligate the driver to wait only another hour longer before starting a restart break

[10] ''Analyses of Fatigue-Related Large Truck Crashes, The Assignment of Critical Reason, and Other Variables Using the Large Truck Crash Causation Study,'' FMCSA, 2008, FMCSA–2004–19608–3481; and Sando 2010a and b.

than would have been necessary without that provision. (A very similar example was provided for cases allowing 10-hour driving shifts.) Thus, they claimed, the 168-hour limit does almost nothing to prevent drivers who only drive from using the restart to accumulate driving hours at a high rate.

FMCSA Response. Advocates' claim that the 168-hour limitation does almost nothing to reduce weekly driving time is both incorrect and beside the point. It is incorrect because by FMCSA's calculations the maximum driving hours per 7 days has been reduced from 73.9 hours down to 70 hours, a small but not a trivial reduction. It is beside the point because the 168-hour limitation was not aimed at cutting maximum weekly driving hours but at cutting maximum weekly on-duty hours, which had been increased dramatically by the 2003 rule, from about 61 to an average of almost 82.

FMCSA also believes that the maximum-driving-hour examples used by Advocates are not realistic. Even drivers who have no tasks other than driving will need to inspect their trucks, fuel, do paperwork, and contact their carriers. If even a half hour of non-driving work is added to each 11-hour shift, the highest practical average number of hours of driving per week drops to about 66, which is 6 hours less than what would be possible for a driver under the existing rules who took 6 11.5-hour shifts (including 0.5 hours of non-driving work) between restarts. Thus, under any plausible scenario, the proposed rule provides a significant reduction in allowable hours of driving per week. While it is true that the drivers who work the longest hours are in the truckload sector, even those on cross-country trips—less than one percent of shipments are cross country—will have some hours of loading and unloading time every week in addition to their daily driving work.

Other Comments on the 168-Hour Limitation. Most industry commenters on the restart issue opposed the 168-hour requirement. ATA and others stated that 34 hours was enough time to recover. OOIDA said the requirement was an attempt to prevent drivers from working more than 70 hours a week. A number of commenters asked why taking two 34-hour restarts in one week was objectionable. Various industries said it would be burdensome. One carrier said it would be particularly detrimental for carriers operating only 6 days a week. CHP asked how it would know if it had been 168 hours since the last restart when it conducted a roadside inspection.

FMCSA Response. OOIDA's comment is correct: The purpose of the once-a-week restriction is to limit the ability of drivers to work the longest hours week after week. Multiple restarts in each week would not generally be a problem because frequent 34-hour-long off-duty periods would leave little time in a given week to build up excessive duty hours. If, however, restarts are taken every 6 days, a problem does arise: Under existing rules, alternating 14 hours on-duty and 10 hours off, a driver would reach 70 hours in less than 5 full days. After a 34-hour break, the driver could then begin this same cycle again, totaling 70 hours on-duty every 6 calendar days, for an average of almost 82 hours per calendar week. Limiting restarts to one every 168 hours prevents this excessive buildup of on-duty hours, while still allowing drivers to use the restart provision to their advantage and avoiding the complexity of special provisions for more frequent restarts.

On the issue of how an enforcement officer will know whether 168 hours have passed since the last restart, § 395.8(k)(2) requires drivers to have 8 days of logs available on the truck (logs for the current day and the previous 7 days). If, however, a driver has taken a restart in the middle of the 8 days covered by the required logs, a roadside inspector may not be able to tell whether 168 hours have elapsed since the last restart. FMCSA recognizes that this provision will not always be enforceable during roadside inspections. FMCSA and our State partners will be able to verify compliance with this provision during compliance reviews or other interventions.

Other Comments on the Restart. Advocates *et al.* also expressed concern about the use of the restart by teams, where one 10-hour off duty period could be added to 24 hours off duty to achieve a 34-hour restart, which means that the team need only stop for 24 hours. Other commenters suggested various periods for the restart, from 24 hours to 48 hours.

FMCSA Response. The 2-night provision ensures that a driver would have to remain at rest for a minimum of 28 hours to allow drivers operating in the night to accumulate 2 consecutive periods from 1 a.m. to 5 a.m. For a team member operating solely during the day, it is true that the truck would not have to stop for as long a period (*e.g.,* a day driver could enter the sleeper berth at 7 p.m. on a Friday, resting while the other team member drove for the next 10 hours until 5 a.m.). Then, if the truck remained at rest for another 24 hours, the first driver would have been off-duty for 34 hours, including two nighttime periods. This much time off was found by the WSU study to have been enough time for a driver on a daytime schedule to recover.

Comments on the Impact of the Restart on Specific Sectors. Various industry groups and carriers expressed concerns about the impact of the restart changes on their sectors. Commenters supported continued exemption of oil field operations and construction from the restart requirement. One shipper association stated that fatigue was not a problem in short-haul operations and, therefore, that the restart need not be limited for these carriers.

FMCSA Response. As noted above, the applicability of the restart to construction and oilfield operations is unchanged. The concerns about the general economic impact of the restart are discussed in detail in Section IV. ''Discussion of All Comments'' B. ''Economic Impacts.'' As for short-haul operations, the commenter offered no basis for its claim that fatigue is not a concern for drivers in these operations if they are working maximum hours. Local drivers may be less likely to be fatigued because they do not work the longest hours, but those drivers do not need to use the restart to obtain extra hours.

H. Duty Period/Driving Window

Comments on 13 versus 14 hours on duty. NTSB supported limiting drivers to 13 hours on duty in a 14-hour consecutive period. Most commenters on this issue opposed the change to 13 hours because they claimed it could prevent drivers from completing their work, reduce drivers' flexibility and potential earnings, require carriers to change routes, require additional drivers and equipment, increase parking problems, increase stress, cause confusion for enforcement personnel, and limit the ability of carriers to serve their customers. Con-way stated that 50 percent of its drivers work 12 to 14 hours a day, 30 percent work 10 to 12 hours. CVSA stated that there appears to be a lack of scientific studies, or collected data, to indicate that the movement from a 14-hour workday rule to a 14-hour driving window, with a 13-hour on-duty limit, will improve the overall performance of a driver of a CMV. OOIDA and others urged FMCSA to focus on driving time, and not on regulating the overall ''bottom line'' time spent working.

FMCSA Response. FMCSA agrees that the limited benefits of the 13-hour provision do not compensate for the increased complexity of the requirement, both for drivers and

enforcement personnel. The Agency has, therefore, eliminated this provision.

Comments on Breaks within the Duty Period. The largest number of comments on duty time asked FMCSA to allow drivers to take breaks that do not count against the 14-hour limit, so that off-duty time would extend the 14-hour period. A few commenters argued for shorter or longer duty periods (from 12 to 16 or unlimited hours).

FMCSA Response. As FMCSA discussed at length in the 2003, 2005, 2007, and 2008 rulemakings, allowing off-duty time to extend the work day results in drivers being allowed to drive long past the time when fatigue becomes extreme. The 14-consecutive-hour rule was adopted to prevent that and to help drivers maintain a schedule that is consistent with circadian rhythms. Breaks will count against the 14-hour period.

Comments on Night Drivers. FMCSA requested comments on whether drivers who drive at least three hours between midnight and 6 a.m. should have an hour less duty time available (to provide a longer period to obtain sleep). Fewer than 50 people commented on the issue, but most opposed the suggested provision because of the adverse impact it would have on them, including changes in scheduling deliveries, increased costs, reduced productivity, and problems in meeting customers' needs. One commenter asserted that such a provision could lead to lower pay, driving on congested roads, greater turnover of drivers, and less experienced drivers on the road. J.B. Hunt found that its drivers who drive occasionally or regularly in the midnight to 6 a.m. window have a 2010 reportable crash rate per million miles that is more than 30 percent lower than the 51 percent of the driving force who do not drive at night. Schneider National's examination of crash data suggested that more analysis is required to definitively conclude that reducing work hours would reduce crash rates for night drivers. ATA opposed the restriction and noted that it would create a forward rotation in scheduling that could disrupt drivers' natural circadian rhythms. FedEx Corporation criticized FMCSA's data supporting this provision.

FMCSA Response. After considering the comments on whether nighttime drivers should have one less hour of duty time, FMCSA concluded that it does not have sufficient basis to move forward with this provision. As a result, FMCSA has not adopted the shorter schedule for night drivers.

Comments on Extending the Driving Window. FMCSA proposed allowing the extension of the driving window to 16 hours twice a week, without a change in allowed duty time. Relatively few commenters addressed this issue and those that did were about evenly divided pro and con. Some commenters specifically expressed their support for keeping the 14-hour window. One commenter opposed any change in the 14- and 10-hour format, as that would appear to defeat the science-based logic for the current rules. The commenter stated that the rules were enacted to prevent the alteration of circadian cycles, and the safety performance of the motor carrier industry in the period following their adoption speaks to the correctness of that underlying science.

ATA and several other commenters supported two 16-hour periods because that approach could provide drivers with additional flexibility to drive when conditions are optimal. OOIDA and an individual driver believed that the extension to 16 hours was a good start, but did not go far enough. Advocates *et al.* and other commenters opposed the 16-hour window for various reasons, including the view that the provision could be confusing, lead to logbook violations, require breaks away from home, cause a forward schedule rotation, and allow driving late in the duty period; they also stated that a 16-hour window lacked supporting data. A carrier pointed out that the proposal also mandates that any work, however brief, that occurs past the end of the 14th hour constitutes use of one of the 16-hour days. The commenter stated that the effect of changing the nature of the 14-hour rule to restrict work that occurs past the end of the 14th hour (rather than to restrict only driving after the end of the 14th hour) would be to eviscerate the new 16-hour provisions. Other commenters argued that the increase in the driving window would be meaningless because of the reduction in maximum on-duty time and the need to anticipate when an unexpected event will occur. Schneider National stated that it would be extremely difficult to manage particularly with electronic logging; to be practical, the carrier would have to pre-approve the use of the longer period, but that would defeat the purpose of using it for unexpected delays.

CVSA noted that anytime there are exceptions outlined in a regulation the difficulty of uniform enforcement practices is greatly multiplied, and the falsification of records of duty status could occur as drivers try to create more on-duty hours within the 14- and 16-consecutive hour driving window. Drivers could claim inspection, servicing (fuel, *etc.*), and many other forms of on-duty time as off-duty, to create a larger window for driving time. With no supporting document requirements for drivers, it would be difficult, at best, to determine actual regulatory compliance or non-compliance during roadside enforcement.

A few commenters supported a twice-weekly extension of the driving window. Other commenters argued that drivers should be able to use the extension even more frequently. One carrier disagreed with FMCSA's proposal that the use of the 34-hour clock would not ''reset'' the use of the 16-hour provision. A trucking association indicated that although carriers cannot always schedule each trip accurately due to unforeseen circumstances, such as adverse weather or traffic conditions, drivers and dispatchers plan for particular schedules. Because it would only be available twice per week, this extension would likely be used infrequently by most carriers who require as much certainty as possible in any scheduled trip. Drivers warned that shippers and receivers may abuse the 16-hour period to extend waiting time. Some carriers were skeptical about the value of the provision, and drivers were sharply split, some favoring it, but others arguing that carriers and shippers would force them to use every bit of the 16 hours, rather than reserving the extra time for special needs.

FMCSA Response. FMCSA has decided not to adopt the proposed two 16-hour driving windows. The Blanco study showed increasing risk as the duty period increases. The study is consistent with a large body of other research pointing to the same conclusion (*e.g.,* Jovanis, TIFA, studies of accident rates in other sectors discussed above). Under the proposed provision, long-haul drivers could have been driving more than 16 hours after waking, when fatigue becomes acute. That is a risk that can neither be ignored nor accepted.

Comments on Requiring Drivers to Go Off Duty at the End of the Driving Window. Of the fewer than 200 commenters on this issue, some supported the proposal to end work at the end of the duty period. Most, however, objected to the provision. Reasons for opposition included a reduction in driver pay, the need for carriers to incur added costs and revise scheduling, the adverse effect on providing customer service, the lack of scientific support for the revision, and questioning FMCSA's authority to determine the number of non-driving work hours. AMSA stated that the

current rule allows a driver to complete inventorying, packing, loading, or unloading at the end of the day without needing to deploy another crew or come back the next day to finish the job. McLane stated that the current rule benefits team drivers because both team members can help unload even if one has used his full 14 hours. It stated that restricting additional time does not contribute to public safety because the first driver cannot drive again until he has taken his 10 hours off. The provision would force more drivers and trucks on the road to make the same number of deliveries.

FMCSA Response. On the question of FMCSA's authority to regulate work hours beyond driving hours, the Agency's statutory authority derives from 49 U.S.C. 31502(b), which authorizes the FMCSA to regulate hours of service and more broadly from 49 U.S.C. 31136(a), which mandates the Agency to ensure that the vehicle be operated safely and that the responsibilities imposed on a driver do not impair his ability to operate the vehicle safely. Long work hours can impair a driver's ability to operate safely. Moreover, none of the statutes authorizing FMCSA to regulate hours-of-service limit the meaning of the term ''hours-of-service'' to driving hours, and it is entirely reasonable for FMCSA to construe the term to include time spent by drivers engaged in activities associated with their operation of CMVs. In fact, that construction was first adopted by the Interstate Commerce Commission (ICC) in the 1930s [*see* 3 M.C.C. 665, 690 decided December 29, 1937] and has been the position of all Federal agencies charged with enforcement of the HOS regulations for 70 years. However, the Agency is not using this authority to require drivers to *go off duty at the end of the driving window.*

There are too many uncertainties associated with such a requirement to warrant adoption at this time. The Agency has little direct data on the frequency of work beyond the 14th hour, the average number of drivers involved, or the average amount of time spent on duty after the 14th hour. Efforts to derive this information from available sources were unsuccessful. FMCSA was therefore unable to calculate the cost to the motor carrier industry of requiring drivers to go off duty at the end of the 14th hour. The benefits of such a requirement are also unknown. Bureau of Labor Statistics (BLS) data indicate that truck drivers have a substantially higher rate of occupational injuries than most American workers, including the kinds of injuries related to non-driving work (back pain, sprains and strains, overexertion in lifting). Research on occupational injuries and accidents submitted with the comments of NIOSH and Advocates *et al.* clearly links long work hours to an increased risk of such injuries; the studies indicate that the risk of injuries rises sharply after 14 hours (*Dembe*). This research, however, is not specific to the motor carrier industry, which further compounds the uncertainty created by the lack of data on drivers working beyond the 14th hour. The Agency remains concerned with long work hours and will seek additional research on the risk of working past the 14th hour, but given the absence or uncertainty of relevant data at this time, FMCSA cannot justify promulgation of this proposed rule provision.

I. Paragraphs 395.1(e)(2) and (o)

Comments. FMCSA proposed eliminating § 395.1(o), which allows some regional drivers to extend their driving window to 16 hours once a week, because it would conflict with the proposed two 16-hour driving windows. The Agency also sought comments on whether § 395.1(e)(2) should be eliminated for the same reason; this paragraph allows certain local drivers to extend their driving window to 16 hours twice a week. About 20 commenters responded. Some of the commenters sought other changes to the provisions, while others stated that the provisions were needed.

FMCSA Response. FMCSA has decided not to rescind either of these paragraphs. The NPRM discussed that option to avoid the excessive complexity that would result from adding two 16-hour driving windows per week to the existing 16-hour provisions. Because the Agency is not extending the driving window from 14 to 16 hours twice a week, as proposed in § 395.3(a)(2)(ii), there is no need to remove § 395.1(e)(2) or § 395.1(o). FMCSA continues to believe, as explained in the 2005 final rule, that the risk of fatigue and fatigue-related crashes for the local short-haul drivers who can utilize the existing 16-hour provisions is less than for regional or long-haul drivers subject to the 14-hour driving window (70 FR 49978, at 49980, 49995–49996, August 25, 2005). Local short-haul drivers typically drive regular schedules of limited mileage during daylight hours, with frequent non-driving breaks, and return to their home terminal in time to sleep in their own bed virtually every night. A study cited in the 2005 final rule (Balkin) showed that short-haul drivers often take naps of 1–2 hours within their work shift to reduce any fatigue accrued during the work day. The authors of a 1997 study of driver fatigue in short-haul operations, which was also cited in the 2005 rule (70 FR 49996), concluded that, despite the limitations in the available data, ''the numbers seem to indicate that class 7–8 tractors in over-the-road service have higher fatigue related fatal involvement rates, per truck or per mile, than the other categories of trucks that were considered'' (Massie). The minimization of fatigue associated with short-haul operational patterns may account for the results noted by Massie, *et al.* In addition, the requirement for 10 hours off duty between shifts makes the use of consecutive 16-hour days under § 395.1(e)(2) unlikely because the driver would have to start his second day 2 hours later than normal and his third day 4 hours later, significantly disrupting his normal schedule. On the other hand, while the Blanco study on work hours was limited to line and long-haul drivers, it does raise concern regarding driving and working long daily hours. The Agency will therefore continue to study the risks posed by allowing the 16-hour exception for local short-haul drivers.

J. On-Duty Definition

Comments Supporting the Changes to the On-duty Definition. FMCSA proposed to exclude from the definition of on-duty time any time resting in a parked CMV or up to 2 hours in the passenger seat of a moving CMV, immediately before or after 8 consecutive hours in the sleeper berth. Fewer than 200 commenters addressed the proposed changes to the definition of on-duty time. ATA, OOIDA, and many others supported the proposed change. ATA stated that the vast majority of team drivers are not able to rest or sleep in a sleeper berth for a full 10 hours, and they would prefer spending two of those hours in the passenger seat. Three carriers supported the proposed changes, but they did not think the rest periods should be deducted from the permissible 14-hour on-duty time. One commenter asked why a driver who can only sleep six or seven hours in the sleeper berth should not be allowed to sit in the passenger seat for the remaining time.

A rail delivery company noted that exclusion of time resting in a parked vehicle from the definition of on-duty would be very beneficial for local short-haul drivers who have a rest period between busy periods or those who must park awaiting loading and unloading. TCA suggested that allowing

drivers to clock time spent resting in a parked CMV would be helpful for the industry provided that the definition of ''resting'' includes reading, checking emails, talking to friends or family, or other similar activities. If so, TCA commented, the ability to count hours wasted at shipping facilities as off-duty will benefit the truckload industry tremendously. It further stated that, although the adjusted definition would not reduce detention times, it could help prevent them from being such a detriment to carriers. The Petroleum Marketers Association of America supported allowing time spent by a driver in a parked CMV to count as off-duty time, and thought that up to three hours would be appropriate. Another commenter favored a three-hour allowance for drivers parked in line waiting to load product.

FMCSA Response. FMCSA is adopting the changes as proposed. FMCSA emphasizes that the changes to the definition do not alter the existing parts of the definition that define, as on duty, ''(5) All time loading or unloading a commercial motor vehicle, supervising, or assisting in the loading or unloading, attending a commercial motor vehicle being loaded or unloaded, remaining in readiness to operate the commercial motor vehicle, or in giving or receiving receipts for shipments loaded or unloaded.'' Unless a driver is released from all responsibility for the vehicle while waiting to be loaded or unloaded, time spent waiting is still considered on duty time.

Comments Opposing the Changes to the On-duty Definition. Advocates *et al.,* CVSA, and some other commenters opposed the proposed change, primarily because the rule did not specify a limit (such as two or three hours) for the amount of time a driver could rest in a parked CMV. Commenters expressed concern that drivers could ''rest'' in the passenger seat for 10 hours to re-qualify without the benefits of truly restorative rest. In addition, they stated that the rule change is complicated, would make enforcement more difficult, and could lead to logbook falsification. One commenter warned that the exclusion from on-duty time might be used by some drivers for time spent waiting for loading or unloading, which may not provide a real opportunity for rest. CVSA added that the provision cannot be justified without further studies and data collection. A carrier claimed that the change in the definition would expand FMCSA' s authority beyond professional drivers and include driver-qualified dock laborers as well, which would encroach upon Department of Labor authority and result in confusion over compliance. Advocates *et al.* suggested the need for a clarification that drivers cannot use vehicles other than the CMV they are operating for these purposes.

FMCSA Response. FMCSA disagrees that the rule should include a time limit in a parked CMV. Under the previous definition, a driver could be forced to spend time up to the 10-hour break out of the cab even if there were no safe place to do so or no shelter or facilities. It is surely better that the driver can rest in the cab in these circumstances. With the 14-hour limit, it is unlikely that either the carrier or driver will want the driver to spend extended periods off duty in a parked truck during the duty day because all of the time counts against the 14-hour period. Drivers are unlikely to tolerate 10 hours at a stretch off-duty without a sleeper berth or provision of a place to sleep; any carrier compelling drivers to sleep in the cab for 10 hours may have trouble retaining its drivers.

The rule change is not complicated; it simply defines when a driver may log certain time as off duty rather than on duty, not driving. The change seems unlikely to lead to any more logbook falsification than already exists. The change in the definition does not alter FMCSA's authority. If a dock worker also drives a CMV in interstate commerce, he is subject to FMCSA rules when driving the vehicle and his other work is included in his on-duty not driving time and counted against his weekly limits.

Other Comments on the On-Duty Definition. Two carriers asked why the two hours in the passenger seat must be immediately before or after the eight-hour period. One commenter suggested that the provision could increase CMV idling time if drivers who formerly rested outside their vehicles will now take ''off-duty'' time in a parked, but idling, CMV. Another carrier pointed out that redefining an activity as off-duty should not change the rule's health benefits.

Although CVSA did not support the change in the definition of on-duty time, it believed EOBRs will help compliance and enforcement efforts if this provision were to be adopted as proposed. In addition, it urged FMCSA to require specified supporting documents to be maintained on a CMV, with access available to roadside enforcement personnel, which would provide a means whereby duty status entries could be verified or refuted.

FMCSA Response. ATA requested the proposed re-definition of on-duty time in September 2005 to allow a team driver to log off duty up to 2 hours riding in the passenger seat immediately before or after the 8-hour sleeper berth period. Many drivers told ATA and repeated in the listening sessions and in docket comments that they take 10 consecutive hours off duty in the sleeper berth to simplify their recordkeeping. This rule allows drivers to take 8 consecutive hours in the sleeper berth as required by the current rule, and to take an additional 2 hours in the passenger seat when the vehicle is moving, without artificially confining them to the sleeper berth for the entire 10-hour period.

FMCSA also proposed excluding from the definition of ''on duty,'' time spent resting in or on a parked CMV. Drivers in the past have noted that the current definition makes it difficult for drivers of CMVs without sleeper berths (known as day cabs) to rest because they were considered to be on duty if they were in a parked truck. In many cases, the safest, most comfortable, and often the only place for such a driver to rest during a duty tour will be in the parked truck. This change to the on-duty definition to allow drivers resting in or on a parked vehicle may lead to more idling, but if the alternative is that a driver has to stand outside, without shelter, in bad weather or in an unsafe location, more idling is the lesser of the two evils. In any case, the proliferation of State and local anti-idling laws makes it questionable whether this amendment will increase idling time. The changes to the definition were not considered in evaluating the health benefits of the rule; at this time, there is no obvious way to evaluate the health effects of such a small change. The issue of supporting documents is beyond the scope of this rulemaking.

K. Penalties

Comments on the Penalty Provision. Fewer than 100 commenters discussed the proposal to consider driving (or allowing a driver to drive) 3 or more hours beyond the driving-time limit to be an egregious violation and subject to the maximum civil penalties. Advocates *et al.* argued that the maximum penalties should be triggered by violations that exceed 2, rather than 3, hours over the daily and weekly driving limits. Another advocacy group argued that because the Agency devoted little attention to the issue in both the NPRM and the RIA, it is unclear why FMCSA considers a violation of 3 or more hours to be egregious whereas a violation for anything less is not. This commenter asserted that without more explanation, the selection of a 3-hour ''trigger'' for maximum penalty eligibility appears entirely arbitrary.

Carriers and drivers did not generally oppose the imposition of maximum penalties for egregious violations, but commented on the scope and applicability of such a provision. One carrier commented that the fact that the imposition of penalties would not be automatic is critically important for the fair administration of this provision. A driver similarly commented that there are situations caused by crashes, traffic congestion, or weather where additional driving time would minimize the possibility of an unsafe condition.

Regarding applicability, one carrier argued that penalties should not apply to carriers unless there is proof that the carrier is complicit in the violation. A driver argued that the provision making both driver and companies responsible for violations is good because too often the carrier causes the driver to push his limits past good safety practices. Another carrier argued that shippers and receivers should be accountable for their actions in instances where shippers or consignees force carriers/drivers to leave shipper premises, even though the driver is over his/her hours. The carrier argued that because the unpredictable load and/or unload times are difficult to plan, such a situation is often out of its control. For similar reasons, a driver argued that duty time violations that occur while getting to a safe place to park (if the driver still has driving time) should not be considered violations. One carrier argued that it does not believe that an egregious violation concept similar to that proposed should apply to other provisions (*e.g.,* duty time, driving window, weekly limits, and restart).

FMCSA Response. The selection of 3 hours as the threshold for an egregious violation was intended to acknowledge the rapid increase in the risk of fatigue-related crashes as work and driving hours increase, and the consequent seriousness of the violation. While opinions may differ about the point at which a violation should be treated as egregious, the Agency made a reasonable policy choice that reserves the maximum penalties for violations that are unequivocally serious.

FMCSA agrees that it is important not to impose the maximum penalty automatically, and to take into account special circumstances. It disagrees, however, that carriers should not be subject to such penalties unless there is proof of their complicity. Under 49 CFR 390.11, motor carriers have long been required to ensure that their drivers comply with the FMCSRs. Carriers are responsible for scheduling and for oversight of drivers' HOS compliance. That includes scheduling runs that will not result in egregious driving-time violations and penalizing drivers who commit such violations despite company policy.

FMCSA does not have the authority to act against shippers and receivers, although it recognizes that the practices of and pressures upon shippers and receivers often contribute to driver violations of the HOS limits. Regardless, it is still the responsibility of the driver and the carrier to stay within the limits. It is difficult to see how a driver who has reached his driving limit when he arrives at a receiver's or shipper's facility would, if forced to leave after loading or unloading, need to drive three hours more before stopping, which could trigger the maximum potential penalty. FMCSA did not propose to apply the provision to any requirement other than driving time.

Other Comments on Penalties. Another commenter asserted that FMCSA's operating statute does not authorize it to regulate the hours of service of self-employed truckers or instructors who are not employees of a motor carrier.

FMCSA Response. Contrary to this assertion, the Motor Carrier Safety Act of 1984 gives FMCSA broad authority over both an ''employee''—defined as ''an operator of a commercial motor vehicle (including an independent contractor when operating a commercial motor vehicle)''—and an ''employer''—defined as ''a person engaged in a business affecting interstate commerce that owns or leases a commercial motor vehicle in connection with that business, or assigns an employee to operate it'' (49 U.S.C. 31132(2) and (3), respectively). An owner-operator could be either an ''employee'' or an ''employer'' and in both cases would be subject to FMCSA's jurisdiction.

L. Compliance Dates

Comments. Commenters suggested compliance dates of 6 to 18 months from the date of publication. The Ohio Public Utilities Commission supported 6 months and stated that inspectors would require substantial retraining and that software modifications would be necessary. It also suggested that FMCSA should provide States with the training and software updates at least 3 months prior to the rule's effective date to allow sufficient time to test the software and complete training.

Three carriers and a shippers' association argued that a compliance date should be no sooner than 1 year after publication because that much time would be necessary to train drivers and reprogram electronic log software. One carrier commented that, given the timing of the implementation of the EOBR regulations, it appears likely that programming changes necessary for HOS compliance will overlap and be significantly impacted by the necessary programming and installation of new EOBR-compliant hardware. A shippers' association commented that companies would need a year to transition to a 10-hour driving limit because they would be required to make extensive operational changes and acquire additional drivers and equipment, to adjust to the more restrictive requirements. Schneider National, which suggested a lead time of at least 18 months, stated that time would also be needed to test updated systems. It commented that training curriculum would need to be developed, contracts would have to be re-negotiated, and lanes would need to be re-engineered to ensure compliance. XATA Corporation, an EOBR developer, argued that FMCSA would need to allow between 4 and 6 months for software/hardware development time, between 4 and 6 months testing, and between 4 and 6 months certifying and validating for deployment.

FMCSA Response. The compliance date, July 1, 2013, is the date on which motor carriers of property and drivers must begin to comply with specified provisions of this rule. Because this final rule is more stringent than the previous rule, drivers and motor carriers of property may comply with its provisions immediately if they wish, but they are not required to do so until the compliance date.

Generally, when implementing safety rules, the Agency prefers to set shorter compliance dates. However, in this case, the Agency recognizes, as many commenters pointed out, that industry and law enforcement may need extra time to train personnel and to adjust schedules and automated systems. With the extended compliance date provided for relevant provisions of this rule, affected entities will have nearly 18 months in which to prepare for these changes. The motor carrier and associated industries and the law enforcement community are dynamic sectors; they have been able to adjust successfully to previous regulatory changes within shorter implementation periods. Based on the comments received to this rule and its experience with the industry and the law enforcement community, FMCSA is confident that an implementation date of July 1, 2013, is sufficient for affected entities to be able to adjust to this rule's requirements.

M. Other Comments

Comments on Complexity. Commenters said that the proposed rule was too complicated for the average truck driver and would make compliance and enforcement by carriers and law enforcement much more difficult. The Pennsylvania Motor Truck Association said the complexity of the NPRM would discourage enforcement personnel from fully enforcing it. OOIDA said that the proposed rule would lead to inadvertent logging errors by drivers and enforcement errors by enforcement personnel.

Advocates *et al.* said that claims that the proposed rule would make the HOS rule more complex to operate under or enforce were misguided. They said that the proposed rule contains ''simple, reasonable, common sense ideas'' that are not too complicated to understand. They also suggested that if the complexity of the HOS rules is a concern, then the 34-hour restart provision should be eliminated altogether. They added that FMCSA's companion proposal to require EOBRs would help simplify record-keeping and enforcement of the HOS rules.

FMCSA Response. FMCSA has simplified the final rule (*e.g.,* by eliminating the 13-hour provision and the two 16-hour periods). It should be noted, however, that before the NPRM was issued the Agency had, in fact, tested the proposed rule with a panel of its own inspectors, some of whom are former drivers or carrier employees responsible for safety. These inspectors were able to grasp the rule very quickly, and most thought the industry would adapt equally rapidly.

Comments on Flexibility. A substantial number of commenters complained that the proposed rule (like the 2003 rule) did not provide drivers with the ability to rest when they need to. Commenters made this point particularly in the context of the duty period, but also raised it in relation to breaks, the restart, and sleeper berth periods. Many of the commenters stated that when they asked FMCSA for flexibility at the public listening sessions in 2010, what they meant was the flexibility provided by the pre-2003 rule, where off-duty time stopped the clock and did not count against daily limits.

FMCSA Response. FMCSA has provided some flexibility in the final rule, but has no intention of returning to the pre-2003 standard. Under the rules the drivers are seeking, they could be on duty and drive well past 14 hours after they came on duty, when studies show that fatigue can become extreme. Drivers under the pre-2003 rule could change their sleeping time by several hours from day to day, disrupting their circadian clocks and further adding to their fatigue.

Comments on the Oilfield Exemption. FMCSA proposed to revise the oilfield operations exception (§ 395.1(d)(2)) to clarify the language on waiting time and to state that waiting time would not be included in the calculation of the driving window. Some commenters supported the proposed revision. CVSA added that the change would allow enforcement personnel to properly identify when actual waiting time is being used at a natural gas or oil well site. However, it said that enforcement would still be difficult because of the lack of a definition for ''commercial motor vehicles which are specially constructed to service oil wells.'' CVSA asked FMCSA to clarify which specific types of equipment qualify for this exception by adding a definition to § 395.1(d)(2). A transportation consultant said that the oilfield exemption would be helpful in some instances, but it would not help drivers on ''non-commercial driving days.'' She said that limiting the number of hours that a driver can work on such days ''just doesn't seem fair and would severely cripple the oilfield industry.''

A carrier opposed the proposed language that would prohibit specially trained drivers of CMVs that are specially constructed to service oil wells from using the exemption for 100 air-mile radius drivers (§ 395.1(e)(1)). The carrier said that its past use of this exemption has not been a safety hazard, and that the proposed prohibition would be an unnecessary burden on the oil and gas industry. This carrier also requested that FMCSA modify the proposed language that specifies how drivers using this exemption should record their duty status. The carrier asked that FMCSA allow the separate ''waiting time'' line to be considered as an ''off duty'' entry without the driver having to make two entries.

Other commenters argued that if drivers in oilfield operations are allowed to turn off the 14-hour clock, all other commercial drivers should also be allowed to do so. Three commenters, including NTSB, opposed the oilfield exemption itself. They argued that drivers in oilfield operations need rest and breaks from work as much as other drivers. NTSB said that such exemptions ''are likely to lead to increased risk for the exempted population and the driving public.'' A driver said that FMCSA should rewrite this provision so that it is clear that a driver cannot extend the 14-hour clock unless he or she has access to a sleeper berth or other sleeping quarters.

FMCSA Response. The Agency did not propose substantial revisions to, or elimination of, the § 395.1(d) oilfield exception. The revisions clarify existing regulatory language regarding the permissible methods of recording ''waiting time.'' They also affirm that ''waiting time'' does extend the 14-hour driving window, as FMCSA has stated in its Web site's Frequently Asked Questions and other public documents since the 14-hour rule was established in 2003 (effective in January 2004).

FMCSA did not propose any revisions to definitions of terms used in the § 395.1(d) exception and cannot go beyond its proposals when publishing this final rule. The terms, such as ''specially constructed to service oil wells,'' have been in place for nearly 50 years and have been clarified in many documents and interpretations during that time.

The Agency believes that the operational flexibility allowed by the § 395.1(d) exception necessitates accurate recordkeeping for enforcement purposes. This is best accomplished through the use of RODS (''logs'') in accordance with § 395.8, or electronic devices compliant with § 395.15. Many drivers would not be eligible to use the 100 air-mile radius exception in § 395.1(e) because their schedules would not meet the conditions of the exception (*e.g.,* returning to the normal work reporting location within 12 hours); therefore, the Agency does not believe that the improved recordkeeping requirement will impose an unnecessary burden.

Comments on State Issues. CVSA, California Trucking Association (CTA), and the Public Utilities Commission of Ohio (PUCO) commented on the impact of the NPRM on Federal and State law enforcement agencies. They expressed concerns about the costs that States would incur to implement the rule. PUCO and NPTC suggested that FMCSA work with State regulators to implement a pilot program to gather information on the proposed rule's effect on safety and feedback on State enforcement and industry compliance challenges. CTA said that the proposed rule would cause enforcement to suffer during the transition period, because enforcement officers would be taken away from their duties for training on the new rules. CVSA said that the proposed rule was confusing and would be more difficult to enforce at the roadside than the current rules, generating a lack of uniformity that would have a negative impact on FMCSA's CSA initiative.

FMCSA Response. As noted above, FMCSA tested the proposed rule on its own inspectors and found that they had no trouble learning the changes quickly. Most thought the industry would adapt equally rapidly. The final rule is less complex, which should further reduce training time. The retention of the previous 11-hour driving-time limit also ensures that drivers will not need to revise their recordkeeping practices on this point. Any rule change requires some re-education, but that is not a reason to forgo needed changes.

Comments on Fatigue Risk-Management Programs. ATA said that rather than implement the proposed rule, FMCSA should focus its expertise and resources on sleep-disorder issues, including training and screening, and promote (but not mandate) the use of fatigue risk-management programs as are promoted in other modes. CVSA also agreed that FMCSA should facilitate the implementation of fatigue management programs and driver health and wellness programs in the industry. Dart Transit Company said that FMCSA has failed to reasonably recognize legitimate fatigue management proposals, as demonstrated by its denial of the company's proposal in early 2010.

FMCSA Response. The Agency continues to consider the role of sleep disorders among CMV drivers, but the issue is beyond the scope of this rulemaking. FMCSA understands that fatigue management programs may be helpful, but given the large number of active carriers, it is hard to imagine how such programs could be monitored by the Agency or enforced at roadside. Inspectors would have no way of determining whether the carrier had a plan or, if so, was operating in compliance with it. Other modes may promote their use, but only the Federal Aviation Administration (FAA) has proposed allowing these programs to substitute for some or all of the flight and duty time limits and then only with FAA approval and oversight of the specific plan. With the very limited number of air carriers and their highly computerized scheduling systems, FAA inspectors would be able to monitor compliance in a way that is simply not feasible in trucking.

Comments on Consistency with Executive Order 13563. The U.S. Chamber of Commerce cited Executive Order 13563, ''Improving Regulation and Regulatory Review,'' which President Obama issued in January 2011. The Chamber said that the proposed rule is in ''direct contradiction'' to the Executive Order and that the rule would be a model of the type of regulation that ''actually produces lower safety standards while simultaneously hurting business productivity in the domestic and global supply chain.'' The National Turkey Federation requested that FMCSA carefully review the proposed rule in accordance with this Executive Order.

FMCSA Response. The final rule is consistent with Executive Order 13563. The rule will reduce fatigue and improve driver health, while having relatively small impacts on business productivity. As discussed at the beginning of this section, the claims of severe impacts made by some commenters were not supported by facts. ATA's own economic consultant stated that the Agency had overstated the use of certain rule provisions, which led to an overstatement of the costs. (See Section IV.''Discussion of All Comments'' B. ''Economic Impacts'' and Section VI. ''Required Analyses'' A. ''Executive Order 12866 and Executive Order 13563'' for discussions of Edgeworth.) In fact, Executive Order 12866, with its directive to use ''the least burdensome tools for achieving regulatory ends,'' thus reinforcing the statutory mandate to consider the ''cost and benefits'' of proposed rules [49 U.S.C. 31136(c)(2)(A) and 31502(d)], was a major factor in FMCSA's decision not to adopt the 10-hour driving limit identified in the NPRM as the Agency's preferred option.

Comments on Motor Carrier Safety Advisory Committee (MCSAC). ATA said that MCSAC has recommended that FMCSA conduct effectiveness reviews of a number of regulations, including Part 395: Hours of Service of Drivers. ATA called it ''regrettable'' that FMCSA did not conduct an effectiveness review before issuing a proposed rule. According to ATA, the review could have revealed whether changes are necessary and—if so—to which provisions of the rule. Further, it would have helped to provide meaningful justification of the changes that could be used in the Agency's regulatory impact analysis.

FMCSA Response. As ATA is aware, the schedule for this rulemaking is constrained by legal agreements. The rulemaking could not be delayed for yet another review that would simply repeat the same research that the Agency had conducted and continues to conduct on issues related to HOS.

Comments on the Baseline for the Rulemaking. ATA and many industry commenters argued, either explicitly or implicitly, that FMCSA had to prove that the 2003 rule was increasing the risk of crashes before a change would be justified. Advocates *et al.,* in contrast, stated that the 11th hour of driving and the 34-hour restart had never been adequately supported by evidence. They stated that unless the Agency can demonstrate that 2003 changes would improve safety and not adversely affect driver health, the 2003 provisions cannot stand. The baseline for the rulemaking, in their argument, should be the pre-2003 10-hour driving limit and no restart.

FMCSA Response. Arguments about what the Agency should have done in 2003 have been overtaken by time and events. The 2003 rule was replaced by notice and comment rulemaking in 2005. In 2007, the DC Circuit vacated two requirements of that rule because of the Agency's failure, first, to provide an opportunity for comment on one part of the methodology of its driver fatigue model and, second, to explain another part of that methodology. *OOIDA* v. *FMCSA,* 494 F.3d 188 (DC Cir. 2007). FMCSA addressed both of those deficiencies in its 2007 interim final rule (IFR) (72 FR 71247, December 17, 2007) and adopted the IFR as final in 2008 (73 FR 69567, November 19, 2008). In 2009, Advocates, Public Citizen, and others petitioned the DC Circuit for review of that final rule, but the parties have agreed to hold the litigation in abeyance while FMCSA completes this rulemaking. The opposing views of the motor carrier industry and various safety groups, repeatedly expressed during this litigation, are opinions; no court has ruled on the merits of an 11-hour driving limit or a 34-hour restart. Both of those provisions, however, have governed motor carrier operations since the start of 2004. The proper baseline against which to evaluate this final rule is therefore the rule currently in effect. The Agency's obligation under the Administrative Procedure Act is to explain reasonably and persuasively why it has changed the rules in effect for the last 7 years. FMCSA believes that this rule does precisely that.

Comments on One Size Fits All. Many commenters criticized the proposed rule for using a ''one-size-fits-all'' approach to regulating driver hours of service. In general, they said that the proposed rule is more appropriate for over-the-road trucking than for other types of operations. Commenters supported exemptions or separate rules for the following types of drivers or carriers. In some cases, such exemptions are already in place; others would be new:

- Construction companies.
- Transportation construction industry.
- Short-haul operations.
- Solid waste and recycling collection trucks.

• Equipment dealers providing parts, repairs, and service of planting and harvesting equipment.
• Propane deliveries within a 100-air-mile radius.
• Carriers hauling Department of Defense shipments of arms, ammunition, explosives, and other sensitive or classified cargo.
• Experienced drivers with few or no HOS violations.
• Drivers of support vehicles for firefighting helicopters.
• LTL drivers.
• Tow truck drivers responding to police-generated calls.
• ''On-call'' individuals responding to no-heat, crashes, and other situations that could potentially cause harm to person or property.
• Railroad employees for whom driving a CMV is incidental to their main responsibilities.

The Association of General Contractors (AGC) of America and a carrier wrote in support of the existing provision that allows construction drivers to reset their on-duty clocks after an off-duty period of at least 24 consecutive hours. However, AGC recommended that the air-mile radius coverage be expanded from 50 to 100 miles and that the time drivers are in line waiting to load materials or to dispense materials not be included in the calculation of the driving window. Agricultural Education Group defended the exemption for operators of vehicles transporting agricultural commodities and farm supplies.

One carrier opposed all HOS exemptions or special provisions, claiming that they are politically motivated and do not promote highway safety. Another carrier objected to HOS rules being different for property carriers and for passenger carriers. In addition, the carrier argued in favor of having the same HOS rules for all drivers of commercial vehicles, not just holders of CDLs.

FMCSA Response. As FMCSA stated in the NPRM, the HOS rules are not one-size-fits-all. There are multiple exemptions and exceptions, some statutory, some regulatory (many cited by the commenters themselves). This final rule does not change existing regulatory exemptions or exceptions, and it cannot change statutory exemptions. On the other hand, the Agency's unfavorable experience with segment-specific HOS proposals does not encourage further action along those lines. In the 2000 NPRM, the Agency proposed different rules for different operational segments. That proposal was almost universally criticized. It was considered too complicated and too difficult given the number of carriers whose operations covered multiple segments and whose drivers may shift from one segment to another from day-to-day.

N. Beyond the Scope

A number of commenters raised issues that were not addressed in the NPRM. Commenters noted the lack of parking areas for trucks. They complained about the practices of shippers and receivers that require the drivers to wait for long hours to load or unload. They stated that shippers press them to violate the rules to meet schedules that the shippers impose. Commenters objected to EOBRs and anti-idling laws. They also stated that other drivers cause most crashes, that traffic laws discriminate against trucks, and that enforcement, not more regulation, is the solution. Several commenters, including ATA, stated that FMCSA should act on recommendations of the Medical Review Board rather than revise the HOS rules. The Expedite Alliance of North America, the National Association of Small Trucking Companies, and Air & Expedited Motor Carrier Association jointly said that both the current and proposed HOS rules lack any real effort to address and monitor fatigue rather than to monitor and restrict hours of service based upon on-duty and driving time. They stated that modern science has developed a variety of cost-effective measures for measuring driver alertness, biorhythms, and fatigue. They urged FMCSA to commit to a ''third millennium'' method for measuring actual fatigue.

FMCSA Response. These issues are beyond the scope of this rulemaking and, in many cases, are beyond FMCSA's statutory authority.

V. Section-by-Section Analysis

In part 385, Appendix B (explanation of safety rating process) is revised to update references to part 395. Revised references are added for paragraphs in § 395.3. References to § 395.3(c)(1) and (2) are deleted because a violation of the minimum restart period will constitute, and be cited as, a violation of the 60- or 70-hour rule. Providing separate violations for elements of the rule will allow FMCSA to determine what parts of the rule have been violated. Under the current method of citing violations, a driver who drives for 17 hours straight cannot be distinguished from the driver who drives 11 hours, takes a 9.5 hour break, then drives another 6 hours. Both are cited for violating the 11-hour driving rule.

In part 386, Appendix B, (penalty schedule; violations and maximum civil penalties) paragraph (a) is revised to add a new paragraph (6) to state that any violation of the driving-time limit that is 3 or more hours above the driving limit could be considered an egregious violation that could trigger imposition of the maximum penalty.

Section 390.23(c) (relief from regulations) is revised to reference § 395.3 on the restart rather than to repeat the language on the restart.

In § 395.1, paragraph (b) (adverse driving conditions) is revised to remove paragraphs (1)(i)–(iv) and to clarify that drivers are allowed to drive no more than 2 hours above the driving limits set in §§ 395.3 and 395.5. In § 395.1, paragraph (d)(2) (oilfield operations) is revised to clarify the language on waiting time and to state that waiting time is not included in the calculation of the 14 consecutive-hour period.

In § 395.1, paragraph (e) (short-haul operations), paragraph (e)(1)(iv)(A) is revised to reference § 395.3. Paragraph (e)(2) is revised to clarify that it exempts drivers from § 395.3(a)(2) (duty time). This approach allows paragraph (e)(2) to focus on only those rules that are different for drivers using the exemption rather than repeating all of the provisions of § 395.3.

Section 395.1(g) (sleeper berths) is revised to change the driving time to a reference to § 395.3 in § 395.1 (g)(1)(i)(B). It is also revised to add the provision (to paragraph (g)(1)(ii)(C)) that a team driver may log as off duty up to 2 hours in the passenger seat of a moving vehicle immediately before or after an 8-hour period in the sleeper berth.

The previous language of § 395.1(q) is removed and new text is added as paragraph (q). Paragraph (q), a statutory exemption for certain transporters of grapes, expired on September 30, 2009. See Sec. 4146 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. 109–59, 119 Stat. 1144, 1749, August 10, 2005. New paragraph (q) sets forth rules specifically applicable to drivers of CMVs transporting Division 1.1, 1.2 or 1.3 explosives. These drivers will be exempt from the requirement that the half-hour break must be off duty. They will be allowed to log a half hour or more of time spent attending the CMV, but performing no other work, as their break. They will have to annotate their record of duty status to indicate when the break was taken.

In § 395.2, the definition of ''on-duty time'' is revised to allow a team driver to log as off duty up to 2 hours spent in the passenger seat either immediately before or after the 8-hour period in the sleeper berth. In addition, FMCSA is

excluding from the definition of ''on duty,'' time spent resting in or on a parked CMV except as provided in § 397.5 ''attendance and surveillance of motor vehicles'' by CMV drivers transporting Division 1.1, 1.2, and 1.3 explosives.

Section 395.3 is revised to place the individual requirements in separate paragraphs so that FMCSA will be able to cite drivers for violations of specific elements. Under the current rule, drivers are cited only for violations of driving time, on-duty time, and the weekly limits. The rule will make it possible to cite drivers for violations of the daily off-duty break, the restart, the 2-night provision, and the 168-hour provision as well as driving time, weekly hours, and on-duty time. This approach will provide useful information about the types of violations being committed. The revised section includes the provisions that apply through June 30, 2013, and the provisions adopted today, which will apply after that date.

It should be noted that, although § 395.3 is being restructured in the form proposed in the NPRM, the 11-hour driving limit in § 395.3(a)(3) is not a newly adopted provision, but simply a ministerial rearrangement of the 11-hour limit in the previous § 395.3(a)(1).

VI. Required Analyses

A. Executive Order 12866 and Executive Order 13563

Under Executive Order (E.O.) 12866 (58 FR 51735, October 4, 1993) as supplemented by E.O. 13563 (76 FR 3821, January 18, 2011), FMCSA must determine whether a regulatory action is ''significant'' and, therefore, subject to Office of Management and Budget (OMB) review and the requirements of the E.O. The E.O. defines ''significant regulatory action'' as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency.

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof.

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the E.O.

Under the E.O., agencies must estimate the costs and benefits of potential rules; for rules that may be considered economically significant ($100 million or more in costs and benefits), agencies must also evaluate options.

FMCSA developed a Regulatory Impact Analysis (RIA) for the proposed rule (available in the docket) and accepted comments on it. This section first summarizes the comments and responds to them, then presents the revised results of the RIA for the final rule.

Edgeworth Analysis

Comments and Responses to the Edgeworth Analysis. Most commenters on the RIA were trade associations and large carriers. Nineteen commenters cited or submitted the study conducted for ATA by Edgeworth Economics. Besides that critique, the major issues raised were the following:

- A perceived failure to analyze supply chain impacts.
- A failure to account for impacts on LTL networks.
- The estimates of training costs for drivers and inspectors.

The Edgeworth study made the following points, cited by commenters:

- FMCSA's field study data overstate the use of long hours. Industry data from large carriers put the use of the 11th hour at 10.7 to 10.8 percent, not 21 percent.
- The RIA assumes that drivers in the field study who were out of compliance would comply with the new rule.
- The RIA overstates the number of drivers who maximize hours. The RIA assumes that a driver who uses part of the 11th or 14th hour uses all it. This overstates costs and benefits.
- The change in methodology (no longer using the logistics model) reduced the estimate of productivity losses.
- The RIA assumes that each hour of driving lost can be seamlessly shifted to another day or driver, rather than modeling the impact of shifting hours as in previous RIAs.
- The RIA assumes that drivers in the moderate and high categories of work intensity never use the restart. The field study indicated that 84 percent of drivers used the restart, 85 percent when they had worked less than 65 hours in the previous week. The RIA understates the impact of the restart change.
- The RIA overstates fatigue by using data from FMCSA's 2006 Large Truck Crash Causation Study (LTCCS), which were collected prior to the 2003 rule; the data should have been adjusted for fatigue-reduction produced by the 2003 rule. The 13 percent fatigue figure was for ''associated factor'' not for the critical event. FMCSA also did not adjust for over-sampling of single-vehicle crashes. The RIA should have used 7 percent as the central estimate of crashes associated with fatigue.
- The RIA assumes that the risk of a crash is the same during a non-driving hour as during a driving hour and rounds up any reductions in work time to the whole hour. These two errors inflate benefits by $200 million.
- The RIA uses old crash data, rather than new data, showing 34 percent fewer crashes. Using the older data thus overstates the number of crashes, and therefore overstates benefits.
- The RIA overstates net benefits by $700 million; the rule would have a net cost of $320 million, excluding health benefits. If the health benefits are included, the rule would still have a net cost of $20 million.

FMCSA Response. Edgeworth, in criticizing FMCSA's use of the Field Survey data, stated that ''It is reasonable to consider that carriers targeted for review may use their drivers more intensely and may be more frequently up against current driving limits, if not over those limits.''

If a broad source of data that included information on weekly work, daily work, and daily driving for the same carriers and drivers was available, the Agency would have used it. The allegedly superior sources pointed out by Edgeworth, however, are fragmentary and partial. The field study, while not without its problems, covered a substantial number of carriers of different sizes and types. It could be that this analysis has overstated the frequency of the use of the 11th hour; if so, that overstatement would affect both costs and benefits in roughly equal measure, and should not change their relative relationship. Hence, it would only mean that FMCSA is being conservative, *i.e.,* that the Agency is less likely to have understated the impacts on the industry of the options that would have limited driving time.

Edgeworth also stated that FMCSA includes ''4.0 percent of tours that exceeded the current legal limit of 11 hours. FMCSA assumes that all of these trips would become compliant under the 10-hour restriction in Option 2. FMCSA offers no explanation for its assumption that drivers currently out of compliance with HOS rules would become compliant under the new rule.''

As a preliminary matter, OMB requires that agencies estimate costs and benefits at full compliance. FMCSA did, in fact, explicitly discuss (in Section 1.3

of the RIA) why we assumed that the rule's limits would be observed by drivers who might currently be out of compliance: again, to avoid the appearance of understating the impacts of its rule by assuming that drivers would not comply with it. Certainly, drivers who currently exceed 11 hours would be unlikely to choose to drive less than 10 hours under a rule that limited driving to 10 hours, so their existence suggests a preference for long driving days; it would be unreasonable to assume they did not exist. Even if they are not complying with the existing driving limit, they could be influenced by it. A lower limit might cause them to reduce their driving hours to an extent so as not to be too far from the legal limit. To the extent that FMCSA overstated the effects of some options by treating current violators of the 11-hour limit as though they will comply with a tighter limit, the Agency is overstating both costs and benefits of its options.

Edgeworth also asserted that FMCSA has overstated the impacts of its options through its use of the Field Survey data, stating ''In its calculations of both costs and benefits, FMCSA assumes that one full hour of driving time would be affected under Option 2 for the share of drivers who are recorded as having used the 11th hour in the field survey. Similarly, FMCSA assumes that one full hour of work time would be affected for the share of drivers that are recorded as having used the 14th hour. Thus, FMCSA has overstated the number of affected hours and, as a result, overstated both the costs and benefits of the proposed rule.''

First, FMCSA explicitly does not assume that one full hour of work time would always be affected for the share of drivers who are recorded as having used the 14th hour. In the RIA for the NPRM, FMCSA stated that only part of the 14th hour is affected by a 13-hour limit on on-duty time: none of that hour for the moderate drivers, half of it for the high intensity drivers, three quarters of it for the very high intensity drivers, and all of it only for the extreme drivers. The analysis then assumes that most of these drivers will be able to shift some of the lost work time to another day, leading to an even lower impact.

Second, though not exactly the same procedure is followed for the 11th hour (because breaks will not necessarily affect the maximum possible hours of driving in a day), industry comments make clear that for many drivers the reason that they have stopped short of the 11th hour is that they do not schedule a trip for more than 10 hours and use the 11th hour to deal with unplanned events (crashes, weather delays, unexpected congestion). Thus, drivers have chosen to leave a cushion between their driving and the limit (stopping at a convenient point to avoid exceeding the limit). To the extent that this takes place, and the drivers chose to use the same cushion under Option 2 (10 hours), dropping the driving limit by 1 hour would affect driving on that day by the full 1 hour. For example, drivers who would stop at 10.5 or 10.75 hours under an 11-hour limit could be expected to stop at 9.5 or 9.75 hours under a 10-hour limit to maintain the same cushion. Finally, to the extent that FMCSA has overstated the effects of the options, the effects would apply to both costs and benefits, that is, both would be lower. The result would be that the actual impacts would be less costly than estimated and that much easier for the industry and the economy to absorb and adjust to, while not changing the relationship of benefits to costs.

Comments and Responses on Impacts of the Proposed Rule on Carrier Operations

Edgeworth asserted that FMCSA's cost analysis is highly inconsistent with its previous RIAs: ''In the 2007 RIA * * * FMCSA tested the current rules against an option which reduced the maximum consecutive driving time to 10 hours and eliminated the restart provision—*i.e.,* a policy similar to FMCSA's Option 2 in the proposed rule. FMCSA estimated that the restrictions would reduce industry productivity by 7.1 percent.''

Edgeworth's assertion that reducing driving time to 10 hours and eliminating the restart position is a policy similar to FMCSA's Option 2 in the proposed rule is incorrect. The option it refers to in the 2007 analysis eliminated the restart, reverting to the old limits of 60/7 or 70/8. Option 2 in the proposed rule allowed a 34-hour restart every single week for the vast majority of drivers and every second week for those driving maximum hours. Comparing the 2007 option with the 2010 option is invalid because the options produce very different effects on productivity. A better comparison is between the option that did nothing but limit driving to 10 hours in the 2007 analysis and FMCSA's current estimate of the impact of a 10-hour driving limit taken by itself. The 2007 analysis estimated the incremental cost of limiting driving hours to 10 at $686 million, or an increase of slightly over 2 percent.

Elimination of the 11th Hour of Driving in Option 2

In addition to Options 1 and 2, we also examined a more restrictive variant of Option 1. That option limited driving to 10 hours in a tour of duty. This more restrictive option was found to provide more benefits than Option 1, but at substantially higher cost. Crash risks were originally found to be reduced by about 0.3 percent relative to Option 1. As discussed in Sections 5.4.3, 5.4.4, 6.4 and Appendix (V), this variant is now estimated to reduce LH [long-haul] crashes by 0.43 percent. This reduction is estimated, using the recent updates to the number of crashes, the damages caused by each crash, and the VSL described above, to be worth $146 million per year.

The projected costs, however, are much higher. They were originally estimated to be $586 million more per year than under Option 1, which has been updated for inflation, industry growth, and industry coverage to $686 million. This estimate was made by finding the average reduction in driver productivity in shifting between a case that assumed the characteristics of Option 1 and a variant that capped driving hours at 10. The average change in productivity, weighting by the fraction of all driving estimated to fall into each operational case, was just over 2.0 percent. (See 2007 Interim Final Rule RIA, pages 69–70, FMCSA–2004–19608–2529.)

The 2010 NPRM analysis presents, in Exhibit C–7, an estimated cost of $680 million, which translates to an increase of slightly less than 2 percent. These values, while not precisely the same, are entirely compatible and do not indicate any material inconsistencies between the complex and detailed approach used in 2007 and the approach FMCSA is currently using (which, as mentioned in Section 3.1 of the RIA, was designed to be simpler and more transparent than the previous analysis, and better able to focus on the particular changes made in this rulemaking). And again, to the extent that there are any differences in estimates of the magnitude of the effects on hours of driving and working, they would affect both costs and benefits in largely equal measure.

Edgeworth also claimed that FMCSA's current approach could understate productivity impacts because it assumes that driving could be seamlessly reassigned to other drivers, and that ''In the previous RIA, FMCSA's carrier logistics model may have accounted for such issues (we are unable to confirm this without access to the detailed workings of the model). However, FMCSA's current methodology clearly does not. For this reason, FMCSA's assumptions may underestimate the productivity impacts of the proposed rule.''

This concern is unwarranted, as demonstrated by the fact that the results generated by the current methodology closely track the results obtained from the 2007 model for the economically significant provision (*i.e.,* the impacts of elimination of the 11th driving hour)

where a direct comparison of the analyses is possible.

Edgeworth then claimed that FMCSA's approach understates the impact of the restart provisions because it assumes they will have no effect on drivers averaging 60 hours per week or fewer. Edgeworth argued that these drivers might occasionally exceed 70 hours and will be affected at those times. Because the restart provisions actually allow a restart every week, though, a driver who occasionally needed to work even as much as 81 hours in a single 7-day period would be able to comply with the rules (working 13.5 hours per day for 5 days, then taking a restart, and working another 13.5 hour day, for a total of 81 hours over that 7 day period). Only drivers who work intensely for 2 or more weeks in a row will be affected. Thus, occasional intense but brief periods of work would still not be affected by the rule. Furthermore, some drivers who occasionally work intensely will have the capacity to redistribute work from more intense weeks to weeks that do not come close to the weekly limits. Edgeworth also pointed to data from the 2007 Field Survey showing that drivers frequently use the restart after weeks in which they work only 65 hours, asserting that these drivers (who fall into the less intense categories) would be affected by the restart provisions. This assertion confused the use of the restart as a bookkeeping convenience with the use of the restart for increasing productivity. Drivers who do not reach their weekly limit do not need the restart to maintain their productivity and will not lose productivity if they cannot use the restart.

Comments and Responses on the Analysis of Fatigue-Reduction Benefits

Turning to the analysis of fatigue-reduction benefits, Edgeworth asserted that FMCSA's use of the estimated percentage of crashes related to fatigue overstates the potential to reduce crashes by reducing fatigue. Edgeworth pointed out that fatigue is, in many cases, only one of a number of associated crash factors, not the single cause of a given crash, and that therefore eliminating fatigue in a crash that had other risk-increasing factors would not be enough to prevent the crash. FMCSA believes, however, that in the absence of truck driver fatigue, the chances of avoiding any given crash (even crashes in which the critical responsibility lies with the driver of the other vehicle) would be much greater. Furthermore, given the difficulty of detecting driver fatigue in the aftermath of a crash, even the careful estimates from the Large Truck Crash Causation Study (LTCCS) could be substantially understated. For these reasons, FMCSA chose to stay with the general approach it used in previous rulemakings, changing only its baseline estimate of the prevalence of fatigue on the basis of LTCCS data.

Edgeworth offered no evidence for its assertion that an accurate estimate of the incremental effects of fatigue could be derived by dividing the number of fatigue-associated crashes by the total number of associated factors.

The moderate benefits that were attributed in two of the options to tightening the daily driving limit, using FMCSA's Trucks Involved in Fatal Accidents (TIFA) analysis, accord well with, or are actually more modest than, the benefits implied by the two most recent studies of the decline of performance over long work days. Blanco and Jovanis (2011) were both conducted under the current HOS rules. The results do not support Edgeworth's contention that fatigue has fallen to the point where it is greatly overstated by FMCSA's use of the TIFA data, nor that reductions in fatigue effects need to be discounted before they are applied to reductions in crashes.

Blanco's study provides clear evidence that there is a statistically significant rise in the risks related to crashes as driving hours increase. A strong trend is seen across all shifts. A somewhat weaker trend, but one that is similar and still significant using a one-tail test (which is the correct statistical approach to use if there are very strong reasons to believe that long hours of driving would not improve performance), is seen even for the smaller set of data that go into the 11th hour.[11] That latter trend shows that risk in the 11th hour is about 36 percent higher than the risk in the first hour (*i.e.,* (0.1379 + 11*0.0052)/0.1379 + 1 * 0.0052) = 1.36). That is actually a stronger effect than would be seen based on the baseline time-on-task function used in the RIA, scaling the fatigue crashes to 13 percent (which is [(1 + 36.1 percent)/(1 + 7.4 percent)] = 1.27). Given that both of these functions are uncertain because they are based on statistical estimation, however, these values are entirely consistent. The results are not, however conclusive on whether the 11th hour is significantly different from the 10th, or on whether increases in risk over the day are more attributable to long hours of driving or long hours in the work shift. The Jovanis (2011) study shows risk increases (not fatigue increases) for the 11th hour of driving in both the TL and LTL segments that are clearly more substantial than the increases estimated and used by FMCSA for the RIA, though it does contain some results that are difficult to interpret.

Edgeworth claimed that the LTCCS overstates the prevalence of fatigue-related crashes because it contains too many single-vehicle crashes. In making this assertion they cite a previous submission to the docket by Knipling. Knipling's submission contended that LTCCS has an overrepresentation of single-vehicle crashes when compared to the proportion of single-vehicle crashes estimated by the National Highway Traffic Safety Administration's (NHTSA) General Estimates System (GES). These comments err in one basic fact, according to Agency analysis of the GES data. The Agency estimates that an average of roughly 20 percent of serious injury and fatal crashes are single-vehicle crashes in the GES for the years in which LTCCS data were collected, not the 15 percent cited in the Knipling submission to the docket. The estimate of the proportion of single-vehicle crashes in GES rises to 26–31 percent, depending on the year chosen, if all crashes—including those that are less severe—are included in the analysis. As Table 1 of the LTCCS Summary tables posted on the Agency's web site shows, single-vehicle crashes were 25 percent of all truck crashes sampled in LTCCS in the raw data. Using the weighted data the percentage increases to 31 percent. Thus the LTCCS data are less biased with regard to sampling single-vehicle truck crashes than the comments claim.

It is not clear whether GES or the LTCCS would have the more accurate estimate of the true single-vehicle crash representation. GES sampling methods were set up to get an accurate assessment of passenger vehicle crashes, not large truck crashes. It could be that the LTCCS, because it was focused exclusively on crashes involving large trucks, derived a more representative distribution of large-truck-involved crashes than that generated by the GES. In addition, LTCCS crash investigators were fairly conservative in coding crash

[11] Tests of statistical significance are used to determine whether a parameter estimate could have taken a value at least as high as it appears to be, simply due to random variability in the data. A standard ''two tail'' test is used if the parameter could be either positive or negative, and takes account of both ''tails'' or extremes of the distribution of a random variable. A ''one-tail'' test is appropriate if there are strong reasons to think that the true value of the parameter cannot have one particular sign—*e.g.,* if the true value cannot be negative. In this case, because there are good reasons to believe that, if time on task has any effect on driving performance that effect is deleterious, a one-tail test is appropriate for assessing whether the time-on-task effect found in the Blanco study is significant.

factors—roughly 12 percent of the crashes in the data were coded with unknown causes. It is reasonable to assume that some of these crashes were fatigue-involved, especially since evidence of fatigue is often difficult to find in the aftermath of a crash.

Finally, the Knipling submission went to great lengths to show the effects that the overrepresentation of single-vehicle crashes would have on the portion of crashes where asleep-at-the-wheel was coded as a factor or critical reason. The Agency, however, did not use asleep-at-the-wheel crashes in its analysis, but instead analyzed crashes where the truck driver was coded as fatigued. This is an important distinction because asleep-at-the-wheel overrepresentation in single-vehicle crashes is significantly higher than fatigue overrepresentation. As a result, overrepresentation of single-vehicle crashes is a less significant problem when looking at fatigue involvement than when one is looking at crashes where the driver actually fell asleep. It is true that asleep-at-the-wheel crashes would be a subset of fatigue-involved crashes, but many fatigue-involved crashes are the result of impairments that fall short of actually falling asleep. If one carries out Knipling's calculations showing the effect of single-vehicle crash overrepresentation on asleep-at-the-wheel representation for fatigue-involved crashes instead, the differences are far smaller. Looking at the single-vehicle involvement rate and multi-vehicle fatigue involvement rate for fatigue, and correcting for the weighting issue using 20 percent single-vehicle involvement from GES compared to 31 percent from LTCCS, a much smaller overestimation is derived. At worst, the LTCCS overweighting of single-vehicle crashes would result in an overestimate of fatigue involvement in the neighborhood of 10–13 percent—*i.e.,* at the worst, the Agency's baseline estimate of 13 percent would be reduced to somewhere between 11 and 12 percent. However, given the variability inherent in any statistical sample or estimate and the fact that LTCCS crash investigators were conservative in coding crash factors, we feel that the estimate from LTCCS is as accurate as any other estimate available, and continue to use it as our baseline.

Edgeworth also claimed that the baseline estimate of 13 percent for fatigue-related crashes is ''substantially higher than any measure previously used by the agency in its analysis of HOS rules or any other publicly-available measure.'' This claim is not correct. For example, the RIA for the 2000 NPRM used a 15 percent estimate and the RIAs for the 2003 and 2007 rules used 15 percent in the sensitivity analyses. In fact, estimates of fatigue-associated crashes run as high as NTSB's 31 percent (though that figure is for truck crashes fatal to the driver) and their observation that ''truck driver fatigue may be a contributing factor in as many as 30 to 40 percent of all heavy truck accidents.'' FMCSA continues to use a range of baseline fatigue estimates, similar to that used in the past, giving a higher weight to the 13 percent estimate because of the care with which the LTCCS analysis was conducted.

On the subject of cumulative fatigue, Edgeworth brought up FMCSA's previous statements that the current rules provide enough time for sleep to allow recovery from cumulative fatigue, and claims that the introduction of a cumulative fatigue function represents a reversal. However, the DC Circuit explicitly faulted FMCSA's previous analyses for excluding the cumulative fatiguing effects of excessive work (as opposed to insufficient time to sleep). FMCSA has since developed and now applies a function relating work hours in the previous week to fatigue levels in the current week, using the LTCCS. This function shows that, for drivers pushing the outer limits of the on-duty hours allowed under current rules, fatigue could still be a serious problem. This problem might not show up in the nationwide data because of other factors (such as the increased rest period between daily shifts) and because maximum weekly hours are not the norm, but that does not mean that safety could not be improved for those drivers who are truly pushing the limits.

Edgeworth pointed out that, in applying the cumulative fatigue function to the regulatory options, FMCSA used a step function that, essentially, rounded reductions in weekly hours up to the nearest hour. This is a fact that FMCSA itself noticed during the comment period and pointed out to ATA/Edgeworth.[12] That approach did overstate estimated benefits somewhat, but this overstatement applied roughly equally to all options. We corrected for this in the regulatory analysis of the final rule, by using a much finer-grained analysis. The corrected analysis shows estimated benefits that are lower by a few percentage points, but does not significantly change the net benefits of Options 2, 3, and 4 relative to each other.

Edgeworth also asserted that FMCSA has ignored the likely interaction between different sources of fatigue (daily driving and weekly work hours), and that reductions in one will be likely to decrease the effectiveness of reductions in the other. This potential issue, however, cuts both ways: for options aimed at cutting work hours and driving hours for the hardest-working drivers, its total effects could well be even greater than its effects on each factor. For example, the limits on the use of the restart will have a disproportionate impact on the 11th hour of driving (because the hardest working drivers can be expected to drive the most hours), and these drivers will often be pushing into the 11th hour in a state of cumulative fatigue.

Edgeworth noted that, in calculating the impact of changes in working hours, the benefits of redistributing hours to other drivers should be based on the value of crash damages per hour on duty, not per hour driving. We acknowledge that there is an inconsistency in this calculation and have corrected it for the final rule. The change is considerably smaller than estimated by Edgeworth. In the existing analysis, the single crash reduction value used to calculate the benefits of redistributing both driving and working hours was part-way between the correct value for driving hours and the correct value for working hours. Changing to a more specific value for each slightly raises the value of reducing the daily driving hours per day while slightly lowering the value of reducing weekly working hours.

Edgeworth then claimed that the reduction in crashes since the crash cost analysis was conducted means that the benefits of reducing crash rates by a given percent has declined. We used the most up-to-date comprehensive assessment of crash costs available. The substantial declines seen in recent years coincided with a sharp drop in the economy, which had a substantial effect on the number of trucks on the road at any time, the miles driven, and the loads moved; the Economic Census Service Sector Survey indicates that there were about 100,000 fewer for-hire trucks on the road in 2009 than in 2007, an 8 percent decline.[13] ATA's complete truckload-sector mileage index indicates that mileage fell roughly 19 percent from 2007 to 2009, using annualized

[12] FMCSA sent this information to ATA in an email titled, ''Supplemental Information on HOS NPRM.'' FMCSA docketed the contents of the attachments with the title ''Response to ATA Request for Further Information on the Cumulative Fatigue Function Used in the Regulatory Evaluation for the 2010 NPRM Proposing Revisions to the Hours of Service Rules,'' January 28, 2011. It is in the docket at FMCSA–2004–19608–6147.

[13] *http://www2.census.gov/services/sas/data/48/2009_NAICS48.pdf.*

numbers. Reduced trucking activity implies reduced costs for any rule that imposes a limit on productivity; it would be invalid to take account of only one side of the equation. Furthermore, the recent recession affected not only truck traffic but also the volume of other vehicles on the road—and with fewer vehicles with which to collide, the crash rate per 100 million miles traveled fell as well. Compounding these effects, if the economic recession caused drivers to work fewer hours, the lower levels of effort by truck drivers could be expected to cut their levels of fatigue at the same time they cut the economic cost of any restrictions. While it would be possible to attempt to estimate the extent to which all of these transient conditions reduced both the benefits and the costs of a given rule, the conclusions would apply only to recessionary periods, which (fortunately) are relatively rare.

Comments and Responses on the Impact of the Proposed Rule on Driver Health

On the subject of the estimated benefits of the proposed rule for driver health, Edgeworth noted that previous RIAs concluded that insufficient evidence existed to support a connection between reduction of maximum work or driving time and health of drivers. While that remains true of many of the health factors discussed in the 2005 rule (exposure to diesel exhaust, noise, and vibration), in recent years the evidence has grown that excessive work and insufficient sleep (which tends to accompany excessive work) are damaging to health. These points are detailed in Chapter 5 and in Appendix B to the RIA. More recent data on driver sleep, collected since the 2003 rules have been in effect, prompted Agency concerns about the baseline average sleep levels experienced by drivers.

Edgeworth then questioned whether increased work is likely to lead to reduced sleep, pointing to the fact that the drivers whose work and sleep patterns were used as the basis for the estimates of the changes in sleep per change in work hours were operating under somewhat different rules. The relationship between additional time working and the way that time cuts into the hours of sleep, though, is a general relationship, and would not be expected to appear only under a particular regulatory regime (especially if many of the drivers were not even pressing hard against the limits in effect at the time). Naturally, there will be some uncertainty in estimating exactly how much average sleep will decline when average work increases, but the risk of overstating the relationship is no greater than the risk of understating it; we believe the Agency's estimate is reasonable.

Edgeworth also pointed to FMCSA's prior statement that ''[t]he Agency has no basis for estimating the extent to which drivers who have an extra hour a day or extra hours per week off duty will use that time to exercise and sleep.'' That statement, however, is strictly true only insofar as both exercise and sleep are considered together, because FMCSA did not search for a relationship between work hours and exercise hours.

The idea put forth by Edgeworth that changes in work hours do not necessarily affect average sleep time is inconsistent with the commonplace observation that workers sleep more on weekends than on week nights as documented in the American Time Use Survey, National Sleep Foundation surveys, and other research.

Finally, Edgeworth also stated that FMCSA should have included the negative effects of excess sleep, but failed to recognize that these negative effects were included as an offset to the benefits of the rule. In both cases, FMCSA is commenting on the difficulty of predicting changes in sleep exactly, but nonetheless uses a consistent methodology in applying the changes in work hours to its health benefits method.

Edgeworth also disputed FMCSA's use of Ferrie's findings of a U-shaped relationship between sleep and mortality, offering several arguments: that the study populations were different, that FMCSA imputed too great a level of precision to the study, and that the very small extra hours of sleep for some driver categories are too small to make any real difference. Though one can raise questions about any particular study population, Ferrie's study is only one of many that find a U-shaped relationship—some stronger, some weaker—between sleep above and below an ideal point (*e.g.,* Grandner & Patel (2009), Cappuccio (2010)). It is true that for some of the driver categories the changes in average sleep are very small—but those are also the categories for which FMCSA finds, and includes, a small negative benefit of restricting hours; leaving them out of the analysis would change the results very little. For the drivers in the more extreme categories, the changes in average sleep are considerably larger. In the real world not every driver will be exactly at the baseline sleep level and will not have exactly the average change in sleep. Given the wide variability in sleep across individuals, many drivers in a category that has (for example) 6.2 hours of sleep on average will actually be sleeping well below 6 hours, and for them the effects of the rule may well be substantial. Although Cappuccio (one of the authors of the study used by FMCSA for its quantitative analysis) raised questions about the way FMCSA applied the Ferrie study (of which he is a co-author) for its quantitative analysis, the lead author of the study, Jane Ferrie, is on record as approving of FMCSA's use, and even considered the Agency's approach conservative in terms of the benefits that could be derived from improved sleep. (See the detailed discussion of Cappuccio's criticism and Ferrie's response below under Comments on Health Benefits.)

Other Comments on the Cost/Benefit Analysis

Comments on Impacts to Shippers, Brokers, or Consumers. Commenters, including ATA, National Association of Manufacturers, the Chamber of Commerce, shipper and trucking associations, and major carriers stated that FMCSA had not addressed the costs of the rule to shippers, brokers, or consumers. They stated that the supply chain would have to be re-engineered. A distributor association estimated costs for changing routes of one carrier at $20 million and cited Kraft Foods as saying that the number of routes that could be covered in one day would drop from 75 percent to 60 percent.

FMCSA Response. The costs of the rule are measured by the cost to the carriers (which, in the case of private carriers, includes shippers because they are the same in that case). We assume that these costs are then shifted, largely, to the direct and indirect users of shipping services: shippers, receivers, and ultimately consumers. We have included costs for reprogramming routes, based on the clearest quantitative estimates provided in past comments in listening sessions; to the extent that the shippers do the work of altering the routes in light of the rule changes, that should reduce the costs to carriers. We have addressed costs to consumers in the RIA. Our cost estimates are for carriers providing the same, or essentially the same, service using more drivers and trucks each with slightly lower average productivity. The costs of changing routes will be mitigated by the time allowed for compliance. In a dynamic economy frequent changes in shipping and routing are necessary; any changes necessitated by the new rules can be phased in whenever they are most convenient. FMCSA believes that the cost factors provided by the commenters are not adequately justified, and they

are exaggerated compared to the averages.

Comments on Impacts on LTL Carriers. ATA stated that the analysis did not account for impacts on LTL carriers; it estimated the productivity losses at 5 to 9 percent. Con-way said the rule would require network changes.

FMCSA Response. The analysis of the impact of the different options did consider impacts on LTL carriers, as they were included in both the population of drivers and power units, and in a survey that was the basis for the estimates of the distribution of work effort. Though there might be some LTL routes that could lose this much productivity if driving were restricted to 10 hours per day, it is highly unlikely that the industry-wide average impact would be that high. Only a driver who drove 11 hours every day, and who was required to cut back to 10 hours, would lose as much as 9 percent of baseline productivity, and ATA is on record stating that even FMCSA's estimate that the 11th hour is used on only about a fifth of trips is substantially overstated. Any segment that currently requires 10 hours or less, or more than 11 hours, would be unaffected by a change in the daily driving limit, and any driver currently taking a full weekend off would be unaffected by the changes in the restart provisions. It is true, as Con-way stated, that some changes in networks might be necessary, and a cost has been assigned to those changes. It should be noted, however, that Con-way stated that its drivers averaged less than 8 hours of driving a day. In any case, the final rule leaves daily driving hours unchanged.

Comments on Reduction in Productivity. Schneider stated that the rule would reduce its productivity by 4.72 percent. Drivers would get home 25 percent less; the average run would drop from 501.7 miles to 478 miles, which would translate to $3,000 a year decrease in driver pay to offset the loss in productivity. Other carriers stated that those carriers that maximize hours would have an 8 to 10 percent reduction in productivity.

FMCSA Response. FMCSA's estimate of the nationwide productivity impacts is close to an average of 1.2 percent; the Agency assumes there is substantial variability across operations and firms. The estimated reduction in productivity for the carriers allowing or requiring drivers to work the longest hours is quite consistent with our estimates—those working about 80 hours must cut back to something below 70, which is a reduction of more than 12 percent.

Comments on Costs to Short Haul. Three shipper associations stated that FMCSA had ignored the costs to short-haul operations and that its statement that they would not be affected was without foundation, particularly as the provisions limited work time other than driving time.

FMCSA Response. The RIA for the 2003 HOS rules did calculate costs and benefits for short-haul and local drivers, and the analysis for the 2005 HOS rules also looked at how longer driving windows could reduce impacts on that segment. For the final rule, however, FMCSA considers any potential impacts to be small. This conclusion is based largely on the nature of the HOS rule changes considered in this rulemaking, compared to the work patterns identified in previous rulemakings. The 2003 rules increased the daily driving hours from 10 to 11, increased the required off-duty period from 8 to 10 hours, allowed restarting the multi-day count of on-duty hours after a 34-hour period off-duty, and limited driving to a 14-hour window after coming on duty. FMCSA's review of work by short-haul and local drivers, which included quantitative assessments of two driver surveys and discussions with industry sources, concluded that most of the changes in the rules would have essentially no effect on short-haul and local drivers. The ability to work the maximum numbers of hours per week (through the restart) was also considered unlikely to provide benefits to the short-haul and local drivers, because they were judged to work much more moderate and regular hours than longer-haul drivers, often with full weekends off.

The only provision of the 2003 rule found to be likely to impose a significant cost on short-haul and local drivers was the fixed 14-hour limit on the driving window. FMCSA's data on the variability of daily work by short-haul and local drivers, however, found that work in excess of 14 hours was quite rare, even when drivers were permitted to work beyond a 14-hour window. Furthermore, the provisions that allow short-haul and local drivers to exceed the 14-hour driving window once or twice a week should provide enough flexibility to prevent any significant impact on the vast majority of these drivers. Finally, the final rule has dropped the 13-hour limit on daily on-duty hours, further reducing the chances that a short-haul or local driver's operations will be constrained.

Comments on Costs of Training Enforcement Personnel. CVSA and the Oregon Department of Transportation stated that the RIA failed to take into account the cost of training 14,000 enforcement personnel, which they estimated to be between $2,682,680 (8-hour course) and $4,924,020 (12-hour course), not including travel and per diem. According to the commenters, these costs will be an additional burden on State resources. Carriers, ATA, and other trucking associations also stated that the 2-hour estimate for training was too low.

FMCSA Response. The proposed rule has been simplified, and the 11-hour driving limit from the previous rule retained, which should mitigate the length of the training needed to familiarize inspectors and drivers with the new requirements. The Agency considered including these costs, but found that they did not change the total cost of the rule, which is rounded to the nearest $10 million. FMCSA also notes that the lead time provided before the rule takes effect will allow training to be incorporated into other on-going activities. For industry costs, we used the clearest quantitative estimate available from comments at listening sessions.

Comments on Costs and Driver Additions. Advocates *et al.* stated that fatigue-related truck crashes cost between $5.5 and $13 billion annually. They also posited that the current HOS rule eliminated the need to hire 60,000 drivers; the proposed rule would add 44,000 driver jobs to the economy.

FMCSA Response. This estimate is broadly consistent with FMCSA's estimates for fatigue-related crashes, though higher than its estimates for long-haul crashes alone. FMCSA's estimate of the number of new drivers is lower, because it anticipates a small shift from truck to rail, and leaves the daily driving limit at 11 hours.

Comments on Cost Disaggregation. Another advocacy group stated that FMCSA should have disaggregated the costs for each key provision, not just driving time. The group also commented that FMCSA should estimate the effects of changes in congestion.

FMCSA Response. FMCSA analyzed the costs and benefits of the provisions individually, as shown in RIA Appendix C, and summarized in Table 3 of this preamble. FMCSA does not expect any significant net effects on congestion. The requirement for two consecutive nighttime periods off to qualify for a restart, which might be anticipated to shift traffic into more crowded times of day, will affect only one day per week for the fraction of drivers who routinely work all night and routinely work very long hours per week. Any effect on congestion due to these small shifts will be counterbalanced by the small

anticipated shift from truck to rail due to the rule's effect on productivity.

Comments on Safety Benefits. Two trade associations and the Missouri Department of Transportation stated that the Agency has no basis for projecting safety benefits. ATA stated that there were no safety benefits. OOIDA stated that the analysis was flawed because it is based on data collected under the pre-2003 rule.

FMCSA Response. FMCSA has shown that reducing working, and building in breaks in long days, will provide more time to rest and reduce the buildup of fatigue. Because fatigue is known to be an important cause of heavy-vehicle crashes, a regulation that reduces fatigue can be expected to reduce crash risks. Some of the analysis did use data from before 2003 along with more recent data, because the most recent data are not yet extensive enough to form the basis of an entirely new set of analyses. FMCSA has no reason to believe that basic relationships between work and sleep, and between excessive work and fatigue, have changed enough since 2003 to invalidate its analysis using data prior to the current rule change. There is no reason why the use of pre-2003 data to examine time-on-task effects would produce spurious results. Furthermore, the time-on-task function used in the current RIA was incorporated into the RIAs accompanying the 2005 and 2008 rules and was used in those rulemaking actions to evaluate the differences in safety impacts between the various options considered. The use of that function in previous rulemakings was tacitly accepted by all commenters.

On March 17, 2008, ATA submitted comments on FMCSA's December 7, 2007, Interim Final Rule's RIA.[14] ATA commented ''that FMCSA had taken diligent and extraordinary steps to assure the comprehensiveness of the analysis and its parts. This included adequately explaining two critical elements of the model in the RIA accompanying the 2005 rule—the analysis of time-on-task and the analysis of whether the 34-hour restart affects cumulative fatigue.'' FMCSA's 2007 RIA used the same TIFA function to estimate benefits as the RIA for this final rule.

ATA noted in its 2008 comments that ''The regression analysis (model) used by FMCSA to measure and project the effect on the risk of crashes associated with driver fatigue of driver's time on task (TOT) is reasonable and appropriate.'' In addition, a statistician hired by ATA as a consultant to examine the Agency's TIFA-based time on task function submitted the following comment: ''Based on my review of the 2007 RIA and related docket materials as well as the considerations set forth in my September 2007 Declaration, it is my opinion that the form and implementation of FMCSA's revised logistic regression model are reasonable in the circumstances for the purpose for which FMCSA used this calculation in the 2007 RIA'' (Marais). In light of the fact that the function has been used twice in the past, and that even ATA and its consultants have stated that use of this function is appropriate, it seems reasonable for the Agency to have used it again for the December 2010 NPRM and this final rule to estimate safety benefits associated with reducing allowed daily driving.

More recent research has corroborated time-on-task and cumulative fatigue effects for driving occupations. Two new studies sponsored by the Agency and conducted with post-2003 data have found evidence of increasing crash risk or SCEs as driving time increases through the day (Blanco and Jovanis (2011)). In addition, other studies involving transit bus operators have shown evidence that longer weekly work hours are associated with an increase in crash risk for drivers working 45 hours per week or more (Sando (2010a and 2010b)). While these drivers operate in a different setting than over-the-road truck drivers, the fact remains that the increase in risk begins appearing at weekly work-effort levels well within the current and previous HOS rules. Taken together, these studies bolster the Agency's claim that limiting work would reduce crashes related to time on task and cumulative fatigue.

Comments on Health Benefits

Although drivers who work fewer hours than the maximum allowed by the rule will experience only limited health benefits, those who currently work the longest schedules must curtail their weekly work hours—in some cases significantly—and will, therefore have additional time off duty to sleep or exercise, both of which are associated with improved health, lower medical costs and, ultimately, with longer life expectancy.

Comments on the Use of the Ferrie Study. ATA submitted an opinion from Francesco Cappuccio that disputed the use of studies cited by FMCSA in the 2010 NPRM to estimate changes in mortality based on sleep. His points were the following:

- The studies used are based on epidemiological data, which do not imply a causal relationship.
- Sleep duration is self-reported and does not differentiate between naps and longer daily sleep. The studies also do not exclude people with sleep disorders.
- The description of a so-called U-shaped relationship between duration of sleep and risk of death is currently insufficient to justify an interpretation of a 'graded and continuous' relationship between exposure (sleep duration) and outcome (death). There could be threshold effects.
- The mapping of sleep time is not supported by data.
- The RIA did not consider the impact of more than 8 hours of sleep.
- Sleep time between 6 and 8 hours is not associated with harm. Most drivers appear to fall into this range.
- There is no evidence that increasing sleep by 5.5 minutes per day would produce health benefits.
- FMCSA assumes that, if given extra time off, drivers would use it to sleep. This is not supported by data.

Cappuccio concluded:

> In these studies reduced weekly work hours led to an increase in sleep time because other approaches were taken at the same time as the reduction in work hours to encourage and facilitate the workers to sleep longer and to recover better from previous shifts. These measures include important components based on well-established principles of sleep medicine and circadian biology: Limit consecutive night shifts to reduce the build-up of chronic partial sleep deprivation due to the limited sleep between night shifts; limit shift duration to minimize acute sleep deprivation; design the sequence of shifts to abolish 'slam shifts'; instruct workers and facilitate naps; and also reduce the proportion of long work weeks. These approaches are effective on performance and reduce errors. No evidence of efficacy on health outcomes is yet available.

Jane Ferrie, the lead author of the study in question on which Cappuccio collaborated, submitted a comment to the docket. She noted that the RIA acknowledged that epidemiological data do not prove causation. She cited a number of studies on self-reported sleep indicating that such reports overstate sleep. Ferrie cited other studies showing that self-reported sleep is strongly associated with health outcomes. The projections in the RIA were very close to the results derived from the data analysis of the Whitehall study. She described the mortality ratios used in Exhibit 3 as robust and added that the quadratic regression analysis used in the RIA is a relatively good approximation within the range of 5–9 hours sleep duration. Mortality rates in Exhibit 5–3 outside these ranges would be less

[14] See document item FMCSA–2004–19608–3437 for ATA's comment on pages 13–14, and document item FMCSA–2004–19608–2924 for NERA's paragraph on page 2.

stable, but she noted that the Agency did not appear to have used them in the cost-benefit analyses. She stated that the problem of covariates appears to be quite minor. She also stated that the inferences in the RIA on increased mortality seem to be in rough agreement with estimates from her study. She noted that the RIA acknowledged that small changes in the amount of sleep make little difference for individuals, but ''small changes at the population level, particularly in large populations, can have significant effects.''

On the unquantified health benefits, Ferrie cited an increasing body of research documenting the effects of working more than 55 hours a week on heart disease, cognitive function, depression, and sleep disturbances. She stated that repeated exposure to long working hours has been shown to be associated with a 3-fold increased likelihood of shortened sleep, a nearly 7-fold increased likelihood of difficulty falling asleep, and a 2-fold increased likelihood of early morning waking. She noted that these effects are not related to shift work. Ferrie concluded that the methods of analysis FMCSA used appear to be robust and that the RIA takes a cautious approach to interpreting the health benefits.

FMCSA Response. In every instance, Cappuccio appears to have drawn the narrowest possible conclusion from the available data, both in the study that he co-authored and in the RIA, with the result that he finds the connection between mortality and sleep duration tenuous or contingent on further research and better data. According to Cappuccio, some sleep scientists suggest that there may be an alternative ''threshold'' hypothesis for the relationship between sleep and mortality. According to this hypothesis, individuals getting at least as much sleep at some threshold level (*e.g.,* 5 hours a night) would gain nothing from small changes in sleep. Cappuccio, however, is on record as stating that research shows that sleeping less than 7 hours a night is likely to lead to greater mortality. In his comments (FMCSA–2004–21675), Cappuccio mentioned his study Cappuccio (2010), which is docket item FMCSA–2004–19608–4041. That report includes the sentences, ''Our study shows an unambiguous and consistent pattern of increased risk of dying on either end of the distribution of sleep duration. Pooled analyses indicate that short sleepers (commonly <7 h per night, often <5 h per night) have a 12% greater risk.'') Thus, granting for the sake of argument that there may be a threshold, even Cappuccio likely would place it above the levels at which we are estimating benefits. Ferrie, on the other hand, was more willing to trust the available research, and to draw real-world conclusions from it. She found FMCSA's use of her own research to be cautious and had no objection to the use of those results as a partial rationale for HOS policy. On the issue of fitting a continuous curve through data collected on an ordinal scale, her comments supported the Agency. As shown above, Ferrie thinks: ''Both the estimated increases in sleep duration and decreases in mortality that result from the RIA are very small, a point acknowledged by the FMCSA authors; the curvature of the relationship 'means that changing average sleep makes very little difference for individuals.' However, small changes at the population level, particularly in large populations, can have significant effects.'' These comments show that the Agency's inferences regarding increases in sleep and mortality reductions were reasonable. In addition, both Ferrie and Cappuccio, along with other researchers on this topic, have referred to a U-shaped curve rather than a step function when discussing the relationship between sleep and mortality. A curve generally connotes a continuous function in the scientific literature, therefore references to a curve in the literature imply a continuous relationship rather than a threshold or step function. While FMCSA recognizes the need for improved data and is sponsoring a wide range of research projects on sleep and fatigue, we are not prepared to repudiate reasonable inferences from work already available because more perfect work might someday be completed. We agree with Ferrie's comments.

FMCSA is, in fact, implementing three of Cappuccio's suggestions in this final rule. This final rule is: (1) Regulating time to abolish ''slam shifts,'' which are shift schedules that cause sudden changes in the sleep/wake cycles; (2) Facilitating naps by providing a 30-minute break; and (3) Reducing the proportion of long work weeks.

Other Comments on Health Benefits. An advocacy group noted that there are underlying medical conditions that lead to lower sleep, such as sleep apnea. A shipper association and a company stated that health benefits are inflated by the change in the on-duty definition.

FMCSA Response. FMCSA recognizes that sleep conditions can reduce sleep, but many of these conditions are associated with obesity, which is linked to long work hours and a sedentary lifestyle. The direction of causality can be difficult to determine, but one likely sequence is that long work hours reduce sleep, which causes biochemical changes that facilitate obesity, which is associated with high blood pressure and diabetes, all of which are associated with an increased incidence of sleep apnea.

The economic analysis did not look at the changes in the on-duty definition or use it to change estimates of sleep time; the revised definition is not expected to alter sleep time. The revision allowing 2 hours in the passenger seat to be logged as off-duty time mainly affects team drivers, whose sleep is poor in any case according to those drivers. Local drivers may ''rest'' in the truck if they are off duty, but that rest will not necessarily include sleep, particularly as local drivers usually work during daylight hours when sleep is difficult even when someone is tired.

Other Comments on Benefits. A trucking association stated that FMCSA should demonstrate that the safety benefit of the 2-night requirement for the restart provision outweighs the cost of increased congestion. An advocacy group stated that the RIA should analyze the costs and benefits of the 16-hour provision and the 30-minute break. It stated that FMCSA should monetize the health impacts beyond mortality. It noted that besides leading to premature death, the chronic diseases associated with lack of sleep impair both quality of life and productivity for a long period. The direct and indirect costs associated with these conditions are high.

FMCSA Response. As discussed earlier in this preamble, it is not clear why commenters believed that the two-night requirement will lead to increased congestion. They seem to assume that nighttime deliveries will end, but they will in fact continue 5 nights a week for the hardest working drivers and 6 or 7 nights a week for drivers who do not need the restart. The final RIA does monetize the costs and benefits of the break; the 16-hour provision has been dropped.

As explained in the RIA, it is difficult to monetize the costs of the chronic health impacts because to do so, FMCSA would need data that linked these conditions to specific amounts of sleep. There are, for example, data that indicate the increase in mortality associated with increases in body mass index (BMI), but these vary considerably by sex and race. To begin to monetize those costs we would need data that link specific levels of sleep to BMI and then data that linked the BMI to incidence of diseases.

Comments on Fatigue Research. Thirteen commenters responded to the

WSU study on night drivers. ATA, OOIDA, CVSA, CHP, a State trucking association, and several carriers stated that the number of subjects was too small and the lab setting too artificial. Two drivers objected to using young healthy subjects instead of trained drivers. Another driver stated that the study did not consider drivers whose natural rhythms are suited for working at night. Advocates stated that previous research supported the findings of the WSU study. JB Hunt stated that it surveyed 249 drivers, 82 percent of whom regularly drove at night; 79 percent of these drivers said they did not change their sleep schedules when at home, which is contrary to the WSU assumption. JB Hunt also stated that anyone who gets 10 hours of rest a day should not develop a sleep debt.

FMCSA Response. FMCSA addressed most of these comments above, in Section IV. ''Discussion of All Comments'' G. ''Restart,'' under the 2-night requirement heading. As for the assertion that 10 hours of rest a day is sufficient to eliminate sleep debt, the commenter is assuming that a driver with 10 hours off will use 7 to 8 hours of that time to sleep. Research has shown that night drivers who are trying to sleep during the day generally get less than 6 hours of poor quality sleep even when they have more than 10 hours off.

Comments on the Impact of Long Hours. On the issue of long hours, Ferrie noted that a recent review concluded that work in excess of 8 hours carries an increasing risk of crashes, with the risk in the 12th hour double that of the 8th. Sando reported that his study showed an increased risk of collisions as hours worked increased.

NIOSH cited a number of studies that indicate that sleep deprivation produces performance deficits, including an inability to assess risk and an increase in risk taking. It also cited studies on fatigue and CMV crashes and sleep apnea. Advocates *et al.* stated that research indicates that performance degrades when drivers have less than 7 to 8 hours of sleep and that most drivers get less than 6 hours of sleep on work days. They also cited a number of studies that indicate people need 7 to 9 hours of sleep. They countered industry arguments that the rule was based on pre-2003 data by noting that the NIOSH study of drivers covered 2004–2006. They stated that the findings of the 2005 Fatigue Management Survey on sleepy drivers indicate that this problem is more common for CMV drivers than for other drivers.

An association stated that fatigue literature does not address the relative risk of the 11th hour. The Missouri Department of Transportation cited the LTCCS as indicating that fatigue was the 10th highest associated factor.

FMCSA Response. FMCSA agrees with the commenters that the great majority of research associates long hours of work with fatigue and increased crash risk. FMCSA also agrees that fatigue literature does not directly address the relative risk of the 11th hour of driving. The new VTTI study indicates that it is difficult to isolate the relative risk of any particular hour of driving because driving hours can occur at differing times during the work day. For example, the 11th hour cannot occur sooner than 11 hours into the work day, but it can occur anytime from 11 to 14 hours into the work day. The fifth hour of driving can occur anytime from 5 to 14 hours into the workday. This affects the relative risk of any particular hour of driving. As for the LTCCS, it may have found that fatigue was the 10th highest factor, but it still was associated with 13 percent of crashes.

Comments on Health Research. Relatively few commenters discussed the health research reported in the NPRM and RIA. ATA and the Retail Industry Leaders Association (RILA) stated that FMCSA has argued in past HOS rulemakings that long hours do not affect health. RILA further stated that the 2000 Balkin study on the relation of work time to sleep time was not valid because the data were collected under the previous HOS rule. It also questioned the assumption that a reduction in driving time would lead to more sleep and exercise. Another State trucking association and a carrier argued that FMCSA had not proven that changes to the rule would have measurable positive impact on driver health. The Minnesota Trucking Association stated that the studies did not answer the question of whether long hours, shift work, or short sleep lead to obesity and diabetes.

NIOSH submitted a number of studies that address health issues. NIOSH cited studies linking shift work to smoking and obesity, noting that research has found that short and poor quality sleep periods alter hormone levels and metabolic function and lead to insulin resistance. NIOSH cited research linking shift work to a higher risk of cardiovascular diseases, including studies of drivers. It noted that a study of unionized U.S. drivers found an elevated rate of mortality from ischemic heart disease. NIOSH stated that the International Agency for Research on Cancer has designated shift work with circadian disruption as a probable carcinogen. It also reported on studies linking long hours to depression and finding that working less than 12 hours a day and 58 hours a week reduced depression and fatigue. It cited a 2010 study of truck drivers associating disrupted sleep patterns with increased obesity and several chronic diseases. Studies of verifiable sleep of truck drivers found daily averages well below 7 to 8 hours (3.8 to 5.2 hours).

Finally, Schneider National stated that FMCSA should address sleep apnea among drivers, which it said is a more important cause of fatigue than HOS. It also questioned the current rule allowing chiropractors to serve as medical examiners. A safety group stated that FMCSA should analyze the impact of diesel fumes.

FMCSA Response. As FMCSA explained in the NPRM, the body of research that finds a connection between long hours of work and worker health has grown substantially in the past 6 years. Most of the health issues that FMCSA reviewed for the 2005 rule—exposure to diesel fumes, noise, and vibration—were not and still are not scientifically associated with long hours. The findings on noise and vibration indicated that the levels to which drivers are exposed were not great enough to cause health effects. With diesel exposure, drivers who are parked with trucks idling may be exposed to higher levels than when they are driving. Altering work hours would not necessarily reduce exposures.

These issues are not the basis of the health impacts discussed in the 2010 NPRM. As the studies submitted by NIOSH and others cited in the NPRM and RIA have reported, long hours of work, particularly work that is primarily sedentary, are associated with low sleep, obesity, and cardiovascular disease. With many factors linked, it is not possible to define a simple pathway for effects. There is, however, a substantial body of research that has identified the chemical changes caused by lack of sleep that can increase the likelihood of obesity and diabetes and increase blood pressure. CMV drivers have a markedly higher rate of obesity than adult male workers as a whole and have been shown to have an elevated risk of dying of some cardiovascular diseases. Interestingly, the commenters did not attempt to deny that drivers have a higher incidence of chronic health conditions, each of which is linked to higher mortality rates and higher on-going medical costs. As mentioned above, this rule is unlikely to improve the health of drivers who work moderate schedules. On the other hand, those currently working the longest schedules will be required to reduce

their work hours, which is likely to increase their opportunity for sleep and/or exercise, both of which are conducive to better health and lower medical costs.

Final Rule Regulatory Impact Analysis

For the analysis of the final rule, FMCSA considered and assessed the consequences of four regulatory options. (A copy of the complete RIA is available in the docket.) Option 1 is the no-action alternative, which would retain the provisions of the current HOS rule. All costs are relative to Option 1. Options 2 through 4 require at least one break during the duty day (none is currently required), and limit the use of the 34-hour restart provision to once every 168 hours with at least 2 nights off duty. Options 2 through 4 differ only in driving time allowed between 10-hour breaks. Option 2 limits allowable daily driving to 10 hours, the driving limit that existed prior to the 2003 rule. Option 3 retains the 11 hours of driving allowed under the current rule. Option 4 allows only 9 hours of driving, or 1 hour less than Option 2. This RIA compares the costs and benefits (in 2008 dollars) of Options 2 through 4 relative to the current rule (*i.e.,* Option 1) and assumes that there is full compliance with each of the options.

Compliance with HOS rules was assumed to be 100 percent for both the baseline and options; no attempt was made to estimate real-world compliance rates or to adjust costs and benefits for non-compliance. This assumption was made to avoid understating the true costs of the rule. To the extent that compliance rates fall short of 100 percent, both costs and benefits would be lower. This approach allows for analyses of supplementary rules aimed at improving compliance, which would presumably move both costs and benefits closer to the levels estimated in this analysis. These incremental changes in costs and benefits would not duplicate the costs and benefits estimated for this rule; rather they would indicate the extent to which the supplementary rules ensured that the rule's costs and benefits were realized.

To calculate the impact of the changes to the HOS rule, it is necessary to develop a profile of the motor carrier industry and estimate the degree to which drivers in various segments work up to or close to the limits of the current rule. Drivers whose preferences or work demands lead them to schedules well within the current limits for reasons unrelated to those limits will not be affected by the rule changes.

The analysis concentrated on inter-city long-haul or regional, as opposed to local, trucking operations. In general, short-haul trucking work has far more in common with other occupations than it does with regional or long-haul trucking. These local, short-haul trucking operations are generally 5-day-a-week jobs, and much of the time on duty is given to tasks other than driving. Typical work days are 8 to 10 hours or so and typical weeks are 40 to 55 hours. Many of these drivers receive overtime pay past 8 hours in a day. Most of the work is regular in character; drivers go to basically the same places and do the same things every day. The rule is expected to have little effect on such operations.

Both for simplicity of presentation and because of the nature of the available data, the analysis used 100 miles as the point of demarcation between local and over-the-road (OTR) service. Much of the information on working and driving hours is drawn from FMCSA's 2007 Field Survey.[15] Companies and drivers were identified as operating within or beyond a 100-mile radius. The Economic Census, which provided data on revenue, defines a long-distance firm as one carrying goods between metropolitan areas; this is roughly compatible with a 100-mile radius for the distinction between local and OTR service. One hundred miles is also compatible with the length-of-haul classes in the Commodity Flow Survey.

To evaluate the impact of the rule changes, the analysis needed to define the prevailing operating patterns in the industry. Of particular interest is the extent to which drivers work close to the limits set by the current rule. To analyze current patterns in work intensity, drivers were assigned to four intensity groups, based on their average weekly hours of work. For this purpose, the analysis used data on weekly work hours from FMCSA's 2007 Field Survey to define intensity groups as shown in Table 6.

Moderate-intensity drivers are on duty an average of 45 hours per week. High-intensity drivers are on duty an average of 60 hours per week. The third group, very-high-intensity drivers, works an average of 70 hours per week. The fourth group, extreme-intensity drivers, is on duty an average of 80 hours per week. The 2007 Field Survey indicated a distribution of the driver population across these groups as shown below.

TABLE 6—DRIVER GROUPS BY INTENSITY OF SCHEDULE

Work intensity group	Average weekly work time	Percent of workforce	Weighted average hours per week
Moderate	45	66	29.70
High	60	19	11.40
Very High	70	10	7.00
Extreme	80	5	4.00
Total			52.10

The weighted average is obtained by multiplying the average work time in each class by the fraction of the workforce in that class. The sum, just over 52 hours, is the average hours of work per week based on each group's share of the total population. The analysis made similar calculations using the Field Survey data to determine the weighted averages for use of the 10th and 11th hour of drive time and the 14th hour of daily on-duty time. These figures can be found in the accompanying RIA.

To estimate the costs of operational changes, the basic approach is to follow the chain of consequences from changes in HOS provisions to the way they

[15] The ''2007 Field Survey'' is an alternate title for the FMCSA, ''2007 Hours of Service Study,'' 2007. FMCSA–2004–19608–2538.

would impinge on existing work patterns in terms of work and (where relevant) driving hours per week, taking overlapping impacts of the rule provisions into account. Estimated changes in productivity are translated into changes in dollar costs using functions developed for the regulatory analyses of previous HOS rules. Summing the different cost components resulted in a total annualized cost of $1.00 billion for Option 2, $470 million for Option 3, and $2.29 billion for Option 4. Though these costs are estimated using impacts on industry productivity, they would most likely be passed along as increases in freight transportation rates, and then ultimately to consumers in increased prices for the goods that are transported by truck.

Rule Benefits

The primary goal of the final rule is to improve highway safety in the most cost-effective way by reducing driver fatigue and the associated increase in the probability that fatigued drivers will be involved in crashes. A second benefit expected from this rule is a decrease in driver mortality due to health problems caused by long working hours and the association of long working hours with inadequate sleep.

To analyze the safety impacts of the 2010 NPRM and 2011 final rule, the Agency developed a series of functions that incorporate fatigue-coded crashes to hours of daily driving and hours of weekly work. In the pre-2010 HOS regulatory analyses, the effects on fatigue and fatigue-related crashes of changing the HOS rules were calculated using fatigue models. These models (the Walter Reed Sleep Performance Model for the 2003 rules, and the closely related SAFTE/FAST Model for 2005, 2007, and 2008 analyses) took into account the drivers' recent sleeping and waking histories, and calculated fatigue based on circadian effects as well as acute and cumulative sleep deprivation. These models did not incorporate functions that independently accounted for hours of driving after an extended rest (*i.e.,* acute time-on-task) or cumulative hours of work (as opposed to off-duty time) over recent days. These effects were assumed, instead, to be accounted for in the effects of long daily and weekly work hours on the drivers' ability to sleep. For the 2005 and later analyses, a separate time-on-task function based on statistical analysis of TIFA data was added to ensure that available evidence for time-on-task effects was not ignored; those analyses were still criticized as deficient for excluding consideration of cumulative time-on-task effects.

For the 2010 NPRM and the 2011 final rule analyses, FMCSA replaced the use of the sleep-related fatigue models with a simpler approach that explicitly relates the risk of a fatigue-coded crash to hours of daily driving and hours of weekly work. The function used to model the effects of daily driving hours is the same as the TIFA-based logistic function used since 2005, while the function for modeling weekly work hours is taken from FMCSA's analysis of the LTCCS. Other fatigue effects, including the effects of insufficient sleep and circadian effects of working and sleeping at sub-optimal times, are implicitly assumed to be incorporated in the daily driving and weekly work-hour functions because those effects were at work on the drivers involved in the crashes recorded in TIFA and LTCCS. To add fatigue effects calculated by a sleep/performance model on top of the empirically based functions would, therefore, run the risk of double counting the benefits of restrictions on work and driving. These functions, and the uncertainty surrounding them, are described in detail in the RIA.

The basic approach for using the empirically based fatigue risk functions was to count the changes in hours worked and driven as a result of the regulatory options. Each hour of driving that is avoided results in a reduction in expected fatigue-related crashes. These reductions were calculated using the predicted levels of fatigue-related crashes indicated by the fatigue functions. The hours of driving and working that are prevented by the options, though, were assumed to be shifted to other drivers or to other work days rather than being eliminated altogether. The fatigue crash risks for those other drivers and other days were also calculated. Taking account of these partially offsetting risks means that the predicted crash reductions attributable to the options were really the net effect of reducing risks at the extremes of driving and working while increasing risks for other drivers and on other days.

The changes in crash risks were monetized (*i.e.,* translated into dollars) using a comprehensive and detailed measure of the average damages from large truck crashes. This measure takes into account the losses of life (based on the DOT's accepted value of a ''statistical life,'' $6 million when this rulemaking began); medical costs for injuries of various levels of severity, pain, and suffering; lost time due to the congestion effects of crashes; and property damage caused by the crashes themselves.[16]

The monetary value of each of the effects thought to affect the safety of drivers was estimated under three different assumptions of the baseline level of fatigue involvements in crashes: 7 percent, 13 percent, and 18 percent. The total benefits resulting from improvements in the safety of long-haul (LH) drivers for Options 2 through 4 are shown below in Tables 7 through 9 below.[17]

TABLE 7—ESTIMATED SAFETY BENEFITS BY FATIGUE CRASH RATE FOR OPTION 2 (10 HOURS DRIVING)

[Millions 2008$]

Assumed percent of crashes due to fatigue [17]	Benefits due to reduced daily time on task effect [a]	Benefits due to reduced weekly time on task effect [b]	Total benefits due to reduced crashes
7	$110	$210	$320
13	210	390	600
18	290	540	830

[a] Acute fatigue from long hours in a day.

[16] Average large truck crash costs were obtained from the report, ''Unit Costs of Medium and Heavy Truck Crashes,'' March 2007, by E. Zaloshnja and T. Miller. The cost of a crash was updated to 2008 dollars and to reflect a value of a statistical life of $6 million. The report is in docket #FMCSA–2004–19608–3995.

[17] Truck driver fatigue was coded as a factor in 13 percent of all crashes in the Large Truck Crash Causation Study (LTCCS). As a sensitivity analysis, FMCSA also used a lower value of 7 percent involvement in fatigue-related crashes, based on the 8.15 percent value used in the RIA for the 2003 HOS rule. A higher value of 18 percent involvement in fatigue-related crashes also was used as a sensitivity analysis, chosen to be roughly as far above the LTCCS value of 13 percent as the 8.15 percent pre-2003 estimate is below 13 percent.

[b] Cumulative fatigue from long hours over many days.

TABLE 8—ESTIMATED SAFETY BENEFITS BY FATIGUE CRASH RATE FOR OPTION 3 (10 HOURS DRIVING)

[Millions 2008$]

Assumed percent of crashes due to fatigue	Benefits due to reduced daily time on task effect [a]	Benefits due to reduced weekly time on task effect [b]	Total benefits due to reduced crashes
7	$10	$150	$150
13	10	270	280
18	10	380	390

[a] Acute fatigue from long hours in a day.
[b] Cumulative fatigue from long hours over many days.
Note: Totals do not add due to rounding.

TABLE 9—ESTIMATED SAFETY BENEFITS BY FATIGUE CRASH RATE FOR OPTION 4 (10 HOURS DRIVING)

[Millions 2008$]

Assumed percent of crashes due to fatigue	Benefits due to reduced daily time on task effect [a]	Benefits due to reduced weekly time on task effect [b]	Total benefits due to reduced crashes
7	$290	$320	$610
13	550	590	1,130
18	760	810	1,570

[a] Acute fatigue from long hours in a day.
[b] Cumulative fatigue from long hours over many days.
Note: Totals do not add due to rounding.

The analysis also calculated benefits associated with improvements in driver health. The Agency has a statutory mandate to ensure that driving conditions do not impair driver health. Research indicates that reducing total daily and weekly work for the drivers working high-intensity schedules should result in these drivers getting more sleep on a daily and weekly basis. Recent research on sleep indicates that inadequate sleep is associated with increases in mortality. This effect appears to involve several complex pathways, including an increase in the propensity for workplace (and leisure time) crashes and mortality due to decrements in several health-related measures, such as an increase in the incidence of high blood pressure, obesity, diabetes, other cardiovascular disease (CVD), and other health problems. See Appendix B of the RIA for the references for this statement. The analysis attempted to model the workplace transportation crash effect explicitly in the crash reduction benefits. However, explicit modeling of all the other various ways that insufficient sleep increases mortality becomes too complex and uncertain for this analysis. The studies the analysis relied on to model health benefits, therefore, are population-based studies that look at overall mortality, independent of the cause of death, as a function of sleep. Because increases in hours worked are associated with decreases in hours spent sleeping and truck drivers working high-intensity schedules get significantly less than the 7 to 8 hours of sleep that studies generally show are required for optimal mortality. Cutting back somewhat on daily work hours and more significantly cutting back on weekly work hours should, to some extent, reduce mortality among these drivers.

These benefit estimates depend on how much sleep CMV drivers currently get and how much more sleep they are expected to get under the proposed rule. The analysis developed a function that relates hours worked to hours slept and used this function to predict how much more sleep drivers would get under the proposed rule than they currently obtain under the existing rule. The results of this analysis are sensitive to the amount of sleep drivers are currently getting; increases in sleep have less substantial health benefits if individuals are already getting close to the optimal 7–8 hours per night than if they average less sleep. Since there is a degree of uncertainty surrounding how much sleep drivers currently get, a sensitivity analysis varied the baseline amount of sleep drivers are currently obtaining. This analysis showed that health improvement benefits are greatest when drivers are getting the least sleep under the current rule, because they have the most room for improvement.

The sensitivity analysis scenarios are divided into the low sleep, medium sleep, and high sleep categories. Under the low sleep scenario, the benefits are greatest because it is the most pessimistic regarding how much sleep drivers currently obtain. The high sleep scenario assumed that drivers are getting close to the optimal amount; as a result, there is little if any benefit to giving them opportunity for more sleep. Results of this analysis indicate that the measurable health benefits of reducing the maximum hours of work allowed per week could well be as great as the costs, and other possible health benefits (which have not been included in the quantitative analysis) could add even further to these benefits. The health benefits of Options 2 through 4 were estimated for three different levels of baseline sleep by drivers at 7 and 3 percent discounting of future health benefits (shown in Table 10). For the assumption of a high level of baseline sleep for Options 2 and 4, it is interesting to note that the benefits are negative (to a relatively minor extent for Option 2), indicating that it is not beneficial for individuals to get additional sleep if they are already getting adequate sleep.

TABLE 10—ESTIMATED HEALTH BENEFITS BY AMOUNT OF SLEEP FOR ALL OPTIONS

[3 and 7 Percent discount rates]

[Millions 2008$]

Assumed baseline amount of nightly sleep	Total benefits due to increased sleep					
	7 Percent discounting			3 Percent discounting		
	Option 2	Option 3	Option 4	Option 2	Option 3	Option 4
Benefits with Low Sleep	$810	$630	$1,110	$1,090	$850	$1,490
Benefits with Medium Sleep	380	350	370	510	470	500
Benefits with High Sleep	−50	70	−370	−70	90	−500

In addition to the quantified and monetized benefits discussed above, there may be other health benefits that shorter work days and weeks could produce. Research indicates that the metabolic and endocrine disruptions associated with short sleep time and long work hours are significantly related to obesity (Van Cauter). Obesity is in turn associated with higher incidences of diabetes, CVDs, hypertension, and obstructive sleep apnea (Mokdad). These medical conditions impose costs on drivers who suffer from them and affect the quality of their lives. Sedentary work alone is also associated with obesity and mortality impacts (Katzmarzyk).

Research on the health of drivers and health costs found that CMV drivers are both heavier for their height and less healthy than adult males as a whole. Drivers are far more likely than adult male workers as a whole to be obese. Table 11 presents the distribution of drivers by weight category and the incidence of health conditions for drivers in each weight group, taken from a study that used medical examination records and health insurance claims of 2,950 LTL drivers (Martin). (The national statistics for the incidence of health conditions among adult males include men over 70, who may have higher incidences of some conditions than the younger working population.)

TABLE 11—DRIVER HEALTH CONDITIONS BY WEIGHT CATEGORY

N = 2,950	Percent drivers in weight category (percent)	Presence of at least one health risk factor	Hypertension (percent)	Diabetes (percent)	High cholesterol (percent)
Normal weight	13	26	21	5	11
Overweight	30	39	31	10	17
Obese	55	59	51	21	26
Overall		48	41	16	21
National adult male (CDC statistics)			31.80	[1] 10.9	15.60

[1] 7.4% diagnosed.

FMCSA has not attempted to quantify the benefits of improved health that may accrue to drivers who have more time off. First, the Agency does not have dose-response curves that it can use to associate sleep time with mitigation or exacerbation of the various health impacts other than sleep loss itself. Second, many of the health impacts are linked to obesity; given the difficulty most people have in losing weight, it would be unjustifiably optimistic to attempt to estimate the degree of potential weight loss.

The health consequences of long hours, inadequate sleep, and long stretches of sedentary work are, however, significant: they cause serious health conditions that may shorten a driver's life and increase healthcare costs. In addition, some studies have linked obesity to increased crash risks, including a recent analysis of the VTTI data, which found that obese CMV drivers were between 1.22 and 1.69 times as likely to drive while fatigued, 1.37 times more likely to be involved in an SCE, and at 1.99 times greater risk of being above the fatigue threshold as measured by eye closure when driving (Wiegand).

Conclusion

Net benefits (*i.e.,* benefits minus costs) are likely to be positive, but could range from a negative $730 million per year to more than a positive $630 million per year for Option 2 (a negative $750 million to positive $920 million with 3 percent discounting), from a negative $250 million to more than a positive $550 million for Option 3 (a negative $220 million to a positive $770 million with 3 percent discounting), and from a negative $2.05 billion to more than a positive $390 million for Option 4 (a negative $2.18 billion to a positive $780 million), as shown in Tables 12 through 14 below. The wide ranges in estimates of benefits and net benefits are a consequence of the difficulty of measuring fatigue and fatigue reductions, which are complex and often subjective concepts, in an industry with diverse participants and diverse operational patterns. Still, it seems clear that the benefits could easily be substantial, and are on the same scale as the costs. The costs, for their part, are large in absolute terms but minor when compared to the size of the industry: $1.00 billion per year (the total annualized cost for Option 2) is less than two thirds of 1 percent of revenues, $470 million per year (the total annualized cost for Option 3) is less than one third of 1 percent of revenues, and $2.29 billion per year (the total annualized cost for Option 4) is less than 1.5 percent of revenues in the for-hire LH segment of the industry. These total annual costs are an even smaller fraction of revenues of the LH segment as a whole. As an additional example, the costs of Option 3 are equivalent to about a $0.03 per gallon increase in long-haul industry fuel costs, which is a minimal increase in an industry used

to wide swings in fuel costs. Between 2006 and 2010, diesel fuel prices ranged from $2.09 a gallon to $4.70 a gallon.[18]

2006 and 2010, diesel fuel prices ranged from $2.09 a gallon to $4.70 a gallon.[18]

TABLE 12—NET BENEFITS FOR OPTION 2 BY SLEEP SCENARIO, CRASH RATE, AND DISCOUNT RATE

[Millions 2008$]

Assumed percent of crashes due to fatigue	Assumed amount of nightly sleep					
	7 Percent discounting			3 Percent discounting		
	Low sleep	Medium sleep	High sleep	Low sleep	Medium sleep	High sleep
7	$130	−$300	−$730	$410	−$170	−$750
13	400	−20	−450	690	110	−470
18	630	210	−220	920	340	−240

TABLE 13—NET BENEFITS FOR OPTION 3 BY SLEEP SCENARIO, CRASH RATE, AND DISCOUNT RATE

[Millions 2008$]

Assumed percent of crashes due to fatigue	Assumed amount of nightly sleep					
	7 Percent discounting			3 Percent discounting		
	Low sleep	Medium sleep	High sleep	Low sleep	Medium sleep	High sleep
7	$310	$30	−$250	$530	$150	−$220
13	440	160	−120	660	280	−90
18	550	270	−10	770	390	20

TABLE 14—NET BENEFITS FOR OPTION 4 BY SLEEP SCENARIO, CRASH RATE, AND DISCOUNT RATE

[Millions 2008$]

Assumed percent of crashes due to fatigue	Assumed amount of nightly sleep					
	7 Percent discounting			3 Percent discounting		
	Low sleep	Medium sleep	High sleep	Low sleep	Medium sleep	High sleep
7	−$570	−$1,310	$2,050	−$180	−$1,180	−$2,180
13	−50	−790	−1,520	340	−660	−1,650
18	390	−350	−1,090	780	−220	−1,220

Compared to the other two options that were analyzed, Option 2 would have roughly twice the costs of Option 3 (which allows 11 hours of daily driving), and less than half the cost of Option 4 (which allows 9). In keeping with their relative stringencies, Option 3 has lower, and Option 4 has higher, projected benefits than Option 2. Option 3's calculated net benefits appear likely to be somewhat higher than the net benefits of Option 2 under some assumptions about baseline conditions. Option 4's substantially larger costs, on the other hand, did not appear to be justified by its generally higher range of benefits. Based on the estimated net benefits of the options, FMCSA has selected Option 3 as the Final Rule. The Agency's goal of improving highway safety and protecting driver health, combined with the potentially significant but unquantifiable health benefits of reductions in maximum working and driving hours, make the functional equivalent of Option 3—the final rule does not change a driving-time limit but retains the current 11-hour limit—the most reasonable choice.

Changes in the Analysis of HOS Options From the NPRM to the Final Rule

There are two distinct categories of changes that result in different estimates of the costs and benefits of the HOS options between the NPRM and the Final Rule:

- Changes to the options, some of which change the cost/benefit calculations for all of the options; and
- As recommended by commenters, refinements to the benefit analyses, which change the estimated benefits, and thus the estimated net benefits, for each of the options.

The changes that fall into these two categories are discussed below, followed by a description of how they affect the estimated costs and benefits.

After considering the comments received on the NPRM and new research, as well as the President's Executive Order 13563 on ''Improving Regulation and Regulatory Review,'' FMCSA has made several changes to the HOS options considered in the NPRM, including the following:

- Eliminating a driving-time limit from the final rule.
- Dropping the 13-hour limit on on-duty time between breaks of at least 10 hours, but keeping the provision requiring at least a half-hour break part-way through long days.
- Shortening the 2-night restart window from two periods including midnight and 6 a.m. to two periods including 1 a.m. through 5 a.m.

[18] U.S. Energy Information Administration, Gasoline and Diesel Fuel Update, *http://www.eia.gov/oog/info/gdu/gasdiesel.asp#*.

• Changing the break requirements to require a break of a half-hour (or more) within the past 8 hours of continuous work, rather than 7, to continue driving.

• Dropping the provision that would have allowed two 16-hour driving windows per week.

Only the first three of these changes affect the cost/benefit calculations. The other two do not change the cost/benefit calculations because the analyses for the NPRM were not sensitive to the particular provisions involved: the effects of breaks were considered to be subsumed within the effect of the daily limit on duty hours, and the use of a 16-hour driving window was not modeled due to uncertainty about how and how much it would be used and the small expected magnitude of its effects.

In response to comments and its own review of the analysis of safety benefits, FMCSA has made three refinements to its benefits analysis of the HOS options. First, as suggested by the Edgeworth study, the safety benefits of reductions in cumulative fatigue are being estimated using a finer-grained function. Because this change affects all of the options to about the same extent, it has no real effect on the relative rankings of the options. Similarly, in response to the Edgeworth study, FMCSA has also refined its estimate of the value of reducing crash damages per hour of effort reallocated from one driver to another. Because this refinement affects all of the options equally, it has no effect on their relative ranking. Third, the Agency has made technical adjustments in the way it calculated and discounted health benefits due to improvements in sleep duration. Careful re-examination of the Ferrie study, occasioned by disagreements in docket comments submitted by Ferrie and Cappuccio on the applicability of their work to HOS rulemaking, suggested that a more refined estimate of the health benefits was possible and should be undertaken. This new analysis ultimately had minimal impact on the cost-benefit analysis, and did not impact the Agency's decision to choose option 3 in the final rule.

Chapter 5 of the RIA presents in detail the methodology used to make these changes. These changes have the effect of moderately reducing benefits associated with improvements in driver health. The size of the reduction in benefits is affected by the discount rate, with a 3 percent discount rate having a smaller impact. Although the Agency norm is to present all impacts in the RIA—including driver health benefits—discounted at 7 percent, the Agency applies equal weight to results using the 3 percent discount rate. Using a 3 percent discount rate, the options rank the same with or without the methodological refinements—Option 3 (11 hours) would be the preferred option at medium sleep, but Option 2 (10 hours) would have higher net benefits at low sleep. Discounted at 7 percent, Option 3 would have higher net benefits at both low sleep and medium sleep than Option 2. Option 4 (9 hours) would be the least likely to have positive net benefits, and its net benefits would be lower than the other two options under any scenario.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires Federal agencies to determine whether rules subject to notice and comment could have a significant economic impact on a substantial number of small entities. FMCSA completed a Final Regulatory Flexibility Analysis (FRFA) to analyze the impact of the proposed changes to the HOS regulations on small entities.

1. A Statement of the Need for, and Objectives of, the Rule

The objectives of the today's changes to the HOS rule are to improve safety in the most cost-effective manner while ensuring that the requirements do not have an adverse impact on driver health. The impact of HOS rules on CMV safety is difficult to separate from the many other factors that affect heavy-vehicle crashes. While the Agency believes that the data show no decline in highway safety since the implementation of the 2003 HOS rule and its re-adoption in the 2005 HOS rule, the 2007 IFR, and the 2008 HOS rule (73 FR 69567, 69572, Nov. 19, 2008), the total number of crashes, though declining, is still unacceptably high. Moreover, the source of the decline in crashes is unclear. FMCSA believes that the required break during long days, and the limits on maximum weekly hours, coupled with FMCSA's many other safety initiatives and assisted by the actions of an increasingly safety-conscious motor carrier industry, will result in continued reductions in fatigue-related CMV crashes and fatalities. Furthermore, the changes in the rule are intended to protect drivers from the serious health problems associated with excessively long work hours, without significantly compromising their ability to do their jobs and earn a living.

2. A Summary of the Significant Issues Raised by the Public Comments in Response to the RFA, a Summary of the Assessment of the Agency of Such Issues, and a Statement of Any Changes Made in the Proposed Rule as a Result of Such Comments

Comments. Very few commenters directly addressed the Initial RFA analysis. Commenters generally stated that the rule would affect revenues of carriers, but these impacts were not specific to small entities. Shippers and receivers also argued that they would be affected, but these entities are not subject to FMCSA regulations and are not, therefore, considered in the RFA analysis. The Petroleum Marketers Association of America stated that the changes to the restart provision would have a serious impact on small heating oil and propane suppliers. They would need to hire extra drivers to cover emergency deliveries.

FMCSA Response. As stated in previous responses, the restart provision will affect only drivers working the longest hours. Without information on the hours being worked by drivers for fuel retailers, it is difficult to assess whether they will be affected, but most local drivers do not work 60 to 70 hours a week and, therefore, are not limited by the restart provision. In any case, drivers of CMVs used primarily in the transportation of propane for winter heating are statutorily exempt from most of the regulations in the FMCSRs if compliance with those regulations would prevent the driver from responding to an emergency condition requiring immediate response (*see* 49 CFR 390.3(f)(7)).

3. The Response of the Agency to Any Comments Filed by the Chief Counsel for Advocacy of the Small Business Administration (SBA) in Response to the Proposed Rule, and a Detailed Statement of Any Change Made to the Proposed Rule in the Final Rule as a Result of the Comments

The Office of Advocacy at SBA filed comments that were a summary of concerns raised by industry at a roundtable that it hosted on February 9, 2011. As SBA indicated, the comments are ''nearly identical to many of those expressed at FMCSA's public listening session on the proposed rule * * *.'' Summarized, the points are as follows:

• The proposed rule is not supported by existing safety and health data.

• The proposed rule would reduce flexibility and could actually impede safety and driver health by increasing the stress on drivers as they try to work within the limits.

• The proposed rule would be operationally disruptive and costly.

• Truck related crashes are decreasing under the current rules, even while truck miles driven have increased.

FMCSA Response. As has been stated throughout this preamble, FMCSA disagrees strongly with these industry claims. The rule is supported by research on crashes and the health effects of long hours on health. Research on the effects of long work hours on crash rates, both for drivers and for other workers clearly indicate that risk rises after 8 hours of work. The research on the health effects of sleep loss and long hours is also extensive.

On the idea that the limits put stress on drivers, the Agency notes that any limit will do this for a driver who is working to the limits. The only way to remove this stress is to allow drivers and carriers to work as many hours as they want regardless of the safety consequences. Research has shown that drivers (and everyone else) have very little ability to accurately assess their own fatigue levels, as is also evidenced by the high percentage of CMV drivers who admit to falling asleep at the wheel. Today's rule allows the hardest working drivers to average 70 hours a week, which is surely enough.

The claims of serious operational disruptions are unsupported by any data and contradicted by the industry's own statements that the provisions at issue are not used by most drivers. SBA noted that carriers are subject to factors beyond their control, such as loading dock availability. FMCSA recognizes that carriers cannot control shippers and receivers, but allowing drivers to regularly work maximum hours is not a reasonable solution to that problem. On SBA's final point, Section IV. ''Discussion of All Comments'' A. ''Safety'' of this preamble discusses the flaws in this argument at length.

FMCSA has made changes to the final rule to reduce the complexity of the rule and provide some flexibility. The periods required under the 2-night restart provision are 2 hours shorter than proposed; this change will provide more flexibility for drivers who work at night irregularly. Most drivers who have regular nighttime schedules already take 2 nights off a week and do not need to use the restart provision. The final rule also changes the break requirement to make it easier for drivers using the sleeper berth provision. Finally, FMCSA has removed the 13-hour duty time limit to reduce the complexity of the final rule.

4. A Description and an Estimate of the Number of Small Entities to Which the Rule Will Apply or an Explanation of Why No Such Estimate Is Available

The HOS regulations apply to both large and small motor carriers. The SBA defines a small entity in the truck transportation sub-sector (North American Industry Classification System [NAICS] 484) as an entity with annual revenue of less than $25.5 million [13 CFR 121.201]. Using data from the 2007 Economic Census, FMCSA estimated that the average carrier earns roughly $160,000 in annual revenue per truck for firms with multiple power units,[19] suggesting that a typical carrier that qualifies as a small business would have fewer than 141 ($25.5 million/$160,000) power units (*i.e.,* trucks or tractors) in its fleet. From the 2007 Economic Census data on non-employer firms, sole proprietorships earn approximately $107,700 in annual revenue.

To determine the number of affected small entities, we used the analysis conducted by FMCSA for the Unified Carrier Registration (UCR) rule.[20] The economic analysis for the UCR rule divided carriers into brackets based on their fleet size (*i.e.,* number of power units), and estimated the number of carriers in each bracket. These brackets and their corresponding numbers of carriers are shown in Table 15. According to these estimates and the above-mentioned characterizations of small entities in the trucking industry, all of the carriers in Brackets 1 through 4 would qualify as small entities, as would many of the carriers in Bracket 5. Therefore, this analysis estimates that between 422,196 (Brackets 1 through 4) and 425,786 (Brackets 1 through 5) small entities would be affected by the HOS rule changes. This range overstates the number of affected small entities for several reasons. First, many private carriers with small fleets may not qualify as small businesses because their primary business is not the movement of freight. These private firms have other sources of revenue and fall under different NAICS codes; for example, one of the largest pharmacy chains has fewer than 141 power units, but is not a small entity. Second, the carriers are allowed to register by location so that a single firm may have multiple DOT registrations, each of which appears to be small, but which at the firm level represents a large entity. Third, the carrier numbers include firms that are not subject to this rule, such as passenger-carrying carriers and utilities, or are subject to only part of the rule (*e.g.,* construction firms have a different restart provision).

TABLE 15—NUMBER OF CARRIERS BY FLEET SIZE

[From FMCSA's analysis of the unified carrier registration plan rule]

Bracket	Fleet size	Number of carriers
1	1	194,425
2	2–5	145,266
3	6–20	65,155
4	21–100	17,350
5	101–1,000	3,590
6	1,001+	292
Total		426,078

Table 16 below presents figures for private carriers by NAICS code for industries with large numbers of drivers (and hence the likelihood of large numbers of fleets). The table includes the total number of CMV drivers

[19] See the RIA Appendix A for the revenue per power unit. A firm with one power unit and two drivers would have even higher revenues per truck because the two drivers could drive more hours than a firm with a single driver.

[20] FMCSA, ''Regulatory Evaluation of the Fees for the Unified Carrier Registration Plan,'' February 19, 2010. Available in the docket: FMCSA–2009–0231–0181.

working in each industry, the percentage of payroll those drivers account for, and the payroll of those industries as a percent of total industry revenue. Some of these industries have SBA size thresholds that are considerably lower than the threshold for truck transportation, strongly suggesting that many firms in these industries that would be considered small using the threshold of 141 power units are actually large. For example, a wholesaler with 141 trucks is certainly a large firm because it will have more than 100 employees. Other industries have thresholds as high as 1,500 full-time equivalent employees (FTEs); a firm in one of these industries might rank as small with even more than 141 power units if the number of power units in its fleet were large compared to the size of its workforce (*e.g.,* if it had 300 power units, and only three employees per power unit, it could be considered small in an industry with a threshold of 1,500 FTEs). From Table 16, however, this circumstance is not likely to be common: in firms in NAICS 21 and 31–33, which have high FTE thresholds, drivers make up only a very small percentage of the workforce. Thus, firms with a substantial numbers of power units are likely to have much larger labor forces, and are therefore likely to rank as large firms. Given these considerations, we are, if anything, over-counting the number of private carriers that qualify as small businesses.

TABLE 16—PRIVATE CARRIERS AND DRIVERS BY INDUSTRY

NAICS	Industry	SBA standard	Number of drivers	Drivers as percent of all employees	Payroll as percent of revenues
21	Mining, Quarrying, and Oil and Gas Extraction.	500 FTE	29,900	4.17	10
23	Construction	$14 million to $33.5 million	127,200	1.76	19
31–33	Manufacturing	500–1,500 FTE	238,600	1.78	11
42	Wholesale	100 FTE	509,000	8.53	5.5
44–45	Retail	$7 million to $29 million	307,900	2.01	10
53	Real Estate and Leasing	$7 million to $25 million	40,500	1.9	18
56	Administrative and Support and Waste Management and Remediation Services.	$7 million to $35.3 million	132,300	1.64	46
722	Food Services	$7 million	175,400	1.82	29
81	Other Services	$7 million	44,000	0.80	24

The analysis of the impact of the HOS rule on small entities shows that, while it is unlikely for the rule to have a significant impact on most small entities, FMCSA cannot certify that there would be no significant impacts. For a typical firm, the first-year costs of the final rule are well below 1 percent of revenues, as are the average annual costs when spread over 10 years.

However, projecting the distribution of impacts across carriers, few of which fit the definition of typical, is made more difficult by the variability in both costs and revenues. The new HOS rule is designed to rein in the most high-intensity patterns of work while leaving more moderate operations largely unchanged. As a result, we project a substantial majority of the costs of the rule to fall on the sixth of the industry currently logging the most hours per week. Thus, most carriers are likely to be almost unaffected, while a minority could experience productivity impacts—and hence costs—well above the industry average.

Average revenues presumably range widely as well, meaning that the ratio of costs to revenues is difficult to characterize. Because greater work intensities are likely to generate greater revenues, though, the impacts and revenues per power unit are likely to be positively correlated: the carriers for which productivity is curtailed the most and which could incur the greatest costs will, therefore, be likely to have unusually large revenues per power unit as well.

5. A Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Rule, Including an Estimate of the Classes of Small Entities Which Will Be Subject to the Requirement and the Type of Professional Skills Necessary for the Preparation of the Report or Record

The rule does not change recordkeeping or reporting requirements. Drivers are required by current rules to keep records of duty status that document their daily and weekly on-duty and driving time, and submit these records of duty status to their employing motor carrier on a bi-weekly basis. This rule does not change or add to this recordkeeping requirement for drivers or carriers. Drivers in all segments of the industry, including independent owner-operators, are well accustomed to complying with these recordkeeping and reporting requirements, and no professional skill over and above those skills that drivers already possess would be necessary for preparing these reports. All small entities in the industry that operate in interstate commerce are subject to these rules. The type and classes of these small entities are described in the previous section of this analysis.

6. A Description of the Steps the Agency Has Taken To Minimize the Significant Adverse Economic Impact on Small Entities Consistent With the Stated Objectives of Applicable Statutes, Including a Statement of the Factual, Policy, and Legal Reasons for Selecting the Alternative Adopted in the Final Rule and Why Each of the Other Significant Alternatives to the Rule Considered by the Agency Was Rejected

The Agency did not identify any significant alternatives to the rule that could lessen the burden on small entities without compromising its goals. However, in response to docket comment from the motor carrier industry, in which small entities are very heavily represented, the Agency did modify the options proposed in the NPRM to reduce both the cost and complexity of the rule adopted today. These changes include retaining the 11-hour daily driving limit, and shortening the 2 nighttime periods required by the new restart provision by one-third, from 12 midnight–6 a.m. to 1 a.m.–5 a.m. This rule is targeted at preventing driver fatigue, and the Agency is unaware of any alternative to restricting driver work that the Agency has authority to implement that would address driver fatigue. This rule impacts motor carrier

productivity proportionally to the number of drivers a motor carrier employs and the intensity of the schedules that motor carrier's drivers work. It is not obvious that productivity losses would be greater for small entities than for larger firms. To the extent that drivers working for a small entity work more intense schedules, that entity may experience greater productivity losses than a carrier whose drivers work less intensely on a daily and weekly basis. However, there appears to be no alternative available to the Agency that would limit driver fatigue while allowing more work. To improve public safety, all drivers, regardless of the size of the carrier they work for, must work within reasonable limits.

The recordkeeping and reporting burdens related to this rule will also affect entities proportional to the number of drivers they employ, and therefore do not disproportionately affect small motor carriers in any way. As noted above, drivers in all segments of the industry, working for entities of all sizes, are accustomed to compiling and submitting records of duty status on a regular basis. This rule will therefore not place an undue recordkeeping or reporting burden on smaller entities.

C. Paperwork Reduction Act

This rule would call for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

D. National Environmental Policy Act

The Agency analyzed this rule for the purpose of the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*) and determined under our environmental procedures Order 5610.1, published March 1, 2004 in the **Federal Register** (69 FR 9680), that this action will not have a significant impact on the environment. FMCSA has also analyzed this rule under the Clean Air Act, as amended (CAA) section 176(c), (42 U.S.C. 7401 *et seq.*) and implementing regulations promulgated by the Environmental Protection Agency. Approval of this action is exempt from the CAA's general conformity requirement since it would not result in any potential increase in emissions that are above the general conformity rule's *de minimis* emission threshold levels (40 CFR 93.153(c)(2)). The Agency received no comments on the draft Environmental Assessment, published with the NPRM. A copy of the Environment Assessment is available in the docket.

E. Executive Order 13132 (Federalism)

A rule has implications for Federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. This action has been analyzed in accordance with E.O. 13132. FMCSA has determined this rule would not have a substantial direct effect on States, nor would it limit the policymaking discretion of States. Nothing in this document preempts any State law or regulation.

F. Privacy Impact Assessment

FMCSA conducted a Privacy Threshold Analysis (PTA) for the rule on hours of service and determined that it is not a privacy-sensitive rulemaking because the rule will not require any collection, maintenance, or dissemination of Personally Identifiable Information (PII) from or about members of the public.

G. Executive Order 12630 (Taking of Private Property)

This rule would not effect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

H. Executive Order 12988 (Civil Justice Reform)

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

I. Executive Order 13045 (Protection of Children)

FMCSA analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule would not create an environmental risk to health or risk to safety that might disproportionately affect children.

J. Executive Order 13211 (Energy Supply, Distribution, or Use)

FMCSA analyzed this rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. FMCSA determined that it is not a ''significant energy action'' under that order. Though it is a ''significant regulatory action'' under Executive Order 12866, it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

K. Executive Order 12898 (Environmental Justice)

FMCSA evaluated the environmental effects of this NPRM in accordance with Executive Order 12898 and determined that there are no environmental justice issues associated with its provisions nor any collective environmental impact that could result from its promulgation. Environmental justice issues would be raised if there were ''disproportionate'' and ''high and adverse impact'' on minority or low-income populations. None of the alternatives analyzed in the Agency's EA, discussed under NEPA, would result in high and adverse environmental impacts.

L. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the net expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $143.1 million or more in any one year. Though this rule would not result in a net expenditure at this level, the economic impacts of the rule have been analyzed in the RIA.

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List of Subjects

49 CFR Part 385

Administrative practice and procedure, Highway safety, Mexico, Motor carriers, Motor vehicle safety, Reporting and recordkeeping requirements.

49 CFR Part 386

Administrative practice and procedure, Brokers, Freight forwarders,

Hazardous materials transportation, Highway safety, Motor carriers, Motor vehicle safety, Penalties.

49 CFR Part 390

Highway safety, Intermodal transportation, Motor carriers, Motor vehicle safety, Reporting and recordkeeping requirements.

49 CFR Part 395

Highway safety, Motor carriers, Reporting and recordkeeping requirements.

In consideration of the foregoing, FMCSA is amending 49 CFR chapter III, parts 385, 386, 390, and 395 as set forth below:

PART 385—SAFETY FITNESS PROCEDURE

■ 1. The authority citation continues to read as follows:

Authority: 49 U.S.C. 113, 504, 521(b), 5105(e), 5109, 13901–13905, 31133, 31135, 31136, 31137(a), 31144, 31148, and 31502; Sec. 113(a), Pub. L. 103–311; Sec. 408, Pub. L. 104–88; Sec. 350, Pub. L. 107–87; and 49 CFR 1.73.

■ 2. Amend Appendix B to part 385, section VII, List of Acute and Critical Regulations, as follows:

■ a. Revise the entries for § 395.3(a)(1) and § 395.3(a)(2);

■ b. Add entries for § 395.3(a)(3)(i) and § 395.3(a)(3)(ii), in numerical order; and

■ c. Remove the entries for § 395.3(c)(1) and § 395.3(c)(2).

Appendix B to Part 385—Explanation of Safety Rating Process

* * * * *

§ 395.3(a)(1) Requiring or permitting a property-carrying commercial motor vehicle driver to drive without taking an off-duty period of at least 10 consecutive hours prior to driving (critical).

§ 395.3(a)(2) Requiring or permitting a property-carrying commercial motor vehicle driver to drive after the end of the 14th hour after coming on duty (critical).

§ 395.3(a)(3)(i) Requiring or permitting a property-carrying commercial motor vehicle driver to drive more than 11 hours (critical).

§ 395.3(a)(3)(ii) Requiring or permitting a property-carrying commercial motor vehicle driver to drive if more than 8 hours have passed since the end of the driver's last off-duty or sleeper-berth period of at least 30 minutes (critical).

* * * * *

PART 386—RULES OF PRACTICE FOR MOTOR CARRIER, INTERMODAL EQUIPMENT PROVIDER, BROKER, FREIGHT FORWARDER, AND HAZARDOUS MATERIALS PROCEEDINGS

■ 3. The authority citation for part 386 continues to read as follows:

Authority: 49 U.S.C. 113, chapters 5, 51, 59, 131–141, 145–149, 311, 313, and 315; Sec. 204, Pub. L. 104–88, 109 Stat. 803, 941 (49 U.S.C. 701 note); Sec. 217, Pub. L. 105–159, 113 Stat. 1748, 1767; Sec. 206, Pub. L. 106–159, 113 Stat. 1763; subtitle B, title IV of Pub. L. 109–59; and 49 CFR 1.45 and 1.73.

■ 4. Amend Appendix B to part 386 by adding paragraph (a)(6) to read as follows:

Appendix B to Part 386—Penalty Schedule; Violations and Monetary Penalties

* * * * *

(a) * * *

(6) *Egregious violations of driving-time limits in 49 CFR part 395.* A driver who exceeds, and a motor carrier that requires or permits a driver to exceed, by more than 3 hours the driving-time limit in 49 CFR 395.3(a) or 395.5(a), as applicable, shall be deemed to have committed an egregious driving-time limit violation. In instances of an egregious driving-time violation, the Agency will consider the ''gravity of the violation,'' for purposes of 49 U.S.C. 521(b)(2)(D), sufficient to warrant imposition of penalties up to the maximum permitted by law.

* * * * *

PART 390—FEDERAL MOTOR CARRIER SAFETY REGULATIONS; GENERAL

■ 5. The authority citation for part 390 continues to read as follows:

Authority: 49 U.S.C. 504, 508, 31132, 31133, 31136, 31144, 31151, 31502; sec. 114, Pub. L. 103–311, 108 Stat. 1673, 1677–1678; sec. 212 and 217, Pub. L. 106–159 (as transferred by sec. 4115 and amended by secs. 4130–4132, Pub. L. 109–59, 119 Stat. 1144, 1726, 1743–1744); sec. 4136, Pub. L. 109–59, 119 Stat. 1144, 1745 and 49 CFR 1.73.

■ 6. Amend § 390.23 by revising paragraph (c) to read as follows:

§ 390.23 Relief from regulations.

* * * * *

(c) When the driver has been relieved of all duty and responsibilities upon termination of direct assistance to a regional or local emergency relief effort, no motor carrier shall permit or require any driver used by it to drive nor shall any such driver drive in commerce until the driver has met the requirements of §§ 395.3(a) and (c) and 395.5(a) of this chapter.

PART 395—HOURS OF SERVICE OF DRIVERS

■ 7. The authority citation for part 395 continues to read as follows:

Authority: 49 U.S.C. 504, 31133, 31136, 31137, and 31502; sec. 113, Pub. L. 103–311, 108 Stat. 1673, 1676; sec. 229, Pub. L. 106–159 (as transferred by sec. 4115 and amended by secs. 4130–4132, Pub. L. 109–59, 119 Stat. 1144, 1726, 1743, 1744); sec. 4133, Pub. L. 109–59, 119 Stat. 1144, 1744; sec. 108, Pub. L. 110–432. 122 Stat. 4860–4866; and 49 CFR 1.73.

■ 8. Amend § 395.1 as follows:

■ a. Revise the paragraph (b) heading and paragraph (b)(1) introductory text;

■ b. Revise pargraph (d)(2);

■ c. Revise paragraphs (e)(1)(iv) and (e)(2);

■ d. Revise paragraphs (g)(1)and (g)(2)(ii); and

■ e. Revise paragraph (q).

The revisions read as follows:

§ 395.1 Scope of rules in this part.

* * * * *

(b) *Driving conditions.* (1) *Adverse driving conditions.* Except as provided in paragraph (h)(2) of this section, a driver who encounters adverse driving conditions, as defined in § 395.2, and cannot, because of those conditions, safely complete the run within the maximum driving time permitted by §§ 395.3(a) or 395.5(a) may drive and be permitted or required to drive a commercial motor vehicle for not more than 2 additional hours beyond the maximum time allowed under §§ 395.3(a) or 395.5(a) to complete that run or to reach a place offering safety for the occupants of the commercial motor vehicle and security for the commercial motor vehicle and its cargo.

* * * * *

(d) * * *

(2) In the case of specially trained drivers of commercial motor vehicles that are specially constructed to service oil wells, on-duty time shall not include waiting time at a natural gas or oil well site. Such waiting time shall be recorded as ''off duty'' for purposes of §§ 395.8 and 395.15, with remarks or annotations to indicate the specific off-duty periods that are waiting time, or on a separate ''waiting time'' line on the record of duty status to show that off-duty time is also waiting time. Waiting time shall not be included in calculating the 14-hour period in § 395.3(a)(2). Specially trained drivers of such commercial motor vehicles are not eligible to use the provisions of § 395.1(e)(1).

(e) * * *

(1) * * *

(iv)(A) A property-carrying commercial motor vehicle driver does

not exceed the maximum driving time specified in § 395.3(a)(3) following 10 consecutive hours off duty; or

(B) A passenger-carrying commercial motor vehicle driver does not exceed 10 hours maximum driving time following 8 consecutive hours off duty; and

* * * * *

(2) *Operators of property-carrying commercial motor vehicles not requiring a commercial driver's license.* Except as provided in this paragraph, a driver is exempt from the requirements of § 395.3(a)(2) and § 395.8 and ineligible to use the provisions of § 395.1(e)(1), (g), and (o) if:

(i) The driver operates a property-carrying commercial motor vehicle for which a commercial driver's license is not required under part 383 of this subchapter;

(ii) The driver operates within a 150 air-mile radius of the location where the driver reports to and is released from work, *i.e.,* the normal work reporting location;

(iii) The driver returns to the normal work reporting location at the end of each duty tour;

(iv) The driver does not drive:

(A) After the 14th hour after coming on duty on 5 days of any period of 7 consecutive days; and

(B) After the 16th hour after coming on duty on 2 days of any period of 7 consecutive days;

(v) The motor carrier that employs the driver maintains and retains for a period of 6 months accurate and true time records showing:

(A) The time the driver reports for duty each day;

(B) The total number of hours the driver is on duty each day;

(C) The time the driver is released from duty each day;

(D) The total time for the preceding 7 days in accordance with § 395.8(j)(2) for drivers used for the first time or intermittently.

* * * * *

(g) * * *

(1) *Property-carrying commercial motor vehicle.* (i) *In General.* A driver who operates a property-carrying commercial motor vehicle equipped with a sleeper berth, as defined in §§ 395.2 and 393.76 of this subchapter,

(A) Must, before driving, accumulate

(*1*) At least 10 consecutive hours off duty;

(*2*) At least 10 consecutive hours of sleeper-berth time;

(*3*) A combination of consecutive sleeper-berth and off-duty time amounting to at least 10 hours; or

(*4*) The equivalent of at least 10 consecutive hours off duty if the driver does not comply with paragraph (g)(1)(i)(A)(*1*), (*2*), or (*3*) of this section;

(B) May not drive more than the driving limit specified in § 395.3(a)(3)(i) following one of the 10-hour off-duty periods specified in paragraph (g)(1)(i)(A)(*1*) through (*4*) of this section. *After* June 30, 2013, however, driving is permitted only if 8 hours or fewer have passed since the end of the driver's last off-duty break or sleeper-berth period of at least 30 minutes; and

(C) May not drive for more than the period specified in § 395.3(a)(2) after coming on duty following one of the 10-hour off-duty periods specified in paragraph (g)(1)(i)(A)(*1*)–(*4*) of this section; and

(D) Must exclude from the calculation of the 14-hour period in § 395.3(a)(2) any sleeper-berth period of at least 8 but less than 10 consecutive hours.

(ii) *Specific requirements.* The following rules apply in determining compliance with paragraph (g)(1)(i) of this section:

(A) The term ''equivalent of at least 10 consecutive hours off duty'' means a period of

(*1*) At least 8 but less than 10 consecutive hours in a sleeper berth, and

(*2*) A separate period of at least 2 but less than 10 consecutive hours either in the sleeper berth or off duty, or any combination thereof.

(B) Calculation of the driving limit includes all driving time; compliance must be re-calculated from the end of the first of the two periods used to comply with paragraph (g)(1)(ii)(A) of this section.

(C) Calculation of the 14-hour period in § 395.3(a)(2) includes all time except any sleeper-berth period of at least 8 but less than 10 consecutive hours and up to 2 hours riding in the passenger seat of a property-carrying vehicle moving on the highway immediately before or after a period of at least 8 but less than 10 consecutive hours in the sleeper berth; compliance must be re-calculated from the end of the first of the two periods used to comply with the requirements of paragraph (g)(1)(ii)(A) of this section.

(2) * * *

(ii) The driving time in the period immediately before and after each rest period, when added together, does not exceed the limit specified in § 395.3(a)(3);

* * * * *

(q) *Attendance on commercial motor vehicles containing Division 1.1, 1.2, or 1.3 explosives.* Operators who are required by 49 CFR 397.5 to be in attendance on commercial motor vehicles containing Division 1.1, 1.2, or 1.3 explosives are on duty at all times while performing attendance functions or any other work for a motor carrier. Operators of commercial motor vehicles containing Division 1.1, 1.2, or 1.3 explosives subject to the requirements for a 30-minute rest break in § 395.3(a)(3)(ii) may use 30 minutes or more of attendance time to meet the requirement for a rest break, providing they perform no other work during the break. Such drivers must record the rest break as on-duty time in their record of duty status with remarks or annotations to indicate the specific on-duty periods that are used to meet the requirement for break.

* * * * *

■ 9. Amend § 395.2 by revising the definition of ''on-duty time'' to read as follows:

§ 395.2 Definitions.

* * * * *

On-duty time means all time from the time a driver begins to work or is required to be in readiness to work until the time the driver is relieved from work and all responsibility for performing work. *On-duty time* shall include:

(1) All time at a plant, terminal, facility, or other property of a motor carrier or shipper, or on any public property, waiting to be dispatched, unless the driver has been relieved from duty by the motor carrier;

(2) All time inspecting, servicing, or conditioning any commercial motor vehicle at any time;

(3) All driving time as defined in the term *driving time;*

(4) All time in or on a commercial motor vehicle, other than:

(i) Time spent resting in or on a parked vehicle, except as otherwise provided in § 397.5 of this subchapter;

(ii) Time spent resting in a *sleeper berth;* or

(iii) Up to 2 hours riding in the passenger seat of a property-carrying vehicle moving on the highway immediately before or after a period of at least 8 consecutive hours in the sleeper berth;

(5) All time loading or unloading a commercial motor vehicle, supervising, or assisting in the loading or unloading, attending a commercial motor vehicle being loaded or unloaded, remaining in readiness to operate the commercial motor vehicle, or in giving or receiving receipts for shipments loaded or unloaded;

(6) All time repairing, obtaining assistance, or remaining in attendance upon a disabled commercial motor vehicle;

(7) All time spent providing a breath sample or urine specimen, including travel time to and from the collection site, to comply with the random, reasonable suspicion, post-crash, or follow-up testing required by part 382 of this subchapter when directed by a motor carrier;

(8) Performing any other work in the capacity, employ, or service of, a motor carrier; and

(9) Performing any compensated work for a person who is not a motor carrier.

* * * * *

■ 10. Revise § 395.3 to read as follows:

§ 395.3 Maximum driving time for property-carrying vehicles.

(a) Except as otherwise provided in § 395.1, no motor carrier shall permit or require any driver used by it to drive a property-carrying commercial motor vehicle, nor shall any such driver drive a property-carrying commercial motor vehicle, regardless of the number of motor carriers using the driver's services, unless the driver complies with the following requirements:

(1) *Start of work shift.* A driver may not drive without first taking 10 consecutive hours off duty;

(2) *14-hour period.* A driver may drive only during a period of 14 consecutive hours after coming on duty following 10 consecutive hours off duty. The driver may not drive after the end of the 14-consecutive-hour period without first taking 10 consecutive hours off duty.

(3) *Driving time and rest breaks.* (i) *Driving time.* A driver may drive a total of 11 hours during the 14-hour period specified in paragraph (a)(2) of this section.

(ii) *Rest breaks. After* June 30, 2013, driving is not permitted if more than 8 hours have passed since the end of the driver's last off-duty or sleeper-berth period of at least 30 minutes.

(b) No motor carrier shall permit or require a driver of a property-carrying commercial motor vehicle to drive, nor shall any driver drive a property-carrying commercial motor vehicle, regardless of the number of motor carriers using the driver's services, for any period after—

(1) Having been on duty 60 hours in any period of 7 consecutive days if the employing motor carrier does not operate commercial motor vehicles every day of the week; or

(2) Having been on duty 70 hours in any period of 8 consecutive days if the employing motor carrier operates commercial motor vehicles every day of the week.

(c)(1) *Through* June 30, 2013, any period of 7 consecutive days may end with the beginning of an off-duty period of 34 or more consecutive hours. *After* June 30, 2013, any period of 7 consecutive days may end with the beginning of an off-duty period of 34 or more consecutive hours that includes two periods from 1 a.m. to 5 a.m.

(2) *Through* June 30, 2013, any period of 8 consecutive days may end with the beginning of an off-duty period of 34 or more consecutive hours. *After* June 30, 2013, any period of 8 consecutive days may end with the beginning of an off-duty period of 34 or more consecutive hours that includes two periods from 1 a.m. to 5 a.m.

(d) *After* June 30, 2013, a driver may not take an off-duty period allowed by paragraph (c) of this section to restart the calculation of 60 hours in 7 consecutive days or 70 hours in 8 consecutive days until 168 or more consecutive hours have passed since the beginning of the last such off-duty period. When a driver takes more than one off-duty period of 34 or more consecutive hours within a period of 168 consecutive hours, he or she must indicate in the Remarks section of the record of duty status which such off-duty period is being used to restart the calculation of 60 hours in 7 consecutive days or 70 hours in 8 consecutive days.

Issued on: December 16, 2011.

Anne S. Ferro,

Administrator.

[FR Doc. 2011–32696 Filed 12–23–11; 8:45 am]

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Part V

Department of Labor

Wage and Hour Division

29 CFR Part 552

Application of the Fair Labor Standards Act to Domestic Service; Proposed Rule

DEPARTMENT OF LABOR

Wage and Hour Division

29 CFR Part 552

RIN 1235–AA05

Application of the Fair Labor Standards Act to Domestic Service

AGENCY: Wage and Hour Division, Department of Labor.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of Labor (the Department or DOL) proposes to revise the current Fair Labor Standards Act (FLSA or the Act) regulations pertaining to the exemption for companionship services and live-in domestic services. Section 13(a)(15) of the FLSA exempts from its minimum wage and overtime provisions domestic service employees employed ''to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary).'' Section 13(b)(21) of the FLSA exempts from the overtime provision any employee employed ''in domestic service in a household and who resides in such household.''

These exemptions were enacted in 1974 at the same time that Congress amended the FLSA to extend coverage to domestic service employees employed by private households. The regulations governing these exemptions have been substantively unchanged since they were promulgated in 1975. Due to significant changes in the home health care industry over the last 35 years, workers who today provide in-home care to individuals are performing duties and working in circumstances that were not envisioned when the companionship services regulations were promulgated. The number of workers providing these services has also greatly increased, and a significant number of these workers are being excluded from the minimum wage and overtime protections of the FLSA under the companionship services exemption. The Department has re-examined the regulations and determined that the regulations, as currently written, have expanded the scope of the exemption beyond those employees whom Congress intended to exempt when it enacted §§ 13(a)(15) and 13(b)(21) of the FLSA. Therefore, the Department proposes to amend the regulations to revise the definitions of ''domestic service employment'' and ''companionship services.'' The Department also proposes to clarify the type of activities and duties that may be considered ''incidental'' to the provision of companionship services. In addition, the Department proposes to amend the record-keeping requirements for live-in domestic workers. Finally, the Department proposes to amend the regulation pertaining to employment by a third party of companions and live-in domestic workers. This change would continue to allow the individual, family, or household employing the worker's services to apply the companionship and live-in exemptions and would deny all third party employers the use of such exemptions.

DATES: Comments must be received on or before February 27, 2012.

ADDRESSES: You may submit comments identified by RIN 1235–AA05, by either one of the following methods: Electronic comments, through the Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments. Mail: Address all written submissions to Mary Ziegler, Director, Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S–3502, 200 Constitution Avenue NW., Washington, DC 20210.

Instructions: Please submit one copy of your comments by only one method. All submissions must include the agency name and Regulatory Information Number (RIN) 1235–AA05. Please be advised that comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. Because we continue to experience delays in receiving mail in the Washington, DC area, commenters are strongly encouraged to transmit their comments electronically via the Federal eRulemaking Portal at *http://www.regulations.gov* or to submit them by mail early. For additional information on submitting comments and the rulemaking process, see the ''Public Participation'' heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: For access to the docket to read background documents or comments received, go to the Federal eRulemaking Portal at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Mary Ziegler, Director, Division of Regulations, Legislation, and Interpretation, U.S. Department of Labor, Wage and Hour Division, 200 Constitution Avenue NW., Room S–3502, FP Building, Washington, DC 20210; telephone: (202) 693–0406 (this is not a toll-free number). Copies of this proposed rule may be obtained in alternative formats (Large Print, Braille, Audio Tape, or Disc), upon request, by calling (202) 693–0675 (not a toll-free number). TTY/TTD callers may dial toll-free (877) 889–5627 to obtain information or request materials in alternative formats.

Questions of interpretation and/or enforcement of the agency's current regulations may be directed to the nearest Wage and Hour Division (WHD) District Office. Locate the nearest office by calling the Wage and Hour Division's toll-free help line at (866) 4US–WAGE (866) 487–9243 between 8 a.m. and 5 p.m. in your local time zone, or log onto the Wage and Hour Division's Web site for a nationwide listing of Wage and Hour District and Area Offices at: *http://www.dol.gov/whd/america2.htm.*

SUPPLEMENTARY INFORMATION:

I. Electronic Access and Filing Comments

Public Participation: This notice of proposed rulemaking is available through the **Federal Register** and the *http://www.regulations.gov* Web site. You may also access this document via the Wage and Hour Division's home page at *http://www.wagehour.dol.gov.* To comment electronically on Federal rulemakings, go to the Federal eRulemaking Portal at *http://www.regulations.gov,* which will allow you to find, review and submit comments on documents that are open for comment and published in the **Federal Register**. Please identify all comments submitted in electronic form by the RIN docket number (1235–AA05). Because of delays in receiving mail in the Washington, DC area, commenters should transmit their comments electronically via the Federal eRulemaking Portal at *http://www.regulations.gov,* or submit them by mail early to ensure timely receipt prior to the close of the comment period. Submit one copy of your comments by one method only.

II. Background

Congress extended FLSA coverage to ''domestic service'' workers in 1974, amending the law to apply to employees performing services of a household nature in or about the private home of the person by whom they are employed. *See* 29 U.S.C. 202(a), 206(f), 207(l). Domestic service workers were made subject to the FLSA even though they worked for a private household and not for a covered enterprise. Domestic service workers include, for example, employees employed as cooks, butlers, valets, maids, housekeepers, governesses, janitors, laundresses, caretakers, handymen, gardeners, and family chauffeurs. Senate Report No. 93–690, 93rd Cong., 2d Sess. p. 20

(1974). The 1974 Amendments also created an exemption from both the minimum wage and overtime pay requirements of the Act for casual babysitters and persons ''employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary).'' 29 U.S.C. 213(a)(15). Congress also created a more limited exemption from the overtime pay requirement for domestic service employees who reside in the household where they work. 29 U.S.C. 213(b)(21).

Congressional committee reports describe the bases for extending the minimum wage protections to domestics as ''so compelling and generally recognized as to make it hardly necessary to cite them.'' Senate Report No. 93–690, at p. 18. Private household work had been one of the least attractive fields of employment. Wages were low, work hours were highly irregular, and non-wage benefits were few. *Id.*

The U.S. House of Representatives Committee on Education and Labor stated its expectation ''that extending minimum wage and overtime protection to domestic service workers will not only raise the wages of these workers but will improve the sorry image of household employment. * * * Including domestic workers under the protection of the Act should help to raise the status and dignity of this work.'' House Report No. 93–913, 93rd Cong., 2d Sess., pp. 33–34 (1974). The legislative history explains that the 1974 Amendments were intended to include all employees whose vocation was domestic service, but to exempt from coverage babysitters and companions who were not regular bread-winners or responsible for their families' support. It was not intended to exclude trained personnel such as nurses, whether registered or practical, from the protections of the Act. *See* Senate Report No. 93–690, at p. 20. Senator Williams, Chairman of the Senate Subcommittee on Labor and the Senate floor manager of the 1974 Amendments to the FLSA, described companions as ''elder sitters'' whose main purpose is to watch over an elderly or infirm person in the same manner that a babysitter watches over children. 119 Cong. Rec. S24773, S24801 (daily ed. July 19, 1973). Senator Williams further noted that all other work, such as occasionally making a meal or washing clothes for the person, must be incidental to that primary purpose. *Id.*

On February 20, 1975, the Department issued regulations and interpretations in 29 CFR part 552 implementing the domestic service employment provisions *See* 40 FR 7404. Subpart A of the rule defined and delimited the terms ''domestic service employee,'' ''employee employed on a casual basis in domestic service employment to provide babysitting services,'' and ''employment to provide companionship services to individuals who (because of age or infirmity) are unable to care for themselves.'' Subpart B of the rule set out statements of general policy and interpretation concerning the application of the FLSA to domestic service employees. Section 552.109 contained the Department's position that the exemptions contained in § 13(a)(15) and § 13(b)(21) of the Act (exemptions for companions or live-in domestic service workers) were applicable to employees of a third party employer or agency.

On December 30, 1993, the Department published a notice of proposed rulemaking in the **Federal Register,** inviting public comments on a proposal to revise 29 CFR 552.109 to clarify that, in order for the exemptions under § 13(a)(15) and § 13(b)(21) of the FLSA to apply, employees engaged in companionship services and live-in domestic service who are employed by a third party employer or agency must be ''jointly'' employed by the family or household using their services. Other minor updating and technical corrections were included in the proposal. *See* 58 FR 69310. On September 8, 1995, the Department published a final rule revising the regulations to incorporate changes required by the recently enacted changes to Title II of the Social Security Act and making other updating and technical revisions. *See* 60 FR 46766. That same day, the Department published a proposed rule reopening and extending the comment period on the proposed changes to § 552.109 concerning third party employment. *See* 60 FR 46797. The Department did not finalize this proposed change.

On January 19, 2001, the Department published a notice of proposed rulemaking to amend the regulations to revise the definition of ''companionship services'' to more closely mirror Congressional intent. The Department also sought to clarify the criteria used to determine whether employees qualify as trained personnel and to amend the regulations concerning third party employment. On April 23, 2001, the Department published a proposed rule reopening and extending the comment period on the January 2001 proposed rule. *See* 66 FR 20411. This rulemaking was eventually withdrawn and terminated on April 8, 2002. *See* 67 FR 16668.

III. Need for Rulemaking

The home care industry has undergone a dramatic transformation since the Department published the implementing regulations in 1975. There has been a growing demand for long-term in-home care for persons of all ages, in part because of the rising cost of traditional institutional care, and because of the availability of funding assistance for in-home care under Medicare and Medicaid. The growing demand for long-term in-home care for persons is also partly due to the significant increase in our aging population.[1]

In response to the growing demand for long-term in-home care, the home health care services industry has grown. According to the National Association of Home Care (NAHC) publication, *Basic Statistics About Home Care* (March 2000), data from the Department of Health and Human Services' Health Care Financing Administration (HCFA) showed that the number of Medicare-certified home care agencies increased from 2,242 in 1975 to 7,747 in 1999. In the NAHC 2008 update, this number increased to 9,284 by the end of 2007. The number of for-profit agencies not associated with a hospital, rehabilitation facility, or skilled nursing facility, *i.e.,* freestanding agencies, increased more than any other category of agency from 47 in 1975 to 4,919 in 2006. These for-profit agencies grew from 2 percent of total Medicare-certified agencies in 1975 to 68 percent by 2006, and now represent the greatest percentage of certified agencies. Public health agencies, which constituted over one-half of the certified agencies in 1975, now represent only 15 percent.

Public funds pay the overwhelming majority of the cost for providing home care services. Medicaid payments represent nearly 40 percent of the industry's total revenues; other payment sources include Medicare, insurance plans, and direct pay. Based on data from the Centers for Medicare and Medicaid Services (CMS), Office of the Actuary, National Health Care Expenditures Historical and Projections: 1965–2016, Medicare and Medicaid together paid over one-half of the funds to freestanding agencies (37 and 19 percent, respectively). State and local governments account for 20 percent, while private health insurance accounts for 12 percent. Out-of-pocket funds

[1] *See* Shrestha, Laura, *The Changing Demographic Profile of the United States,* Congressional Research Service p. 13–14 (2006).

account for 10 percent of agency revenues.

There has been a similar increase in the employment of home health aides and personal care aides in the private homes of individuals in need of assistance with basic daily living or health maintenance activities. Bureau of Labor Statistics' (BLS) national occupational employment and wage estimates from the Occupational Employment Statistics (OES) survey show that the number of workers in these jobs tripled during the decade between 1988 and 1998, and by 1998 there were 430,440 workers employed as home health aides and 255,960 workers employed as personal care aides. The combined occupations of personal care and home health aides constitute a rapidly growing occupational group. BLS statistics demonstrate that between 1998 and 2008, this occupational group has more than doubled with home health aides increasing to 955,220 and personal care aides increasing to 630,740. (*http://www.bls.gov/oes/current/oes399021.htm*).

The growth in demand for in-home care and in the home health care services industry has not resulted in growth in earnings for workers providing in-home care. The earnings of employees in the home health aide and personal care aide categories remain among the lowest in the service industry. Studies have shown that the low income of direct care workers including home care workers continues to impede efforts to improve both jobs and care.[2] Protecting domestic service workers under the Act is an important step in ensuring that the home health care industry attracts and retains qualified workers that the sector will need in the future. Moreover, the workers that are employed by home care staffing agencies are not the workers that Congress envisioned when it enacted the companionship exemption *i.e.,* neighbors performing elder sitting, but are instead professional caregivers entitled to FLSA protection. In view of the dramatic changes in the home health care sector in the 36 years since these regulations were first promulgated and the growing concern about the proper application of the FLSA minimum wage and overtime protections to domestic service employees, the Department believes it is appropriate to reconsider whether the scope of the regulations are now too broad and not in harmony with Congressional intent.

IV. Proposed Regulatory Revisions

A. Domestic Service Employment (29 CFR 552.3)

Current § 552.3 states that ''As used in section 13(a)(15) of the Act, the term domestic service employment refers to services of a household nature performed by an employee in or about a private home (permanent or temporary) of the person by whom he or she is employed.'' The current definition also lists various occupations which are considered ''domestic service employment.'' The Department proposes to update and clarify the § 552.3 definition of ''domestic service employment'' in order to reflect the changing workforce.

The Department proposes to remove the qualifying introductory language ''[A]s used in section 13(a)(15) of the Act'' because the definition of domestic service employment has broader context than simply those employed to provide babysitting services on a casual basis and those performing companionship services. The proposed definition also removes the language that the domestic service work be performed in or about the home ''of the person by whom he or she is employed.'' This language has been part of the regulations since first implemented in 1975; however, the Department believes the definition may be confusing and may be misread as impermissibly narrowing coverage of domestic service employees under the FLSA. The Senate Committee responsible for the 1974 Amendments looked at regulations issued under the Social Security Act for defining domestic service. The Department borrowed this language from the Social Security regulations without discussion or elaboration, and has consistently maintained that the phrase is extraneous vestige. *See Long Island Care at Home, Ltd.* v. *Coke,* 551 U.S. 158, 169–70 (2007) (concluding that § 552.3 does not answer the question on third party employment and that the Department's third party regulation at § 552.109 controls). Moreover, the legislative history states that Congress intended to extend FLSA coverage to all employees whose ''vocation'' was domestic service, but to exempt from coverage casual babysitters and companions who were not regular breadwinners or responsible for their families' support. *See* House Report No. 93–913, p. 36. Removal of this extraneous language more accurately reflects Congressional intent and clarifies coverage of these workers.

Congress considered domestic service workers to include, for example, employees working as cooks, butlers, valets, maids, housekeepers, governesses, janitors, laundresses, caretakers, handymen, gardeners, and family chauffeurs. *See* Senate Report No. 93–690, p. 20. The Department included these occupations in § 552.3 as illustrative of domestic service workers. The Department proposes to delete the more outdated occupations in the list, such as governesses, footmen, and grooms, and to add additional modern day occupations such as nannies, home health aides, and personal care aides. The Department also proposes to include babysitters and companions to the list of domestic service workers, as workers in those occupations are domestic service workers, however, workers in those occupations may be exempt under FLSA § 13(a)(15) or § 13(b)(21). The list continues to be illustrative, not exhaustive.

B. Duties of a Companion (29 CFR 552.6)

The Department proposes to revise § 552.6, the regulation pertaining to companionship services for the aged and infirm. Current § 552.6 defines ''companionship services'' including ''fellowship, care, and protection'' provided to a person who, because of advanced age or physical or mental infirmity, can not care for his or her own needs. This regulation defines exempt services as including household work related to the person's care (such as meal preparation, bed making, washing of clothes, and other similar services). Under the current regulation, a companion may also perform additional general household work within the exemption if it is ''incidental'' and comprised of no more than 20 percent of the total weekly hours worked. This regulation further explains that the term ''companionship services'' does not include services relating to the care and protection of the aged or infirm which require and are performed by trained personnel, such as a registered or practical nurse.

1. Companionship Services

In 1974 Congress amended the FLSA specifically to include domestic service workers (such as maids, cooks, valets and laundresses) as among those to be covered by the Act. Congress simultaneously created a narrow exemption for casual babysitters and those providing companionship to the elderly or infirm. The Senate debate of the companionship services exemption provides insight into the type of work Congress sought to exempt:

[2] *See* Brannon, Diane, *et al.,* ''Job Perceptions and Intent to Leave Among Direct Care Workers: Evidence From the Better Jobs Better Care Demonstrations'' *The Gerontologist,* Vol. 47, No. 6, p. 820–829 (2007).

Senator Burdick: I am not concerned about the professional domestic who does this as a daily living. But we have situations in which young people, a widow, a divorcee, or a family of low income, of necessity, must have someone sit with their children while they are at work.

We have another category of people who might have an aged father, an aged mother, an infirm father, an infirm mother, and a neighbor comes in and sits with them.

This, of course, entails some work, such as perhaps making lunch for the children, or making lunch for the infirm person, and may even require throwing some diapers in the automatic washing machine for the baby. This would be incidental to the main purpose of the employment.

The Senator has used the word ''companion'' in the exception. When the Senator uses the word ''companion,'' the Senator does not mean that in the ordinarily accepted sense, that they are there to make them feel good. They are there to take care of them, he means, when he uses the word ''companion.'' Is that correct?

Senator Williams: We use the situation in which people are in a household not to do household work but are there, first, as babysitters. I think we all have the full meaning in mind of what a babysitter is there for—to watch the youngsters.

''Companion,'' as we mean it, is in the same role—to be there and to watch an older person, in a sense.

Senator Burdick: In other words, an elder sitter.

Senator Williams: Exactly.

119 Cong. Rec. at S24801.

The House Report offers further insight into Congressional intent with respect to those employees providing ''companionship services'' stating:

It is the intent of the committee to include within the coverage of the Act all employees whose vocation is domestic service. However, the exemption reflects the intent of the committee to exclude from coverage babysitters for whom domestic service is a casual form of employment and companions for individuals who are unable because of age or infirmity to care for themselves. But it is not intended that trained personnel such as nurses, whether registered or practical, shall be excluded. People who will be employed in the excluded categories are not regular bread-winners or responsible for their families support. The fact that persons performing casual services as babysitters or services as companions do some incidental household work does not keep them from being casual babysitters or companions for purposes of this exclusion.

House Report No. 93–913, p. 36.

This legislative history indicates that Congress intended to remove from minimum wage and overtime pay protection only those domestic service workers for whom domestic service was not their vocation and whose actual purpose was to provide casual babysitting or companionship services. Congress also intended that a limited amount of incidental work, such as making a meal or washing diapers for the person being cared for, would not remove the worker from the exemption.

In addition to the legislative history, the dictionary definition of ''companionship'' is instructive in understanding the scope of a companion as originally intended in the legislative history, that is, someone in the home primarily to watch over and care for the elderly or infirm person. The dictionary defines companionship as the ''relationship of companions; fellowship,'' and the term ''companion'' is defined as a ''person who associates with or accompanies another or others; associate; comrade'' and as a ''person employed to live with or travel with another.'' *See* Webster's New World Dictionary, p. 288 (2d College Ed. 1972). It further defines ''fellowship'' as including ''a mutual sharing, as of experience, activity, interest, *etc.'' Id.* at 514.

The Department is concerned that the current regulatory definition of ''companionship services'' allows for the denial of minimum wage and overtime pay protection to workers who work in private homes and routinely perform general household work or provide medical care, and who may also provide fellowship and protection as an incidental activity to the household work or medical care. The current regulatory language places inappropriate emphasis on the ''household work related to the person's care,'' such as meal preparation, bed making, washing of clothes, and other similar services. These activities, particularly when combined with the current 20 percent tolerance for general household work, exempt workers for whom providing ''fellowship and protection'' is incidental to their employment as cooks, waiters, butlers, valets, maids, housekeepers, nannies, nurses, janitors, laundresses, caretakers, handymen, gardeners, home health aides, personal care aides, and chauffeurs of automobiles for family use. Therefore, the Department proposes to revise § 552.6 to clarify the tasks an exempt companion may perform and to more closely align the regulation with Congressional intent.

The Department proposes to divide § 552.6 into four paragraphs. Proposed paragraphs (a), (b) and (c) will clarify what duties and activities may be considered ''companionship services'' and ''incidental'' to companionship services. Proposed paragraph (d) explains and clarifies that the companionship exemption is not applicable to medical care typically provided by personnel with specialized training.

Current § 552.6 defines the term ''companionship services.'' Proposed § 552.6(a) also defines ''companionship services'' as ''the provision of fellowship and protection for a person who, because of advanced age or physical or mental infirmity, is unable to care for themselves'' and adds language that defines the terms ''fellowship'' and ''protection.'' The legislative history describes a companion as someone who ''sits with [an infirm parent];'' provides ''constant attendance;'' and renders services similar to a babysitter, *i.e.,* ''someone to be there and watch an older person,'' an ''elder sitter.'' Such duties fall under the umbrella of fellowship and protection. Examples of activities that fall within fellowship and protection may include playing cards, watching television together, visiting with friends and neighbors, taking walks or engaging in hobbies. In addition, a companion may provide assistance with mobility and transfers. In the Department's view, ''mobility'' includes assistance with ambulation, including the use of a wheelchair or walker, and ''transfers'' include assisting the recipient in moving from one seating or reclining area to another. The Department believes that such tasks are consistent with what a babysitter or elder sitter would perform as contemplated by Senator Burdick in his explanation of the bill. The Department believes this expanded paragraph clarifies what is meant by ''companionship services,'' ''fellowship,'' and ''protection.''

Proposed § 552.6(b) explains that ''companionship services'' may include the intimate personal care services that the Secretary considers ''incidental'' to the provision of fellowship and protection. The proposed regulation limits a companion's duties to fellowship and protection with some allowance for certain incidental work, provided the incidental duties are performed concurrent with fellowship and protection of the individual and exclusively for that individual. The discussion of companionship duties in the legislative history allows incidental work, such as ''making lunch for the infirm person'' and ''some incidental household work.'' *See* 119 Cong. Rec. at S24801. However, such incidental services must be performed attendant to and in conjunction with the provision of fellowship and protection and in close physical proximity to the aged or infirm individual. Proposed paragraph (b) makes clear that such intimate personal care services that are incidental to the provision of fellowship and protection

must not exceed 20 percent of the total hours worked in the workweek. Should the provision of these incidental services exceed 20 percent of the total hours worked in any workweek, then the exemption may not be claimed for that week and workers must be paid minimum wage and overtime.

Proposed paragraph (b) also provides an illustrative list of permissible incidental services that may be provided by an exempt companion. In proposed § 552.6(b)(1), the Department proposes to include assistance with occasional dressing of the elderly or infirm person as an incidental activity. The Department believes that allowing assistance with dressing is consistent with Congressional intent, as assistance with dressing is something that would normally be contemplated by a babysitter or elder sitter. For example, a companion may assist an elderly or infirm person in laying down or arising from a nap which may either be preceded by shedding of some clothing or applying some clothing. Adjustments in weather may also require either the addition or subtraction of certain clothing or footwear, or the elderly or infirm person may, on occasion, need assistance in dressing after soiling their clothing by spilling food on their blouse or shirt during a meal, for example. This type of occasional dressing is permissible; however, the Department does not envision this task as being a regular and recurring part of the companion's duties. Further, the Department does not consider the application of special appliances or medical wraps (that require specialized training to apply) as part of assistance with dressing.

In proposed § 552.6(b)(2), the Department proposes that an exempt companion be allowed to assist with occasional grooming, including combing and brushing hair, assistance with brushing teeth, application of deodorant, or cleansing of the person's face and hands, such as following a meal. The Department recognizes that occasional grooming of the aged or infirm person is consistent with the Department's goal of providing incidental intimate personal care services attendant to and in conjunction with the provision of fellowship and protection for the aged or infirm person.

In proposed § 552.6(b)(3), the Department has included assistance with toileting, including assistance with transfers, mobility, positioning, use of toileting equipment and supplies (such as toilet paper, wipes, and elevated toilet seats or safety frames), diaper changing, and related personal cleansing. In the Department's view, assistance with toileting is carried out attendant to and in conjunction with the provision of fellowship and protection of the aged or infirm person. Because toileting is a basic human need and not a function that can be scheduled, the Department proposes to include it in the list of incidental tasks that may be performed by the exempt companion. The Department specifically invites comment on the inclusion of occasional toileting and diaper changing to the list of incidental activities performed by the exempt companion.

Proposed § 552.6(b)(4) suggests that an exempt companion may occasionally drive the aged or infirm individual to appointments, errands, and social events. The Department believes there is some justification for a companion who provides ''fellowship and protection'' to accompany an aged or infirm person to certain appointments. There is, however, some concern that providing transportation may be more akin to the duties of a chauffeur than to the duties of a companion. The Department is mindful that drivers and chauffeurs were expressly considered by Congress as among those they intended to be covered by the Act. The Department is also concerned about issues such as extra costs for the domestic worker and/or their employer with respect to insurance coverage levels, for example. The Department proposes that occasional driving can be a component of incidental duties; however, with the cap on incidental duties at 20 percent, the Department anticipates that only a limited amount of time will be spent driving the aged or infirm person to appointments, errands and social events. The Department notes that while it seeks to limit the time an exempt companion spends driving the aged or infirm individual, the Department considers time spent accompanying an aged or infirm individual to appointments, errands or social events (*e.g.,* traveling via a taxi cab or using public transportation) to be providing fellowship and protection. The Department explicitly invites comment on the proposal to include driving among the incidental activities an exempt companion may perform.

Proposed § 552.6(b)(5) provides that an exempt companion may provide occasional assistance with feeding the aged or infirm person, including food preparation and clean-up associated with feeding; however, the Department considers feeding through or assistance with a feeding tube to be medical care (that is typically provided by personnel with specialized training) that is excluded from the definition of ''companionship services.'' The Department notes that Senator Burdick stated in his floor speech that companionship was meant to include, ''some work, such as perhaps making lunch for the children, or making lunch for the infirm person * * *.'' 119 Cong. Rec. at S24801. The Department proposes to require that in order for food preparation to be considered as an incidental activity, the food prepared by the companion must be eaten by the aged or infirm person while the companion is present. The Department believes that this is consistent with the goal that incidental intimate personal care services be provided attendant to and in conjunction with the provision of fellowship and protection of the aged or infirm person. However, it is not the Department's intent that an exempt companion will be permitted to cook a week's worth of food while the aged or infirm individual is engaged in other activities, for example, because that would not be attendant to and in conjunction with providing fellowship and protection.

Proposed § 552.6(b)(6) provides that an exempt companion may occasionally place clothing worn by the person in the hamper, deposit the aged or infirm person's clothing into the washing machine or dryer, and assist with hanging, folding, and putting away the aged or infirm person's clothing. The Department's review of the legislative history indicates that occasional, light laundry was contemplated by Congress in consideration of the casual babysitter and companionship exemptions. In their exchange, Senators Williams and Burdick indicated that one ''may even require throwing some diapers in the automatic washing machine for the baby. This would be incidental to the main purpose of the employment.'' 119 Cong. Rec. at S24801.

Proposed § 552.6(b)(7), allows for occasional assistance with bathing the aged or infirm person. The Department does not consider bathing to be part of the regular duties of the exempt companion; however, the Department believes that in certain exigent circumstances, a companion may need to provide assistance with bathing to the elderly or infirm person. An example of exigent circumstances would be when the elderly or infirm person has an unexpected toileting accident requiring the need for bathing. Generally, the Department believes that bathing is something that can be scheduled to not coincide with the companion's duty hours, but proposes to allow reasonable but limited exceptions that more closely align to an imminent need to assist the elderly or infirm person with cleansing.

The Department specifically invites comments with respect to the 20 percent threshold for incidental care services, and whether this percentage is an appropriate figure. Further, the Department invites comments on the list of services, whether additional services should be included or certain services should be excluded, whether the list should be an exclusive list of permitted incidental services, and whether the requirement that such services must be performed attendant to and in conjunction with the provision of fellowship and protection to the elderly or infirm person should be adopted.

Proposed § 552.6(c), makes clear that work benefiting other members of the household, such as preparing meals for the household, performing housekeeping or laundry for the other members of the household does not fall within incidental duties for an exempt companion. Similarly, general household services not otherwise allowed in § 552.6(b) and (d), are not considered ''companionship services.'' The Department's proposal includes a change from the current regulation that allows the companionship services exemption to apply when the worker spends up to 20 percent of his or her time performing general household work which is unrelated to the care of the person. General household work that is not allowed under proposed § 552.6(b), such as vacuuming, washing windows, and dusting, is the sort of work that Congress sought to cover when it amended the Act in 1974 to reach domestic service workers such as maids and housekeepers, and therefore, companions are precluded from performing such tasks in order for the exemption to apply. The Department believes the proposed revisions to the definition strike a balance that implements Congress' twin goals of extending FLSA coverage to domestic service workers generally while exempting companions, by recognizing that the fellowship and protection provided by a companion are very different from the household chores performed by a maid or cook or laundress. Further, the proposed regulations also reflect that coverage under the FLSA is construed broadly and the exemptions are construed narrowly to effectuate the Act's remedial purposes.

Thus, the performance of duties that are not for fellowship and protection of the aged or infirm person, or incidental to the provision of fellowship and protection, are not ''companionship duties,'' and therefore, any performance of general household work would result in the loss of the exemption for the week. The Department believes that the combination of proposed § 552.6(b) and (c) results in the narrow slice of the workforce that Congress intended to exempt under the companionship exemption.

2. Medical Care

Proposed paragraph § 552.6(d) excludes from the definition of ''companionship services'' medical care that is typically provided by personnel with specialized training. The Department proposes in § 552.6(d) to continue to make clear that ''companionship services'' does not include care that is typically provided by personnel with specialized training and provides an illustrative and non-exhaustive list of examples of the type of care that is not considered ''companionship services.''

The Department proposes to maintain the exclusion of medical care from the definition of ''companionship services,'' but proposes to clarify that companionship services do not include the performance of medically-related tasks for which training is typically a prerequisite. The Department's experience indicates that many workers for whom the companionship exemption is claimed are categorized as personal care aides or home health aides. The Department understands that these workers often visit a care recipient for the purpose of providing wound care such as changing bandages, taking the care recipients vital signs, evaluating the care recipient's health and performing other diagnostic or medically-related tasks. While some personal care or home health aides may be engaged to perform companionship services, the Department is concerned that many such workers are primarily performing medically-related or personal-care-related tasks rather than providing fellowship and protection, and are being denied minimum wage and overtime pay protections through misapplication of the companionship services exemption.

The Department proposes to exclude from the definition of companionship services medically-related duties such as medication management, the taking of vital signs (pulse, respiration, blood sugar screening, and temperature), routine foot, skin, and back care, and assistance with physical therapy. This list is illustrative, not exhaustive. Similarly, determining whether prescription medication needs to be taken would remove the domestic service worker from the companionship exemption.

However, the Department notes that reminders of medical appointments or a predetermined medicinal schedule would be encompassed within companionship duties. For example, where the companion is provided clear instructions to remind the aged or infirm person to take medication that has been provided in a daily pillbox at a prescribed time and the companion exercises no discretion as to the amount or when the care recipient takes the medication, such work generally would be intimate personal care activities considered by the Secretary to be incidental to the provision of fellowship and protection. The Department believes, however, that Congress did not intend the companionship services exemption to apply to employees who perform medically-related duties, such as registered or licensed nurses, certified nursing assistants, or certified nursing aides. Tasks being performed by these workers that typically require medical training and are beyond what Congress envisioned when it stated that persons providing companionship services are present in the home, as a neighbor might be, to watch over an elderly person the way a babysitter watches over a child.

The Department specifically seeks comment on whether the proposed rule appropriately reflects medical care tasks currently performed by home health aides or personal care aides which require training in order to perform. The Department also seeks comment on whether the rule should list additional examples of minor health-related actions that do not require training and could be included within companionship services, such as applying a band aid to a minor cut or helping an elderly person take over-the-counter medication.

It is important to note that workers providing healthcare in homes are already subject to minimum wage and overtime protections. However, the Department invites comment on the potential effects of the proposed changes as discussed above on the delivery of companionship services and whether unique circumstances exist that impact the provision of companionship services in the context of the broader healthcare system.

C. Third Party Employment (29 CFR 552.109)

The Department also proposes to revise § 552.109, the regulation pertaining to third party employment. Current § 552.109 provides that employees who are employed by an employer or agency other than the family or household using the companionship services may be subject to the FLSA exemption from minimum

wage and overtime pay for companions under § 13(a)(15). The current regulation also provides that live-in workers who are employed by a third party may be subject to an overtime exemption under § 13(b)(21) of the FLSA.

Upon further consideration and analysis, the Department believes that these two exemptions from the minimum wage and overtime protections of the FLSA should not be applicable to employees of third party employers. The Department proposes to revise § 552.109 to limit the application of these exemptions to the individual, family or household employing the companion or live-in domestic worker, regardless of whether the family member employing the companion or live-in domestic worker resides in the home where the services are performed. The Department believes this proposed change better reflects the understanding of Congress when it created these exemptions. In addition, the Department believes amending this regulation is necessary to address the changes that have taken place in the home health care industry since this regulation was first promulgated.

As noted by the Supreme Court, the Department has ''struggled with the third party employment question.'' *Long Island Care at Home, Ltd.* v. *Coke,* 551 U.S. 158, 171 (2007). In 1974, the Department proposed a regulation that would have denied the exemptions in §§ 13(a)(15) and 13(b)(21) of the Act to employees who, although providing companionship or live-in domestic services, were employed by an employer or agency other than the family or household using their services. *See* 39 FR 35383. However, in the final regulation, promulgated in 1975, the Department concluded that the exemption could be applicable to employees providing companionship or live-in domestic services employed by such third party employers. *See* 40 FR 7404. In 1993, 1995, and 2001, the Department revisited this regulation specifically, proposing amendments that would have curtailed the applicability of these exemptions to the employees of third party employers.

In revisiting the legislative history of the 1974 Amendments, the Department believes that Congress contemplated that individual family members, and not third party employers that already were covered by the FLSA, would be impacted by the extension of coverage to domestic service workers. ''I just cannot imagine the housewife struggling with the paper work which would be required.'' 120 Cong. Rec. S5269 (daily ed. Mar. 5, 1974) (statement of Sen. Fannin). ''The position of the committee in adding complete coverage for domestics and thus adding additional recordkeeping and other chores for the American housewife * * *'' 120 Cong. Rec. S5275 (statement of Sen. Dominick). Because Congress believed that private households would be impacted by the expansion of FLSA coverage, it is reasonable to conclude that Congress intended only private households to be entitled to the exemptions from FLSA protections for domestic service workers. Professional caregivers, such as those individuals employed by third party employers, are simply not the type of employment arrangements that Congress sought to exempt. In view of the professionalization and standardization of this growth industry that has taken place over the last three decades, it is the Department's position that employees providing companionship services who are employed in the vocation of caregiver by third parties should have the same minimum wage and overtime protections that other workers enjoy.

Statements in the Congressional Record made by supporters of the amendment also demonstrate that Congress considered the impact that the expansion of FLSA coverage would have on poor women, many of them women of color, employed as domestics. Senator Williams noted that ''the plain fact is that private household domestic workers are overwhelmingly female and members of minority groups,'' and ''[i]n failing to cover domestics under our basic wage and hour law we would be turning our backs on these people.'' 119 Cong. Rec. S24799 (statement of Senator Williams). Senator Williams further emphasized that ''[s]ince domestic employment is one of the prime sources of jobs for poor and unskilled workers, it is clear that there is an important national interest at stake in insuring that the wages received for such work do not fall below a minimal standard of decency.'' *Id.* at 24800. Such statements indicate that Congress intended broad FLSA coverage for domestic workers. Poor, minority women, many of them immigrants, continue to comprise the great majority of the companion workforce today. The fact that 70 percent of home health care workers are employed by third party agencies—and fall outside of FLSA coverage under the current third party regulation—is an important indication that what Congress intended to accomplish in amending the FLSA in 1974 remains unfinished.[3]

Moreover, under the 1974 Amendments, Congress explicitly extended FLSA coverage to domestic service employees who were not previously covered, *i.e.,* those who worked only for a private family or a small business and not for a covered enterprise. Prior to 1974, employees who had worked for a covered placement agency, but were assigned to work in someone's home were covered by the FLSA. 39 FR 35385. Congress did not intend for the 1974 Amendments, which sought to extend the reach of the FLSA, to exclude workers already covered by the Act. The focus of the floor debate concerned the extension of coverage to categories of domestic workers who were not already covered by the FLSA, specifically, those not employed by an enterprise-covered agency. *See, e.g.,* 119 Cong. Rec. at S24800 (''coverage of domestic employees is a vital step in the direction of insuring that *all* workers affecting interstate commerce are protected by the Fair Labor Standards Act''); *see also* Senate Report No. 93–690 at p. 20 (''The goal of the Amendments embodied in the committee bill is to update the level of the minimum wage and to continue the task initiated in 1961—and further implemented in 1966 and 1972—to *extend* the basic protection of the Fair Labor Standards Act to additional workers and to reduce to the extent practicable at this time the remaining exemptions.'') (emphasis added). Further, there is no indication that Congress considered limiting enterprise coverage for third party employers providing domestic services. The only expressions of concern by opponents of the amendment related to the new recordkeeping burdens on private households. Recognizing this intended expansion of the Act, the exemptions excluding employees from coverage must therefore be defined narrowly in the regulations to achieve the law's purpose of extending coverage broadly. This is consistent with the general principle that coverage under the FLSA is broadly construed so as to effect its remedial purposes, and exemptions are narrowly interpreted and limited in application to those who clearly are within the terms and spirit of the exemption. *See, e.g., A.H. Phillips, Inc.* v. *Walling,* 324 U.S. 490, 493 (1945). Upon further analysis, the Department acknowledges that the regulatory rollback of coverage for many workers that resulted from current § 552.109 was not in accord with Congress' purpose of expanding coverage.

[3] University of California San Francisco, Center for California Health Workforce Studies, *An Aging U.S. Population and the Healthcare Workforce: Factors Affecting the Need for Geriatric Care Workers at 30* (Feb. 2006).

In addition, 14 states already have statutes providing minimum wage and overtime protections to all or most third-party-employed home care workers who may otherwise fall under the federal companion exemption. These states are Colorado, Hawaii, Illinois, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Jersey, New York, Pennsylvania, Washington, and Wisconsin. Maine and California extend minimum wage and overtime protections to all companions employed by for-profit agencies. Five more states (Arizona, Nebraska, North Dakota, Ohio, and South Dakota) and the District of Columbia provide only minimum wage coverage only to home care workers, including companions, employed by third parties.

Significantly, several of the states have instituted these protections in the last several years. For example, in January 2010 Colorado extended minimum wage and overtime protection to home care workers not employed by private households; in October 2003 Michigan extended minimum wage and overtime protection to home care workers employed by an employer with 2 or more employees and in July 2003 California extended minimum wage coverage to all companions employed by third parties and overtime coverage to companions employed by for-profit agencies. The fact that these state statutes exist negates many of the objections raised in the past regarding the feasibility and expense of prohibiting third parties from claiming the companionship and live-in worker exemptions.

Members of Congress have also recently urged the Department to narrow the scope of these exemptions. In 2009, over 50 Members of Congress wrote to Secretary Solis, urging the Department to revise the companionship regulation because it ''interpreted a narrow exemption Congress provided for 'companionship services' to exclude all workers, including those employed by a third party, who provide in-home care for elderly or disabled people from the FLSA's wage and overtime protections.'' *See* Letter from Representative Sanchez *et al.* to Secretary Solis, May 18, 2009; Letter from Senator Harkin, *et al.,* to Secretary Solis, June 11, 2009. The Members also noted that most home care workers are women and often the sole bread winners for their families. The latter point is important because Congress stated that ''[p]eople who will be employed in the excluded categories are not regular bread winners or responsible for their families' support.'' Senate Report No. 93–690, at p. 20. The expanded coverage was needed to raise incomes for those workers who depended on domestic work as a ''daily living,'' which was the workforce that Rep. Shirley Chisholm described as the ''thousands of ladies who have the sole responsibility for taking care of their families and will not be able to adequately support their families.'' This situation continues today. One survey in New York City, for example, reported that 81 percent of home care workers served as the primary income earner for their family.[4]

In 2007, the Department's third party employment regulation was addressed by the Supreme Court. *See Coke,* 551 U.S. 158. In *Coke,* a home health care worker employed by a third party challenged the validity of the Department's regulation permitting employees of third parties to claim the companionship exemption. The Court acknowledged that the statutory text and legislative history do not provide an explicit answer to the third party employment question. *Id.* at 168. Rather, the FLSA leaves gaps as to the scope and definition of statutory terms such as ''domestic service employment'' and ''companionship services,'' and it provides the Department with the power to fill those gaps. *Id.* at 167. Further, when the Department fills statutory gaps with any reasonable interpretation, and in accordance with other applicable requirements, the courts accept the result as legally binding. *Id.* at 167–68. The Court noted that the 1974 Amendment ''expressly instructs the agency to work out the details of those broad definitions'' and explained that the regulation ''concerns a matter in respect to which the agency is expert,'' because whether the 1974 Amendment should extend protection to any third party companions turns ''upon the kind of thorough knowledge of the subject matter and ability to consult at length with affected parties that an agency, such as the Department of Labor, possesses.'' *Id.* at 167–68. The Court concluded that ''whether to include workers paid by third parties within the scope of the definitions is one of those details'' that Congress entrusted to the Department. *Id.* at 167.

In *Coke,* the Department argued that the third party regulation was an exercise of its expressly delegated legislative rulemaking authority, and as such, was legally binding and must be accorded the highest level of deference. The position taken by the Department in *Coke* concerning deference, as affirmed by a unanimous Supreme Court, remains relevant as the Department reconsiders the scope of these exemptions. By engaging in a new round of notice and comment rulemaking, the Department is again appropriately exercising its expressly delegated rulemaking authority. The Department's proposal to revise the third party regulation is in no way inconsistent with the Court's ruling. Rather, the Court recognized that the statutory text does not answer the question and affirmed the Department's broad authority to promulgate regulations that define the scope of the exemption. The Court explicitly recognized that the Department may interpret its ''regulations differently at different times in their history,'' and may make changes to its position, provided that the change creates no unfair surprise. *Id.* at 170–71. The Court also recognized that when the Department utilizes notice-and-comment rulemaking in an attempt to codify a new regulation, as it is doing now, such rulemaking makes surprise unlikely. *Id.* at 170.

It must be noted that the Department argued in *Coke,* as well as in Wage and Hour Advisory Memorandum (''WHAM'') 2005–1 (Dec. 1, 2005) (found at *http://www.dol.gov/whd/FieldBulletins/index.htm*), that the third party regulation, as currently written, was the Department's best reading of these statutory exemptions. However, upon further consideration of the purpose and objectives behind the 1974 Amendments, the Department is no longer convinced that our prior reading is the best one. The purpose behind the Amendments, confirmed by the legislative history, was to extend FLSA coverage to domestic workers who were not employed by covered enterprises. In recognition that it was expanding coverage to workers employed by private households, Congress created the narrow exemption for casual babysitters and companions whose vocation is not domestic service. In light of the purposes behind the amendment and the exemption, § 13(a)(15) of the FLSA cannot and should not necessarily be read to apply to third party employers, as we argued for in the WHAM. The Department erroneously focused on the phrase ''any employee,'' instead of focusing on the purpose and objective behind the 1974 Amendments, which was to expand minimum wage and overtime protections to workers employed by private households that did not otherwise meet the FLSA coverage requirements. The Supreme

[4] Gilbert, Lenora. *Home Care Workers: The New York City Experience,* Encyclopedia of Occupational Safety and Health, Vol. 3. (4th ed. International Labor Organization, 1998).

Court has ''stressed that in expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.'' *U.S. Nat'l Bank of Oregon* v. *Indep. Ins. Agents of Am., Inc.,* 508 U.S. 439, 455 (1993) (internal quotation marks omitted). The Supreme Court concluded that ''the text of the FLSA does not expressly answer the third party employment question.'' *Coke,* 551 at 168. Thus, the statutory phrase ''any employee'' cannot, standing alone, answer the question at hand, and after considering the purpose and objectives of the Amendments as a whole, the Department believes that the companionship exemption was not intended to apply to third party employers.

Moreover, upon further reflection, the Department is no longer convinced that Congress' failure to limit the companionship exemption to employees of a particular employer is evidence of Congressional intent on this issue. WHAM at 2. In 1974, Congress understood that enterprises that employed domestic service workers to perform services in private homes were already covered employers under the Act and thus, their employees already received the protections of the FLSA even when they performed companionship services. There is no indication that Congress intended to narrow coverage of those employed by third party employers when this would be contrary to the intent and purpose of expanding coverage and protecting low-wage workers. By focusing on the impact that the 1974 Amendments would have upon private households during the debates, Congress presumably did not think it necessary to explicitly limit the narrowly created statutory exemptions to families and households who employ companions, causal babysitters and live-in domestics. Rather, Congress provided the Department with the power to fill these kinds of statutory gaps.

The WHAM noted the ambiguity and lack of clarity in the companionship regulations, stating that ''phrases in the [companionship regulations] could potentially be read to exclude third party employees from the definition of domestic service employment.'' WHAM at 3. This admitted lack of clarity is one of the reasons the Department has revisited these regulations, and, upon further consideration, proposes amending this regulation to state that employees of third party employers may not use these exemptions. This proposed amendment, as explained above, is based upon a closer examination of the legislative history and legislative intent, the manner in which the home health care industry has evolved, an attempt to better harmonize the regulations pertaining to companionship, 36 years of enforcement experience, and additional information provided by stakeholders, Members of Congress, and individual states.

Based on the foregoing reasons, the Department proposes to revise § 552.109(a) and (c) to apply the exemptions in §§ 13(a)(15) and 13(b)(21) of the FLSA only to workers employed by the individual, family or household using the worker's services. Further, to address concerns expressed in the legislative history that FLSA compliance would be a burden to the individual, family, or household, the Department believes it is consistent with the statute to maintain the §§ 13(a)(15) and 13(b)(21) exemptions for the individual, family, or household even if they engage the services of a third party employer. Therefore, if the individual, family, or household and the third party agency are joint employers, only the individual, family, or household is still entitled to assert the exemptions. However, regardless of whether a joint employment relationship exists, the exemptions are not available to the third party employer. Thus, all workers employed by a third party, whether solely or jointly, are entitled to the minimum wage and overtime protections of the Act. The Department further notes that if the employee fails to qualify as an exempt companion, such as if the employee performs incidental duties that exceed the 20 percent tolerance allowed under the proposed § 552.6(b), or the employee provides medical care for which training is a prerequisite, the individual, family or household member cannot assert the exemption and is jointly and severally liable for the violation. The proposed revision appropriately limits these exemptions to the scope Congress intended.

Finally, the proposed regulation refers to ''the individual or member of the family or household'' who employs the companion or live-in domestic worker. It is the Department's intent that ''member of the family or household'' be construed broadly, and no specific familial relationship is necessary. For example, a ''member of the family or household'' may include an individual who is a child, niece, guardian or authorized representative, housemate, or person acting *in loco parentis* to the elderly or infirm individual needing companionship or live-in services.

The Department invites comments on the proposed changes to the third party employment regulation, and specifically seeks feedback from home health care workers, organizations, and employers.

D. Live-in Domestic Service Employees (29 CFR 552.102 and 552.110)

The Department proposes revisions to the recordkeeping requirements in 29 CFR part 552 applicable to live-in domestic employees, in order to ensure that employers maintain an accurate record of hours worked by such workers and pay for all hours worked in accordance with the FLSA. Section 13(b)(21) of the Act, provides an overtime exemption for live-in domestic employees; however, such workers remain subject to the FLSA minimum wage protections. Current § 552.102 allows the employer and employee to enter into an agreement that excludes the amount of sleeping time, meal time, and other periods of complete freedom from duty when the employee may either leave the premises or stay on the premises for purely personal pursuits. Paragraph 552.102(a) makes clear that if the free time is interrupted by a call to duty, the interruption must be counted as hours worked. Paragraph 552.102(b) allows an employer and employee who have such an agreement to establish the employee's hours of work in lieu of maintaining precise records of the hours actually worked. The employer is to maintain a copy of the agreement and indicate that the employee's work time generally coincides with the agreement. If there is a significant deviation from the agreement, a separate record should be kept or a new agreement should be reached.

The Department is concerned that not all hours worked are actually captured by such agreement and paid, which may result in a minimum wage violation. The current regulations do not provide a sufficient basis to determine whether the employee has in fact received at least the minimum wage for all hours worked.

Proposed § 552.102(b) would no longer allow the employer of a live-in domestic employee to use the agreement as the basis to establish the actual hours of work in lieu of maintaining an actual record of such hours. Instead, the employer will be required to keep a record of the actual hours worked. Consequently, the language suggesting that a separate record of hours worked be kept when there is a significant deviation from the agreement is deleted. Nonetheless, proposed § 551.102(b) requires entering into a new written agreement whenever there is a significant deviation from the existing agreement.

The Department also proposes to amend § 552.110 with respect to the records kept for live-in domestic employees. Current § 552.110 specifies the recordkeeping requirements for domestic service employees. Paragraph 552.110(b) provides that records of actual hours worked are not required for live-in domestic employees; instead, the employer may maintain a copy of the agreement referred to in § 552.102. It also states that the more limited recordkeeping requirement in this section does not apply to third-party employers and that no records are required for casual babysitters. Paragraph 552.110(c) permits, when a domestic service employee works a fixed schedule, the employer to use the schedule that the employee normally works and either provide some notation that such hours were actually worked or, when more or less hours are actually worked, show the exact number of hours worked. Paragraph 552.110(d) permits an employer to require the domestic service employee to record the hours worked and submit the record to the employer.

For the reasons outlined above, proposed § 552.110(b) will no longer permit an employer to maintain a copy of the agreement as a substitution for recording actual hours worked by the live-in domestic employee. Instead, it requires that the employer maintain a copy of the agreement and maintain records showing the exact number of hours worked by the live-in domestic employee. Proposed § 552.110(b) also makes clear that the provisions of 29 CFR 516.2(c) do not apply to live-in domestic employees, which means that employers of such employees may not maintain a simplified set of records for live-in domestic employees who work a fixed schedule. As a result, § 552.110(c) is revised to clearly state that the provision does not apply to live-in domestic workers. The Department believes that the frequency of schedule changes simply makes reliance on a fixed schedule and noting exceptions too unreliable to ensure an accurate record of hours worked by these employees. In addition, the proposed changes to § 552.109 makes the reference in § 552.110(b) to third-party employers not being able to rely on the simplified recordkeeping requirements moot; consequently, it is removed from proposed § 552.110(b). The proposed regulations also revise § 552.110(d), thus no longer allowing the employer to require the live-in domestic service employee to record the hours worked and submit the record to the employer. As with other employees, the employer is responsible for making, keeping, and preserving records of hours worked and ensuring their accuracy. As is the case now, the Department does not require records for casual babysitters as defined by § 552.5; however, that provision is in a stand-alone paragraph, proposed 29 CFR 552.110(e).

V. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.,* and its attendant regulations, 5 CFR part 1320, requires that the Department consider the impact of paperwork and other information collection burdens imposed on the public. Under the PRA, an agency may not collect or sponsor the collection of information, nor may it impose an information collection requirement unless it displays a currently valid Office of Management and Budget (OMB) control number. *See* 5 CFR 1320.8(b)(3)(vi).

This action contains the following proposed amendments to the existing information collection requirements previously approved under OMB Control Number 1235–0018. As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d), the Department has submitted these proposed information collection amendments to OMB for its review.

Summary: The Department seeks to minimize the paperwork burden for individuals, small businesses, educational and nonprofit institutions, Federal contractors, State, local, and tribal governments, and other persons resulting from the collection of information by or for the agency. The PRA typically requires an agency to provide notice and seek public comments on any proposed collection of information contained in a proposed rule. *See* 44 U.S.C. 3506(c)(2)(B); 5 CFR 1320.8.

The PRA requires all Federal agencies to analyze proposed regulations for potential time burdens on the regulated community created by provisions within the proposed regulations that require the submission of information. These information collection (IC) requirements must be submitted to OMB for approval. Persons are not required to respond to the information collection requirements as contained in this proposal unless and until they are approved by the OMB under the PRA at the final rule stage. This ''paperwork burden'' analysis estimates the burdens for the proposed regulations as drafted. The Department proposes to amend 29 CFR part 552 with respect to the records kept for live-in domestic employees. Proposed 29 CFR 552.102(b) would no longer allow the employer of a live-in domestic employee to use an agreement as the basis to establish hours worked in lieu of maintaining actual record of such hours. Instead, the employer will be required to keep a record of the actual hours worked. Concurrently, proposed 29 CFR 552.110(b) will no longer permit an employer to maintain a copy of an agreement as a substitute for keeping records of hours worked by the live-in domestic employee. Finally, the Department's proposed amendments to 29 CFR part 552 results in fewer employees being exempt from the minimum wage and overtime law. Employers must maintain records of hours worked for employees who are not exempt from minimum wage and overtime pay requirements. Therefore, the number of employees for whom an employer must maintain records of hours worked will increase under the proposed rule. This will increase the burden under 29 CFR part 516, the general recordkeeping regulation under the FLSA.

Circumstances Necessitating Collection: The Fair Labor Standards Act (FLSA), 29 U.S.C. 201 *et seq.,* sets the Federal minimum wage, overtime pay, recordkeeping and youth employment standards of most general application. Section 11(c) of the FLSA requires all employers covered by the FLSA to make, keep, and preserve records or employees and of wages, hours, and other conditions and practices of employment. A FLSA covered employer must maintain the records for such period of time and make such reports as prescribed by regulations issued by the Secretary of Labor. The Department has promulgated regulations at 29 CFR part 516 to establish the basic FLSA recordkeeping requirements. The Department has also issued specific recordkeeping requirements in 29 CFR part 552 which is the subject of this collection. The Department proposes to amend recordkeeping requirements in § 552.102 and § 552.110 regarding agreements for live-in domestic workers. The Department also notes that the proposed amendments to the definition of companion results in fewer employees being exempt from the minimum wage and overtime requirements of the FLSA.

Purpose and Use: The Wage and Hour Division (WHD) and employees use this information to determine whether covered employers have complied with various FLSA requirements. Employers use the records to document FLSA compliance, including showing qualification for various FLSA exemptions.

Technology: The recordkeeping aspect of this collection makes clear that the regulations prescribe no particular order or form of records and employers may preserve records in such forms as microfilm, or automated word or data processing memory is acceptable provided facilities are available for inspection and transcription of the records.

Duplication: This information is not available through any other source.

Minimizing Small Entity Burden: Although this information collection does involve small businesses, including small State and Local government agencies, the Department minimizes respondent burden by requiring no specific order or form of records in responding to this information collection. Moreover, employers would normally maintain the records identified in this information collection under usual or customary business practices.

Agency Need: The Department is assigned a statutory obligation to ensure employer compliance with the FLSA. The Department uses records covered by this information collection to determine compliance with the FLSA.

Special Circumstances: There are no special circumstances associated with this collection.

Public Comments: The Department seeks public comments regarding the burdens imposed by information collections contained in sections 552.102 and 552.110 of this proposed rule. In particular, the Department seeks comments that: Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; enhance the quality, utility and clarity of the information to be collected; and minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses. Commenters may send their views about these information collections to the Department in the same way as all other comments (*e.g.,* through the regulations.gov Web site). All comments received will be made a matter of public record, and posted without change to *http://www.regulations.gov,* including any personal information provided.

An agency may not conduct an information collection unless it has a currently valid OMB approval, and the Department has submitted the identified information collection contained in the proposed rule to the OMB for review under the PRA under the Control Number 1235–0018. *See* 44 U.S.C. 3507(d); 5 CFR 1320.11. Interested parties may obtain a copy of the full supporting statement by sending a written request to the mail address shown in the **ADDRESSES** section at the beginning of this preamble or by visiting the *http://www.reginfo.gov/public/do/PRAMain* Web site.

In addition to having an opportunity to file comments with the Department, comments about the paperwork implications of the proposed regulations may be addressed to the OMB. Comments to the OMB should be directed to: Office of Information and Regulatory Affairs, Attention OMB Desk Officer for the Wage and Hour Division, Office of Management and Budget, Room 10235, Washington, DC 20503, Telephone: (202) 395–7316/Fax: (202) 395–6974 (these are not toll-free numbers).

Confidentiality: The Department makes no assurances of confidentiality to respondents. As a practical matter, the Department would only disclose agency investigation records of materials subject to this collection in accordance with the provisions of the Freedom of Information Act, 5 U.S.C. 552, and the attendant regulations, 29 CFR part 70, and the Privacy Act, 5 U.S.C. 552a, and its attendant regulations, 29 CFR part 71.

OMB Control Number: 1235–0018.

Affected Public: Businesses or other for profit, not-for-profit institutions.

Total Respondents: 3,493,514.

Total Annual Responses: 43,478,185.

Estimated Burden Hours: 987,778.

Estimated Time per Response: 2 minutes.

Frequency: 24 times annually.

Total Burden Cost (capital/startup): 0.

Total Burden Costs (operation/maintenance): $22,580,605.

VI. Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been designated a ''significant regulatory action'' because it is economically significant, under section 3(f) of Executive Order 12866, based on the Preliminary Regulatory Impact Analysis (PRIA) presented below. As a result, the OMB has reviewed this proposed rule. The Department also has concluded that this proposed rule is a major rule under the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*).

Preliminary Regulatory Impact Analysis of the Proposed Revisions to the Companionship

Regulations Background

Under Executive Order 12866 (58 FR 51735, October 4, 1993), the Department must determine whether a regulatory action is ''significant'' and therefore subject to OMB review and the requirements of the Executive Order. Executive Order 12866 defines ''significant regulatory action'' as one that is likely to result in a rule that may have ''an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities; create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.'' This proposed rule meets the criteria for a significant regulatory action because it is anticipated to have an annual effect on the economy of $100 million or more. As a result, the rule is submitted to OMB for review.

The provisions of the FLSA apply to all enterprises that have employees engaged in commerce or in the production of goods for commerce and have an annual gross volume of sales made or business done of at least $500,000 (exclusive of excise taxes at the retail level that are separately stated); or, are engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, or the mentally ill who reside on the premises; a school for mentally or physically disabled or gifted children; a preschool, elementary or secondary school, or an institution of higher education (regardless whether such hospital, institution or school is public or private, or operated for profit or not);

or, are engaged in an activity of a public agency.

There are two ways an employee may be covered by the provisions of the FLSA: (1) Any employee of an enterprise covered by the FLSA is covered by the provisions of the FLSA, and (2) even if the enterprise is not covered, individual employees whose work engages the employee in interstate commerce or in the production of goods for commerce or in domestic service is covered by the provisions of the FLSA. Covered employers are required by the provisions of the FLSA to: (1) Pay employees who are not exempt from the Act's requirements not less than the Federal minimum wage for all hours worked and overtime premium pay at a rate of not less than one and one-half times the employee's regular rate of pay for all hours worked over 40 in a workweek, and (2) make, keep, and preserve records of the persons employed by the employer and of the wages, hours, and other conditions and practices of employment.

In 1974, Congress expressly extended FLSA coverage to ''domestic service'' workers performing services of a household nature in private homes not previously subject to minimum wage and overtime requirements. While domestic service workers are covered by FLSA minimum wage and overtime requirements even though they work for a private household and not a covered enterprise, Congress created exemptions from these requirements for casual babysitters and persons employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves.[5]

Need for Regulation and Why the Department Is Considering Action

In 1974, Congress extended coverage of the FLSA to many domestic service employees performing services of a household nature in private homes not previously subject to minimum wage and overtime pay requirements. Section 13(a)(15) of the Act exempts from its minimum wage and overtime pay provisions domestic service employees employed ''to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary).'' Section 13(b)(21) of the FLSA exempts from the overtime pay provision any employee employed ''in domestic service in a household and who resides in such household.''

Since the 1975 regulations were implemented, the home health care industry has evolved and expanded in response to the increasing size of the population in need of such services, the growing demand for in-home care instead of institutional care for persons of all ages, and the availability of public funding assistance for such services under Medicare and Medicaid. As the industry has expanded, so has the range of tasks performed by workers providing companionship services. The range now includes assistance with activities of daily living (ADLs), instrumental activities of daily living (IADLs), and paramedical tasks (such as catheter hygiene or changing of aseptic dressings).[6] Public funding programs do not cover services such as social support, fellowship or protection.[7] According to the U.S. Department of Health and Human Services (HHS), ''[s]imple companionship or custodial observation of an individual, absent hands-on or cueing assistance that is necessary and directly related to ADLs and IADLs, is not a Medicaid personal care service.'' [8]

The Department of Labor believes that the current application of the companionship services exemption in the home health care industry is not consistent with the original Congressional intent. The Department proposes to modify the definition of companionship services to exclude personnel who perform functions that require training in the performance of medically-related duties, and to provide only a 20 percent tolerance for intimate personal care services and related household work. As a result, to qualify for the companionship services exemption, workers must spend at least 80 percent of their time in activities that provide fellowship or protection. Those workers who are providing home health care services that exceed the 20 percent tolerance for intimate personal care services and related household work must be paid in accordance with federal minimum wage and overtime requirements.

Objectives and Legal Basis for Rule

Section 13(a)(15) of the FLSA exempts from its minimum wage and overtime pay provisions domestic service employees employed ''to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary).'' Due to significant changes in the home health care industry over the last 36 years, workers who today provide in-home care to individuals are performing duties and working in circumstances that were not envisioned when the companionship services regulations were promulgated. Section 13(b)(21) provides an exemption from the Act's overtime pay requirements for live-in domestic workers. The current regulations allow an employer of a live-in domestic worker to maintain a copy of the agreement of hours to be worked and to indicate that the employee's work time generally coincides with that agreement, instead of requiring the employer to maintain an accurate record of hours actually worked by the live-in domestic worker. The Department is concerned that not all hours worked are actually captured by such agreement and paid, which may result in a minimum wage violation. The current regulations do not provide a sufficient basis to determine whether the employee has in fact received at least the minimum wage for all hours worked.

The Department has re-examined the regulations and determined that the regulations, as currently written, have expanded the scope of the companionship services exemption beyond those employees whom Congress intended to exempt when it enacted § 13(a)(15) of the Act, and do not provide a sufficient basis for determining whether live-in workers subject to § 13(b)(21) of the Act have been paid at least the minimum wage for all hours worked. Therefore, the Department proposes to amend the regulations to revise the definitions of ''domestic service employment'' and ''companionship services,'' and to require employers of live-in domestic workers to maintain an accurate record of hours worked by such employees. In addition, the proposed regulation would limit the scope of duties a companion may perform, and would prohibit employees of third-party employers from claiming the exemption.

Summary of Impacts

The Department projects that the average annualized cost of the rule will total about $4.7 million per year over 10 years. In addition to the direct cost to employers of the rule, there are also transfer effects resulting from the rule. The primary impacts of the rule are

[5] 29 U.S.C. 202(a), 206(f), 207(l), and 213(a)(15).

[6] PHI, 2010a. Background Report on the U.S. Home Care and Personal Assistance Workforce and Industry (Forthcoming). P. 22.

[7] PHI, 2010a. p. 22.

[8] ''Understanding Medicaid Home and Community Services: A Primer,'' Gary Smith, Janet O'Keefe, Letty Carpenter, Pamela Doty, Gavin Kennedy, Brian Burwell, Robert Mollica and Loretta Williams, George Washington University, Center for Health Policy Research, October 2000.

income transfers to home health care workers in the form of: increased hourly wages to reach minimum wage (about $16.1 million in the first year, negligible thereafter); payment for time spent traveling between patients (average annualized value of $34.7 million per year); and payment of an overtime premium when hours worked exceed 40 hours per week. Because overtime payments depend on how employers adjust scheduling to eliminate or reduce overtime hours, the Department considered three adjustment scenarios resulting in payment of: 100 percent of current overtime hours worked (average annualized value of $180.7 million per year); 50 percent of current overtime hours worked (average annualized value of $90.4 million per year); or no payment of overtime. On the basis of previous evidence on the impact of overtime pay, the Department judges that overtime payments in the range of scenarios 2 and 3 are more likely than scenario 1.

Although the transfer of income to workers in the form of higher wages is not considered a cost of the rule from a societal perspective, higher wages do increase the cost of providing home health care services, resulting in the provision of fewer services. This reduction in the provision of services causes the market to function less efficiently, and this allocative inefficiency is a cost from a societal perspective. With a 3% real rate, the Department measures the range of average annualized deadweight loss attributable to this allocative inefficiency as $105,000 when no overtime pay adjustment is assumed, $36,000 when 50% of overtime pay is assumed to adjust and $3,000 when a 100% adjustment in overtime pay is assumed. The relatively small deadweight loss primarily occurs because both the demand for and supply of home health care services appear to be inelastic—that is, the equilibrium quantity of companionship services is not very responsive to changes in price, possibly due to the importance of these services and the coverage of many companionship services by Medicare and Medicaid. Table 1 summarizes the projected costs, transfer effects and impacts of the proposed revisions to the FLSA.

TABLE 1—SUMMARY OF IMPACT OF PROPOSED CHANGES TO FLSA

	Year 1 ($ mil.)	Years 2–10 ($ mil.)[a]		Average Annualized Value ($ mil.)	
				3% Real Rate	7% Real Rate
Costs					
Regulatory Familiarization Agencies	$3.9	$0.3	$0.3	$0.7	$0.8
Families Hiring Self-employed	6.0	3.2	4.0	3.8	3.9
Total Costs	9.9	3.5	4.4	4.6	4.7
Transfers					
Minimum Wages (MW)					
To Agency-Employed Workers	13.0	0.0[b]	0.0[b]	1.5	1.7
To Self-Employed Workers	3.1	0.0[b]	0.0[b]	0.4	0.4
Travel Wages	26.7	27.8	45.8	35.4	34.7
Overtime Scenarios					
OT 1	139.3	144.8	238.8	184.2	180.7
OT 2	69.7	72.4	119.4	92.1	90.4
OT 3	0.0	0.0	0.0	0.0	0.0
Total Costs and Transfers by Scenario					
Reg Fam + MW + Travel + OT 1	192.1	176.2	289	226	222.2
Reg Fam + MW + Travel + OT 2	122.4	103.8	169.6	133.9	131.9
Reg Fam + MW + Travel + OT 3	52.7	31.4	50.2	41.8	41.5
Deadweight Loss					
Reg Fam + MW + Travel + OT 1	0.103	0.080	0.132	0.105	0.103
Reg Fam + MW + Travel + OT 2	0.042	0.027	0.044	0.036	0.036
Reg Fam + MW + Travel + OT 3	0.008	0.002	0.004	0.003	0.003
Disemployment (number of workers)					
Reg Fam + MW + Travel + OT 1	793	739	1,169	938[c]	
Reg Fam + MW + Travel + OT 2	505	435	686	544[c]	
Reg Fam + MW + Travel + OT 3	218	132	203	172[c]	

[a] These costs are a range where the first number represents the estimate for Year 2; the second estimate for Year 10.
[b] 2010 statistics on PCA and HHA wages indicate that few workers, if any, are currently paid below minimum wage (*i.e.* in no state is the 10th percentile wage below $7.25 per hour). See the BLS Occupational Employment Statistics, 2010 state estimates, at URL: *http://stats.bls.gov/oes/.*
[c] Simple average over 10 years.
Columns may not sum to totals due to rounding.

State Law Requirements

In evaluating the economic impact of the proposed rule, it is important to consider the current wage requirements for home health care workers. There are numerous state laws pertaining to home health care workers. The State Medicaid Manual requires states to develop qualifications or requirements (such as background checks, training, age, supervision, health, literacy, or

education, or other requirements) for Medicaid-financed personal care attendants. These state programs can each have multiple delivery models, with care being agency-directed or consumer-directed with care given by agencies or independent providers. These delivery models are not necessarily mutually exclusive. In general, for the purposes of this analysis, we refer to independent providers as workers providing services through informal arrangements, and therefore they are not counted in the statistics on home health care providers used as the basis for this analysis.

A 2006 report by the HHS Office of the Inspector General (OIG) found that states have established multiple sets of worker requirements that often vary among the programs within a state and among the delivery models within programs, resulting in 301 sets of requirements nationwide.[9] Four of the consumer-directed programs in the OIG review had no attendant requirements.

Furthermore, states define these requirements differently, and specify different combinations of requirements in different programs. The most common requirements, and some characterization of how these might be defined by different programs, include:

• *Background Checks.* May include the following: criminal background checks; checks of abuse or neglect registries; and checks of Federal or State exclusion lists for previous fraudulent or abusive activities.

• *Training.* May include the following: First aid or cardiopulmonary resuscitation (CPR); basic health knowledge (*e.g.,* food and nutrition, blood-borne pathogens, hygiene, universal precautions); assistance with daily living activities (*e.g.,* patient transfer techniques, proper patient bathing and showering techniques, and grooming); program orientation (*e.g.,* beneficiary rights and responsibilities, safety, behavioral issues, patient confidentiality); training specific to an individual beneficiary's needs; or other training.

• *Supervision.* Might be performed by registered or licensed practical nurses (RN or LPN); home health or personal care service agency staff; case managers; other qualified staff or individuals; or the beneficiary.

• *Minimum Age.* Most commonly set at 18-years-old, but in some states might be 14-years-old, 19-years-old, or of ''legal working age.''

• *Health.* May include the following: Test negative for tuberculosis; be able to perform the services in the plan of care; meet an established minimum level of physical ability (*e.g.,* able to lift a certain weight or stand for a certain time); be free of communicable disease; pass a physical examination; or drug test.

• *Education/Literacy.* Minimum requirements might include: An ability to read and write adequately to follow instructions or to keep records; a General Education Diploma (GED) or high school diploma; completed a certain grade; be a Certified Nursing Assistant (CNA) or a home health aide; have a Homemaker/Personal Care Service Provider certification issued by the state; be able to communicate with the beneficiary and/or supervisory staff; pass a competency test or have previous experience; have the skills, knowledge, and abilities necessary to perform the services needed; be able to meet the needs of the beneficiary; or be mature and sympathetic.

• *Other.* Might be required to: Have a Social Security number; have an identification card; be a U.S. citizen; or meet state motor vehicle requirements if providing transportation.

The number of states that included each requirement in at least one program and the number of state program sets that include each requirement are summarized in Table 1–1.

TABLE 1–1—SIX MOST COMMON ATTENDANT REQUIREMENTS

Requirement	Number of states that utilized requirement in at least one program	Number of sets containing requirement (of 301 sets)
Background Checks	50	245
Training	46	227
Age	42	219
Supervision	43	198
Health	39	162
Education/Literacy	31	125

Source: DHSS OIG, 2006. p. 9.

States' laws also vary in whether they extend minimum wage and overtime provisions to home health care workers. In many states companions or home health care workers are not explicitly named in the regulations, but often fall under those regulations that apply to domestic service employees.

• 16 states extend both minimum wage and overtime coverage to most home health care workers who would otherwise be excluded under the current regulations: California, Colorado, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Jersey, New York, Pennsylvania, Washington, and Wisconsin. However, in some states certain types of these workers remain exempt, such as those employed directly by households or by non-profit organizations. Additionally, New York's overtime law provides that workers who are exempt from the FLSA and employed by a third-party agency need only be paid time and one-half the minimum wage (as opposed to time and one-half of the worker's regular wage). Minnesota's overtime provision applies only after 48 hours of work.

• Five states (Arizona, Nebraska, North Dakota, Ohio, and South Dakota) and the District of Columbia extend minimum wage, but not overtime coverage to home care workers. There are again some exemptions for those workers employed directly by households or who live in the household.

• 29 states do not include home health care workers in their minimum wage and overtime provisions: Alabama, Alaska, Arkansas, Connecticut,

[9] U.S. Department of Health and Human Services (HHS) Office of the Inspector General (OIG). States' Requirements for Medicaid-Funded Personal Care Service Attendants, available at *http://oig.hhs.gov/oei/reports/oei-07–05–00250.pdf.* (2006).

Delaware, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, New Hampshire, New Mexico, North Carolina, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, and Wyoming.[10]

Of the 22 jurisdictions that extend minimum wage to at least some home health care workers, 12 have a state minimum wage that is higher than the current federal minimum wage of $7.25 an hour.[11] These state laws are summarized in Table 1–2.

TABLE 1–2—STATE MINIMUM WAGE AND OVERTIME COVERAGE OF NON-PUBLICLY EMPLOYED COMPANIONS

State	State minimum wage [a]	MW	OT	Neither	Analysis and citations [b]
AL				x	
AK	$7.75			x	
AZ	7.35	x			Minimum wage but no overtime coverage for companions as defined in the FLSA. No state overtime law. See Ariz. Rev. Stat. Ann. §§ 23–362, 23–363; see also Office of the Attorney General of the State of Arizona, Opinion No. I07–002 (Feb. 7, 2007).
AR	6.25			x	
CA	8.00	x			All companions as defined in the FLSA are entitled to minimum wage. California's overtime rules create in terms of overtime four categories of workers who provide home care. (1) Those who are employed by non-profits and do no additional work beyond feeding, dressing, and supervising the person do not receive overtime. (2) Those who are employed by non-profits but do additional work beyond feeding, dressing, and supervising do receive overtime. (3) All for-profit workers receive overtime regardless of their job description. (4) County-employed home care worker, of whom there are approximately 367,000, receive up to $11.50 an hour straight time per their union contracts and may also receive overtime under those contracts. Industrial Welfare Commission Order No. 5–2001, "Judge Orders State to Halt Wage Cut for California Home Care Workers, *http://www.seiu.org/2009/06/judge-orders-state-to-halt-wage-cut-for-california-home-care-workers.php* (last visited Jun. 28, 2011); PHI, 2010a. p. 14.
CO	7.36	x	x		Minimum wage and overtime coverage for third-party-employed home care workers who do work beyond Colorado's definition of "companion." Colorado's definition of "companion" is much narrower than the FLSA definition. Companions may not help to bathe and dress the person, do any amount of housekeeping, or remind the person to take medication. People who do those tasks are more than just "companions" they are "personal care" attendants. Personal care attendants are entitled to minimum wage and overtime. However, PCAs employed directly by private households are exempt from minimum wage and overtime. Colorado Minimum Wage Order No. 26 § 5; 7 Colo. Code Regs. § 1103–1:5.
CT	8.25			x	
DE	7.25			x	
DC	8.25	x			Minimum wage for companions as defined in the FLSA. D.C. Mun. Regs. tit. 7, § 902.1, 902.3, 902.4 (West 2011).
FL	7.25			x	
GA	5.15			x	
HI	7.25	x	x		Minimum wage and overtime coverage for companions as defined in the FLSA, but exemption for those employed directly by private households. Haw. Rev. Stat. § 387–1.
ID	7.25			x	

[10] National Employment Law Project (NELP). 2011. Fair Pay for Home Care Workers, available at *http://www.nelp.org/page/-/Justice/2011/FairPayforHomeCareWorkers.pdf?nocdn=1.*

[11] U.S. Department of Labor (DOL). 2011. Minimum Wage, available at *http://www.dol.gov/dol/topic/wages/minimumwage.htm.*

TABLE 1–2—STATE MINIMUM WAGE AND OVERTIME COVERAGE OF NON-PUBLICLY EMPLOYED COMPANIONS—Continued

State	State minimum wage [a]	MW	OT	Neither	Analysis and citations [b]
IL	$8.25	x	x		Minimum wage and overtime coverage for any person whose primary duty is to be a companion for individual(s) who are aged or infirm or workers whose primary duty is to perform health care services in or about a private home. There may be an exemption for those employed solely by private households as a result of a general exemption for employers with fewer than four employees. 820 Ill.Comp. Stat. § 105/3(d); Ill. Adm. Code § 210.110.
IN	7.25			x	
IA	7.25			x	
KS	7.25			x	
KY	7.25			x	
LA				x	
ME	7.50	x	x		Minimum wage and overtime coverage for all companions as defined in the FLSA. No relevant exemptions. Me. Rev. Stat. Ann. tit. 26, §§ 663, 664.
MD	7.25	x	x		Minimum wage coverage for all companions as defined in the FLSA. Overtime coverage for most home care workers but exemption for workers employed by non-profit agencies that provide ''temporary at-home care services''. Md. Code Ann., Lab. & Empl. § 3–415.
MA	8.00	x	x		Minimum wage and overtime coverage for all companions as defined in the FLSA. No relevant exemptions. Mass. Gen. Laws Ch. 151, § 1.
MI	7.40	x	x		Minimum wage and overtime coverage for companions as defined in the FLSA, but exemption for live-in workers. Mich. Comp. Laws § 408.394(2)(a). Exemption for workers employed solely by private household as a result of exemption for employer with fewer than two employees. Mich. Comp. Laws § 408.382(c).
MN	6.15 or 5.25 for employers grossing under $625,000 per year.	x	x		Minimum wage and overtime coverage after 48 hours for all companions as defined in the FLSA, but nighttime hours where companion is available to provide services but does not actually do so need not be compensated. Minn. Stat. § 177.23(11).
MS				x	
MO	7.25			x	
MT	7.35	x	x		Minimum wage and overtime coverage for companions as defined in the FLSA, but exemption for those employed directly by private households. Mont. Code. Ann. § 39–3–406(p).
NE	7.25	x			Minimum wage but no overtime coverage for companions as defined in the FLSA. No state overtime law. De facto exemption for most households as a result of general exemption for employers with fewer than four employees. Neb. Rev. Stat. §§ 48–1202, 48–1203.
NV	8.25	x	x		Minimum wage and overtime coverage for companions as defined in the FLSA, but exemption for live-in workers. Also, business enterprises with less than $250,000 annually in gross sales volume need not pay overtime. Nev. Rev. Stat. § 608.250(2)(b).
NH	7.25			x	
NJ	7.25	x	x		Minimum wage and overtime coverage for all companions as defined in the FLSA. No relevant exemptions. N.J. Stat. Ann.§ 34:11–56a *et seq.*
NM	7.50			x	
NY	7.25	x	x		Minimum wage coverage for all companions as defined in the FLSA. N.Y. Labor Law § 651(5). There is overtime coverage for all companions but those employed by third party agencies receive overtime at a reduced rate of 150% of the minimum wage (rather than the usual 150% of their regular rate of pay). N.Y. Labor Law §§ 2(16), 170; N.Y. Comp. Codes R. & Regs. tit. 12, § 142–2.2. Overtime coverage for live-in workers after 44 hours/week (rather than the usual 40 hours) at the same rates detailed above. *Id.*

TABLE 1–2—STATE MINIMUM WAGE AND OVERTIME COVERAGE OF NON-PUBLICLY EMPLOYED COMPANIONS—Continued

State	State minimum wage [a]	MW	OT	Neither	Analysis and citations [b]
NC	7.25			x	
ND	7.25	x			Minimum wage but no overtime coverage for companions as defined in the FLSA. However, companions who are certain first or send-degree relatives of the person receiving care do not receive minimum wage. Additionally, nighttime hours where companion is available to provide services but does not actually do so need not be compensated. N.D. Cent. Code § 34–06–03.1.
OH	7.40			x	Minimum wage but not overtime coverage for companions as defined in the FLSA. Ohio Rev. Code Ann. § 4111.03 (A) § 4111.14 (West 2011). Additional overtime exemptions for live-in workers. *Id.* § 4111.03(D)(3)(d).
OK	7.25			x	
OR	8.50			x	
PA	7.25	x	x		Minimum wage and overtime coverage for companions as defined in the FLSA, but exemption for those employed solely by private households. Pa. Stat. Ann. tit. 43, § 333.105(a)(2). *Bayada Nurses* v. *Commonwealth of Pennsylvania,* 8 A.3d 866 (Pa. 2010).
RI	7.40			x	
SC				x	
SD	7.25	x			Minimum wage but no overtime coverage for companions as defined in the FLSA. No state overtime law. S.D. Codified Laws §§ 60–11–3, 60–11–5.
TN				x	
TX	7.25			x	
UT	7.25			x	
VT	8.15			x	
VA	7.25			x	
WA	8.67	x	x		Washington minimum wage and overtime coverage for most companions as defined in the FLSA, but exemption for live-in workers. Wash. Rev. Code § 49.46.010(5)(j).
WV	7.25			x	
WI	7.25	x	x		Minimum wage and overtime coverage for most companions as defined in the FLSA, but overtime exemption for those employed directly by private households, Wis. Admin. Code § 274.015, and those employed by non-profit organizations. Wis. Admin. Code §§ 274.015, 274.01. Companions who spend less than 15 hours a week on general household work and reside in the home of the employer are also exempt from minimum wage. Wis. Admin. Code § 272.06(2).
WY	5.15			x	

Abbreviations: MW = Minimum Wage, OT = Overtime, FLSA = Fair Labor Standards Act.
Sources: [a] DOL, 2011; [b] NELP, 2011.

Data Sources

The primary data services used by the Department to estimate the number of workers, establishments, and customers likely to be impacted by the proposed rule include:

- Bureau of Labor Statistics (BLS) 2009 Occupational Employment Survey, employment and wages by state for SOC codes 39–9021 (Personal Care Aides) and 31–1011 (Home Health Aides);
- BLS Quarterly Census of Employment and Wages, 2009 for NAICS 6216 and 62412;
- BLS National Employment Matrix, 2008;
- 2007 Statistics of U.S. Businesses, for NAICS 6216 and 62412; and
- 2007 Economic Census, by state for NAICS 6216 and 62412.

The key limitation of this set of data sources is that it results in an inconsistency between the Department's best estimate of agency-employed caregivers (from the 2009 BLS Occupational Employment Survey), and its best estimate of independent providers directly employed by families (from the 2008 BLS National Employment Matrix). The Occupational Employment Survey (OES) is employer based, and does not collect data from the self-employed. The National Employment Matrix (NEM) obtains estimates on the self-employed from the Current Population Survey. However, it is not possible to match the OES estimates by subtracting the estimated number of self-employed workers from the NEM. Because these two estimates cannot be completely reconciled, the Department uses each source as the best estimate for one segment of the labor market and acknowledges there is some inconsistency between the two.

Care Recipients and Demand for Services

Demand for home health care services is anticipated to continue to grow in the

next few decades with the aging of the ''baby boomer generation.'' According to PHI:

Nearly one out of four U.S. households provides care to a relative or friend aged 50 or older and about 15 percent of adults care for a seriously ill or disabled family member. Over the next two decades the population over age 65 will grow to more than 70 million people [the U.S. population 65 years and older was estimated at 40 million in 2009 [12]]. Additionally, with significant increases in life expectancy and medical advances that allow individuals with chronic conditions to live longer, the demand for caregiving is expected to grow exponentially. The growth in the demand for in-home services is further amplified by an increasing preference for receiving supports and services in the home as opposed to institutional settings. This emphasis has been supported by the increased availability of publicly funded in-home services under Medicaid and Medicare as an alternative to traditional and increasingly costly institutional care.[13]

While many recipients of home health care services are elderly, about two-fifths of those in need of these services are under 65 and include those with varying degrees of mental or developmental disabilities. This group of home health care recipients is also anticipated to grow rapidly as more individuals opt for home-based care over institutional settings.[14] It is estimated that the demand for home health care workers will grow to approximately 5.7 to 6.6 million workers in 2050, an increase in the current demand for workers of between 3.8 and 4.6 million (200 percent and 242 percent respectively).[15] The home health care industry has grown significantly over the past decade and is projected to continue growing rapidly; for example:

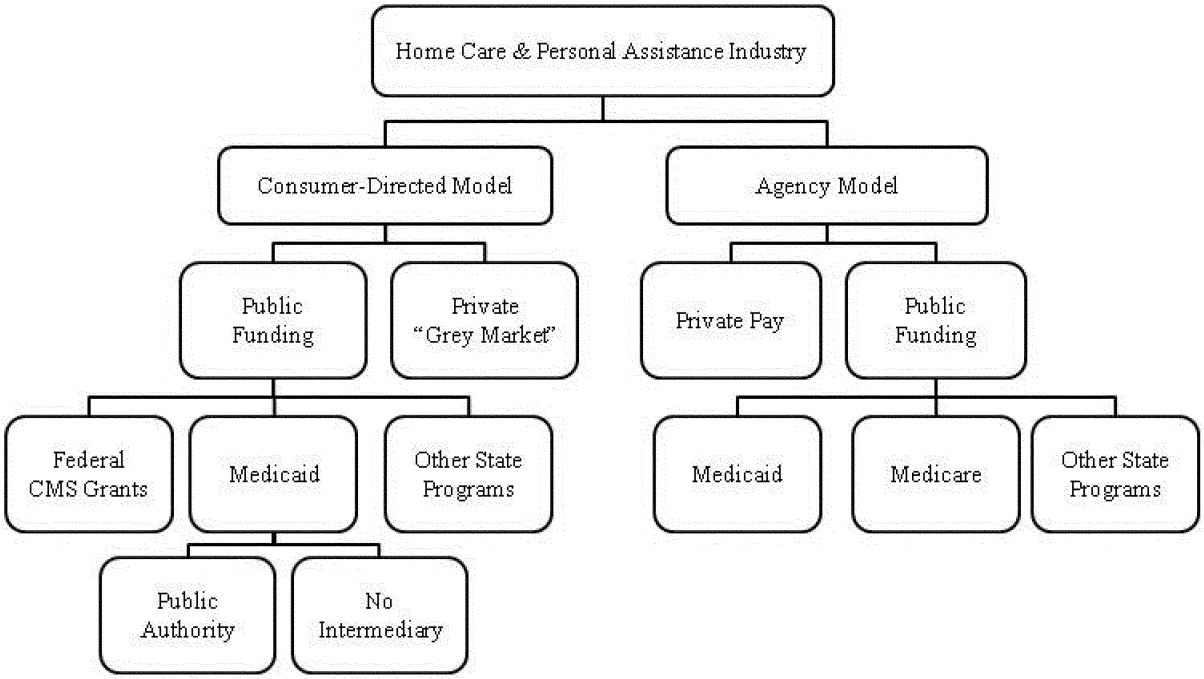
- The number of establishments in Home Health Care Services (HHCS) grew by 70 percent between 2001 and 2009; during that same period, the number of establishments in Services for the Elderly and Persons with Disabilities (SEPD) grew by 355 percent.[16]
- Between 2008 and 2018 the number of home health aides is projected to increase by 50 percent and the number of personal care aides by 46 percent.

Employers and Funding Sources

This section focuses on the employers of workers who are currently classified as companions and common sources of funding for the services they provide; the next section describes the workers and the work they do. Services in the home health care industry are provided through two general delivery models: Agencies and consumer-directed (which often use independent providers and family caregivers).

Figure 2 provides a visual overview of the home care and personal assistance industry and the two primary models for service provision, which are discussed in more detail in the sections that follow.

Figure 2. Overview of the Home Health Care Industry and Funding Sources



Agency Model

Under the agency model a third-party provider of home care and personal assistance services (usually a home health care company) employs the home care workers and is responsible for ensuring that services authorized by a public program or contracted for by a private party are in fact delivered.[17] There are currently about 73,000 establishments providing these services. The services are paid for through public programs such as Medicaid, Medicare, and other state programs, and through private sources such as private health

[12] 2011 Statistical Abstract, U.S. Census Bureau.

[13] National Alliance for Caregiving and the American Association of Retired Persons. 1997. Family caregiving in the U.S.: Findings from a national study. Available from *http://www.caregiving.org.*

[14] PHI, 2003. The Personal Assistance Services and Direct-Support Workforce: A Literature Review, available at *http://www.directcareclearinghouse.org/download/CMS_Lit_Rev_FINAL_6.12.03.pdf.*

[15] HHS, 2001. Pgs. 4, 5, and 7.

[16] U.S. Bureau of Labor Statistics (BLS). 2008. National Employment Matrix—Search by Occupation, available at *http://data.bls.gov/oep/nioem?Action=empios&Type=Occupation.*

[17] Seavey and Marquand, 2011, pg. 26. Available at: *http://www.directcareclearinghouse.org/download/caringinamerica-20111212.pdf.*

insurance or out-of-pocket payments. In 2009, public programs (Medicare, Medicaid, and other government spending) accounted for about 75 percent ($63.1 billion) of the $84.1 billion in annual revenue dispersed to these agencies.[18]

Agencies providing home care and personal assistance services are covered by two primary industries: Home Health Care Services (HHCS, NAICS 6216), and Services for Elderly and Persons with Disabilities (SEPD, NAICS 62412).[19] HHCS is dominated by for-profit agencies that are Medicare-certified and depends on public programs for three-quarters of its revenue.[20] SEPD is a rapidly growing industry that is dominated by small non-profit enterprises. Table 2–1 provides an overview of these two industries in terms of number of employees, establishments, payroll and wages, and estimated revenues.

TABLE 2–1—SUMMARY OF HHCS AND SEPD, 2009

Industry	Employees [a]	Establishments	Total wages ($ mil.)	Avg weekly wage	Est. revenue ($ mil.)
SEPD + HHCS	1,714,000	73,200	$413,181	$464	$80,307
SEPD	679,600	49,100	133,247	377	28,645
HHCS	1,034,400	24,100	279,934	520	51,662

[a] Employees include HHA, PCA, and other occupations.
Sources: BLS QCEW 2009; BLS National Employment Matrix, 2008.

These two industries primarily employ workers as home health aides (HHA) and personal care aides (PCA) in addition to other occupations. However, not all of the HHA and PCA employed by these agencies work as companions under the companionship exemption; these agencies provide a variety of health-related services that may be delivered in private homes (and potentially companionship services) or in public or private facilities (and not defined as companionship services). Simply put, only a fraction of the 1.7 million employees listed in the table above are currently working as exempt companions who may see changes in their wages and/or work schedules as a result of the proposed rule.

Within these two industries there are three broad employer types: Home health care companies, for-profit franchise chains, and private-duty home care companies. The latter two types are smaller, emerging types of employers that focus on the provision of non-medical care for clients. Home health care companies focus on providing medically-oriented home health care services and non-medical home care or personal assistance services. Many of these agencies are Medicare-certified; those that avoid obtaining certification do so because they do not provide the skilled nursing care required by Medicare. These companies also derive a significant portion of their revenue from the provision of medical devices to customers.[21]

Consumer-Directed Models

Under the consumer-directed model, the consumer or his/her representative has more control than in the agency-directed model over the services received, and when, how, and by whom the services are provided. The approaches to delivering services under this model range from the more formal state-organized systems to informal arrangements coordinated through word-of-mouth between care recipients. In the public version of this model, the care is funded either by Medicaid, directly by states, or through programs or grants administered by the HHS Centers for Medicare & Medicaid Services (CMS).

Other recipients arrange for and pay for care privately through informal negotiations with individual service providers. In this model, the customer may act as the sole or a joint employer and has varying degrees of responsibility for interviewing, hiring, training, managing, and firing the provider. Due to the sometimes informal nature of the consumer-directed employment arrangements, there are no data on the total number of customers under this model, and there is limited information on the total number of providers. BLS National Employment Matrix data show that 127,000 Personal Care Aides (about 16 percent) are employed in private households and 61,500 (about 8 percent) are self-employed, for a total of 188,500 workers (about 23 percent) that may provide services as independent contractors.[22] Fewer Home Health Aides are employed in this manner, with 1,700 (less than one percent) working for private households and 16,400 (about two percent) who are self-employed. Combining the data for Personal and Home Health Aides suggests that 206,600 of these workers (about twelve percent) may be either self-employed or employed in private households. The Department believes that these workers can reasonably be described as independent providers that directly provide caregiver services to families, perhaps through informal arrangements.

However, consumer-directed employment is sometimes referred to as a ''grey market;'' that contains an element of ''over-the-back-fence network of women [who are] usually untrained, unscreened, and unsupervised, but more affordable without an agency's fee, less constrained by regulations and hired through personal recommendation.''[23] The term ''grey market'' is sometimes used to suggest that at least some of these private arrangements are designed to avoid applicable labor laws; the extent to which care recipients use private arrangements for this purpose is unclear; there is very little information available about this segment of the market for home health services. It is also possible, and likely, that care providers who are employed by an agency or who provide services through a state registry also occasionally provide services through informal arrangements. The Department's best estimate of consumer-directed employment is

[18] Seavey and Marquand, 2011, pgs 22, 23. Available at: *http://www.directcareclearinghouse.org/download/caringinamerica-20111212.pdf.*

[19] These two industries are the primary employers of workers currently classified as companions; however, based on data reported by BLS in the National Employment Matrix there are approximately 25 other industries that also employ these workers. Since these other industries employ so few of the workers under consideration here they will be minimally affected by this proposed rule.

[20] Seavey and Marquand, 2011, pgs 20–22. Available at: *http://www.directcareclearinghouse.org/download/caringinamerica-20111212.pdf.*

[21] PHI, 2010a. p.2.

[22] BLS, 2008.

[23] Gross, J., *New Options (and Risks) in Home Care for Elderly.* New York Times available at *http://nytimes.com/2007/03/01/us/01aides.html.* (March 1, 2007).

summarized in the previous paragraph, and we are unable to estimate the extent to which the group of providers described above participates in the informal market. We are also unable to characterize the extent to which other providers not included in this estimate participate in the ''grey market.''

There is no consolidated source of data on state consumer-directed programs; however, PHI offers an overview of what programs are offered: Seven states have no publicly-funded consumer-directed program, 38 states offer options under one or more Medicaid Waivers, seven states offer options under Medicaid Home Health programs, and 12 states offer consumer/participant-directed options under Medicaid Personal Care Option.[24]

Of those states that do offer a consumer-directed program, some have implemented a ''public authority'' model. In this model, a public authority or some other governmental or quasi-governmental entity plays a role in setting compensation and other employment terms for the service provider, who is compensated through public funds, acts as the ''employer-of-record,'' and may provide training, and create and maintain registries of providers.[25] Service providers in this system have the option to select representatives for collective bargaining with the state. Six states (California, Massachusetts, Michigan, Oregon, Washington, and Wisconsin) have fully implemented a public authority, and Missouri is in the process of doing so. Several states have implemented a consumer-directed program without creating a public authority, they include: Illinois, Iowa, Maryland, and Ohio.

California's policies are of particular note because it has one of the largest home care caseloads. This is due to a combination of demographic factors and a robust social movement of the disabled community that created Centers for Independent Living in the 1970s.[26] California's In-Home Supportive Services (IHSS) program was created in 1973. IHSS is the largest personal care program in the nation and is funded through a combination of state, county, and federal Medicaid funds.[27] A 2000 study of independent home care workers found that IHSS employed more than 200,000 independent personal care workers through IHSS, 72,000 in Los Angeles County alone.

IHSS initially allowed counties to organize the service in different ways, and each had a different approach to employing the worker. Under the individual provider model, the consumer hired the worker and the worker was considered an independent contractor, with the state paying for the service and social workers allocating hours. Under the county model, the worker was a government employee. Under the contract model, the county contracted with an agency which became the employer.[28] Ambiguity about who was really employing IHSS workers continued in the following decades. In 1985, California's attorney general determined that IHSS attendants came under state workers' compensation and other labor laws, and were county employees for purposes of collective bargaining. However in *Service Employees International Union, Local 434* v. *County of Los Angeles,* the court found IHSS workers to be independent contractors because the counties did not control their activities directly.[29] In 1992, California began to establish county-based public authorities. Under the public authority model, workers are no longer self-employed, and the employer responsibilities are split between the public authority (which serves as the employer in collective bargaining with the union) and the consumer (who is responsible for the selecting, hiring, and supervising of workers).[30] Today there are approximately 367,000 home care workers employed by the California public authority.[31]

In an effort to connect participants in consumer-directed programs with care providers, some states and public authorities have created matching registries; these systems provide some insight into how consumers identify care providers to meet their needs. Depending on the registry, consumers can either search the worker database online, or speak to trained staff who conduct the search and report the results to the consumer. Some registries may also offer worker screening and orientation, access to consumer and worker training, and recruitment and outreach to potential workers.[32] Others stipulate that providers in the database have not been pre-screened in any way and such responsibilities lie with the consumer. The PHI Matching Services Project[33] has identified 16 state-based matching services and six states with regional matching services. Of the 16 state-based matching services, five (California, Massachusetts, Michigan, Oregon, and Washington) operate under a public authority. Wisconsin's registry, which also operates under a public authority, is currently regional but scheduled to become state-wide in 2011. These registries are listed in Table A–1 in APPENDIX A. PHI notes that these public matching registries are not to be confused with the registries that exist in all states to perform criminal background checks on potential care providers or verify nursing training.

The Department also located registries operated by not-for-profit organizations, such as the Meals on Wheels of Contra Costa County Home Care Registry,[34] where the registry recruits, screens, and checks the references of local care providers, but the care providers are self-employed and work as independent contractors. Various private sector entities that refer to themselves as registries,[35] [36] [37] [38] however, appear to be operating under an agency or quasi-agency model, with the care recipient paying the company a weekly or bi-weekly registry fee in addition to paying the caregiver, or with the company receiving some portion of the caregiver's hourly rate.

When consumers are allowed to hire any worker they choose, many choose friends or family members. For instance, the Cash and Counseling demonstration program provides a monthly allowance to Medicaid beneficiaries that beneficiaries can use to hire their choice of worker. In this program, 58 percent

[24] Seavey and Marquand, 2011, pg 28. Available at: *http://www.directcareclearinghouse.org/download/caringinamerica-20111212.pdf.*

[25] PHI, 2010a. p. 14.

[26] Boris, E. & Klein, J. 2006. Organizing home care: Low-waged workers in the welfare state, available at *http://escholarship.org/uc/item/21x6q48g;jsessionid=197876DF1E12B3D17476457ED5FE5E24#page-6.*

[27] PHI, 2010b. California's Direct-Care Workforce. Available at *http://www.directcareclearinghouse.org/download/CA%20Fact%20Sheet-%2011-04-10.pdf.*

[28] Boris & Klein, 2006.

[29] Boris & Klein, 2006.

[30] PHI, 2011b. California Direct Care Workforce Initiatives,. available at *http://www.directcareclearinghouse.org/s_state_det1.jsp?res_id=5&action=null.*

[31] PHI, 2010a.

[32] PHI, 2011a. The PHI Matching Services Project, available at *http://phinational.org/policy/the-phi-matching-services-project/.*

[33] PHI, 2011a.

[34] Meals on Wheels of Contra Costa County. 2011. Home Care Registry, available at *http://www.mowsos.org/pages/page.php?pageid=48.*

[35] Experienced Home Care Registry. 2011. About Us, available at *http://www.experiencedhomecare.com/pgs/about_us.php.*

[36] Angelic Nursing & Home Care Registry, Inc. 2011. Home Care Services for Seniors in Tolland and Hartford Counties in Connecticut, available at *http://angelicregistry.com/.*

[37] Golden Care Co. Inc. 2011. Billing Policy, available at *http://www.goldencareco.com/billing.asp.*

[38] American HealthCare Capital. 2011. $1.5 Million Oregon Private Pay Homecare Registry for Sale, available at *http://www.americanhealthcarecapital.com/Listings/Current/orpd1a.html.*

of directly hired workers in Florida, 71 percent in New Jersey, and 78 percent in Arkansas were related to the consumer, and about 80 percent of those directly hired workers had provided unpaid care to the consumer before the demonstration began.

Since the passage of the National Family Caregiver Support Program enacted under the Older Americans Act Amendments of 2000, Medicaid waivers and state-funded programs have provided the bulk of public financing to support family caregiving.[39] A survey of state consumer direction and family caregiving programs found that:

Over one-half (86 out of 150, or 57 percent) of the programs in 44 states and the District of Columbia say family members can be paid to provide care. Viewed another way, the vast majority of programs that offer some component of consumer direction, allow payment to relatives to provide care (86 out of 106 programs, or 81 percent). Only six states (Alaska, Delaware, Mississippi, Nevada, Pennsylvania, and Tennessee) did not allow payments to family members in any of their programs at the time of the study.[40]

Of the 86 programs that allow relatives to be paid providers, 73 percent allow family members to provide personal care, 70 percent allow family members to provide respite care, 20 percent allow family members to act as homemakers or do chores, and 6 percent allowed family members to provide any service needed.[41] Some programs place restrictions on what type of family members are allowed to be paid providers as well. Among these 86 programs, 61 percent do not permit spouses to be paid providers, while others do not permit parents/guardians (37 percent), primary caregivers (18 percent), legal guardians (8 percent), children 18 and under (6 percent), or other relatives (4 percent).[42] These programs and their stipulations about payment to family caregivers are summarized in Table B–1 in APPENDIX B.

Funding Sources

There are a variety of different funding sources for provision of home health services. Table 2–3 provides an overview of these funding sources, care recipient eligibility requirements, and types of home health services covered. Public funding sources such as Medicare and Medicaid provide a majority of the reimbursement for services. In 2008, Medicare and Medicaid accounted for nearly 75 percent of home health care services revenue, followed by 15 percent from private insurance coverage, five percent from patients paying out-of-pocket, and the remaining five percent contributed by a mix of other government programs.[43]

In 2009, HHS outlays for Medicare programs totaled $424 billion, and outlays in support of Medicaid totaled $251 billion.[44] Under Medicare, an estimated $18.3 billion went to home health programs.[45] In 2006, Medicaid programs accounted for approximately $38.1 billion (about $40 billion inflated to 2009 dollars) through Medicaid Home Health ($4.6 billion), State-Plan Personal Care Services benefit ($8.5 billion), and Medicaid Home and Community-based Services (HCBS) benefits ($25 billion).[46] Thus, payments for home health care programs composed approximately 4 percent of Medicare spending, and about 15 percent of Medicaid spending.

Both Medicaid and Medicare pay the service provider directly. The Medicare program uses a prospective payment system (PPS) to reimburse home health agencies a pre-determined base payment for an episode of care; this base payment is adjusted for the condition and needs of the beneficiary as well as geographic variation in wages.[47] Under Medicaid, the state agency implementing the program pays the service provider directly except under certain consumer-directed programs.

The Medicare and Medicaid programs also work together to provide services for a group of care recipients referred to as ''dual eligibles,'' that is, care recipients that are eligible for both Medicare and Medicaid coverage. Studies have found that individuals covered by both Medicare and Medicaid are among the most expensive groups to cover and are more likely to use more Medicare-covered home health services than Medicare home health care patients not also covered by Medicaid. Also, states with low Medicaid spending appear to shift costs to the Medicare home health program spending.[48] Most of the public matching registries listed in Appendix A are funded by the state, with a few receiving federal dollars through reimbursement for Medicaid administrative costs or receiving initial funding through federal Medicaid Systems Transformation grants.[49]

[39] Feinberg, L. & Newman, S. 2005. Consumer Direction and Family Caregiving: Results from a National Survey, State Policy in Practice, available at *http://www.hcbs.org/files/79/3926/ConsumerDirection&FamilyCaregivingNWEB.pdf* Feinberg, L. *et al.* 2004. The State of the States in Family Caregiver Support: A 50–State Study. San Francisco, CA: Family Caregiver Alliance; available at *http://www.caregiver.org/caregiver/jsp/content_node.jsp?nodeid=1276.*

[40] Feinberg & Newman, 2005. p. 8.

[41] Feinberg & Newman, 2005. p. 8.

[42] Feinberg & Newman, 2005. p. 9.

[43] PHI, 2010a, p.6.

[44] U.S. Department of Health & Human Services (HHS). 2011. FY 2011 Budget, available at *http://dhhs.gov/asfr/ob/docbudget/2011budgetinbrief.pdf.* p. 13.

[45] Medpac. 2010. A Data Book: Healthcare Spending and the Medicare Program, p. 139, available at *http://www.medpac.gov/documents/jun10databookentirereport.pdf.*

[46] PHI, 2010a, p. 18. Note, not all of the HCBS goes to personal care services; a more detailed breakdown of this spending is not available. For additional data, see Kaiser Family Foundation, State Health Facts: *http://statehealthfacts.org/comparetable.jsp?ind=242&cat=4.*

[47] For additional detail see Center for Medicare & Medicaid Services (CMS). 2011a. Home Health PPS, available at *http://www.cms.gov/HomeHealthPPS/.*

[48] Center for Medicare & Medicaid Services (CMS). 2011b. Home Health Study Report: Literature Review, available at *http://www.cms.gov/HomeHealthPPS/Downloads/HHPPS_LiteratureReview.pdf. p.16.*

[49] Seavey & Marquard, 2011.

TABLE 2–2—SUMMARY OF HOME HEALTH CARE SERVICE PAYERS AND SERVICE COVERAGE

Payer	Description	Eligibility	Home health service coverage
Public			
Medicare	Federal government program to provide health insurance coverage, including home health care, to eligible individuals who are disabled or over age 65. The program pays a certified home health agency for a 60 day episode of care during which the agency provides services to the beneficiary based on the physician approved plan of care.	Individual is under the care of a doctor and receiving services under plan of care; has a certified need for intermittent skilled nursing care, physical therapy, speech-language pathology services, continued occupational therapy; and must be homebound. HHA providing services is Medicare-certified; services needed are part-time or intermittent, and are required <7 days per week or <8 hours per day over 21 day period.	Intermittent skilled nursing care, physical therapy, speech-language pathology services, continued occupational therapy. Does not cover 24hr/day care at home; meals delivered to home; homemaker services when it is only service needed or when not related to plan of care; personal care given by home health aides when it is only care needed.
Medicaid	A joint federal-state medical assistance program administered by each state to provide coverage for low income individuals. The program pays home health agencies and certified independent providers.	Eligibility and benefits vary by state. In general, states must cover individuals who receive federally assisted income maintenance payments such as Social Security, individuals who are eligible for Temporary Assistance for Needy Families and to other individuals defined as ''categorically needy.''	Coverage of home health services must include part-time nursing, home care aide services, medical supplies and equipment. Optional state coverage may include audiology; physical, occupational, and speech therapies; and medical social services. Coverage is provided under: Medicaid Home Health, State Plan Personal Care Services benefit, and Home and Community-Based state plan services and waivers.
Older Americans Act	Provides federal funding for state and local social service programs that provide services so that frail, disabled, older individuals may remain independent in their communities.	Must be 60 yrs of age or older	Home care aides, personal care, chore, escort, meal delivery, and shopping services.
Veterans Administration	Home health care services provided through the VA's network of hospital-based home care units.	Veterans who are at least 50% disabled due to service-related conditions.	Home health care. Does not include nonmedical services provided by HCAs.
Social Services Block Grant	Federal block grants to states for state-identified service needs.	Varies by state	Often includes program providing home care aide, homemaker, or chore worker services.
Community organizations	Some community organizations provide funds for home health and supportive care.	Varies by program	Covers all or a portion of needed services. Vary by program.
Private			
Commercial Health Insurance Companies.	Many policies cover home care services for acute, and less often, long-term needs.	Varies by policy	Varies by insurance policy
Medigap Insurance	Covers some personal care services when a Medicare beneficiary is receiving covered home health services.	Varies by policy	Focused on short-term personal care services in support of Medicare covered home health care skilled nursing services.
Self-Pay	The individual receiving the services pays ''out of pocket.''	Individuals who are not eligible for covered services under third-party public or private payers.	Services that do not meet the eligibility criteria of other payers.

Sources: National Association for Home Care. 1996. Who Pays for Home Care Services? Available at URL: *www.nahc.org/consumer/wpfhcs.html;* Centers for Medicare and Medicaid Services (CMS). Medicare and Home Health Care. Available at URL: *http://www.medicare.gov/publications/pubs/pdf/10969.pdf.*

Home Health Care Workers

This section provides an estimate of the total number of home health care workers who may be impacted by the proposed rule as well as the characteristics of these workers, the services they provide, and the wages they receive for their work.

Number of Affected Workers

The workers who will be directly affected by the change to the companionship exemption are concentrated in two occupations: Home Health Aides (SOC 31–1011) and Personal Care Aides (39–9021). These workers are concentrated in two industries: Home Health Care Services (NAICS 6216) and Services for the Elderly and Disabled Persons (NAICS 62412).

These workers are predominantly women in their mid-forties, minorities, with a high school diploma or less education but this varies highly by

region. A similar percentage of PCAs are Black and Hispanic (20% and 19%, respectively), but a much higher percentage of HHAs are Black (35%) than Hispanic (8%). One in four (25%) PCAs are foreign-born, with higher percentages (over 50%) in certain regions of the country, *e.g.,* California and New York. California also has a high percentage of caregivers who are paid family members.[50]

Home health care workers are called by a variety of titles, including: home health aides, home care aides, personal care aides, personal assistants, home attendants, homemakers, companions, personal care staff, resident care aides, and direct support professionals. They are tracked by the following occupational titles.[51]

Personal Care Aide (SOC 39–9021): ''Assist the elderly, convalescents, or persons with disabilities with daily living activities at the person's home or in a care facility. Duties performed at a place of residence may include keeping house (making beds, doing laundry, washing dishes) and preparing meals. May provide assistance at non-residential care facilities. May advise families, the elderly, convalescents, and persons with disabilities regarding such things as nutrition, cleanliness, and household activities.''

Home Health Aide (SOC 31–1011): ''Provide routine individualized healthcare such as changing bandages and dressing wounds, and applying topical medications to the elderly, convalescents, or persons with disabilities at the patient's home or in a care facility. Monitor or report changes in health status. May also provide personal care such as bathing, dressing, and grooming of patient.''

Note that the companionship services of fellowship and protection are not included in either the definition of personal care aide or home health aide. Companionship services as defined in this NPRM are separate from the services provided by home health care workers as defined officially above and outlined in detail below.

The Department uses BLS' employer-based OES estimate of the number of workers in the PCA and HHA occupational categories as its best estimate of the number of caregivers employed by agencies that might be affected by the proposed rule. There were approximately 1.59 million caregivers employed by agencies in 2009, composed of

- 631,000 PCAs, and
- 955,000 HHAs.[52]

These data do not include workers providing these services as independent providers who may be affected by the proposed rule. As described above, the Department determined from the NEM that an estimated additional

- 188,500 PCAs, and
- 18,100 HHAs[53]

can be considered independent providers directly employed by families. Thus, we estimate

- 819,500 PCAs, and
- 973,100 HHAs,

for a total of 1.79 million caregivers, might be affected by the proposed rule.

However, not all 1.79 million of these PCAs and HHAs are employed as FLSA-exempt companions. Many of these workers are employed at agencies that provide a variety of health-related services that may or may not be provided in the home; HHA and PCA employed in facilities, such as nursing homes and hospitals, are not classified as providing companionship services. Furthermore, many of these workers who are classified as companions are employed in states which currently provide minimum wage and overtime coverage. Only a subset of the 1.79 million workers, those who provide services in the home and are not eligible for minimum wage or overtime pay under state law, will be directly impacted by the proposed rule. The Department will define the number of workers directly affected by both the minimum wage and overtime pay provisions of the proposed rule.

While many agency-employed caregivers might work in various facilities that make them ineligible for the FLSA companionship exemption, there is little information available concerning independent providers. The Department assumes that all PCAs and HHAs classified in the NEM as self-employed or employed by households are independent providers directly employed by the family, and are thus by assumption currently exempt from the FLSA.

Tasks, Wages, Hours

Traditionally, companionship tasks have been defined to include fellowship, care, protection, and a limited amount of assistance with general household tasks.[54]

- Fellowship: Defined in the proposed regulation as meaning ''to engage the person in social, physical, and mental activities, including conversation, reading, games, crafts, walks, errands, appointments, and social events''.[55] Fellowship services are generally not covered by public programs.
- Protection: Defined in the proposal as ''being present with the person in their home or to accompany the person when outside of the home to monitor the person's safety and well-being.''[56] Some states reimburse specific types of participants (*i.e.,* those living with mental disabilities) for protection services.
- Social support: Services that enable the consumer to take an active part in his or her family and community, includes accompanying the consumer to regular social activities and ensuring that the consumer's cognitive state does not deteriorate due to social isolation.

The spectrum of tasks performed by modern workers classified as companions has expanded beyond traditional companionship to include: activities of daily living (ADLs), instrumental activities of daily living (IADLs), and paramedical (''medicalized'') tasks.

- ADLs: Assistance with the following activities: personal hygiene, dressing and changing clothes, transferring, toileting, eating and drinking, maintaining continence, and ambulation.
- IADLs: Includes tasks such as light housework, preparation of meals, assistance with physical taking of medications, shopping for groceries or clothes, using the telephone, escorting, assistance with the management of money, and other tasks that allow the consumer to live independently in the community.
- Paramedical tasks: May include tasks such as changing of aseptic dressings, administration of non-injectible medications (*e.g.,* blood pressure medication in tablet form);[57] and ostomy, catheter and bowel hygiene.

While PCAs and HHAs overlap to some extent in the type of services they provide—both generally provide assistance with ADLs and IADLs—it is primarily HHAs who are employed by Medicare-certified agencies who may be asked to perform paramedical tasks. Those workers are required by Medicare to be trained and certified to perform these types of tasks.

[50] PHI, 2010a. p. 9.

[51] U.S. Bureau of Labor Statistics (BLS). 2011. Standard Occupational Classification, available at *http://www.bls.gov/soc/home.htm.*

[52] 2009 BLS Occupational Employment Survey, employment and wages for SOC codes 39–9021 and 31–1011.

[53] BLS, 2008.

[54] **Federal Register**, 2001. p. 5481.

[55] Proposed § 552.6.

[56] Proposed § 552.6.

[57] Administration of an injectible medication is a medical task generally performed by workers with additional training in medical tasks, such as Certified Nurse Assistants (CNAs).

Generally speaking, a home health aide or agency is authorized to provide a specific number of hours of service to care recipients depending on their needs. Agencies work to schedule home health aides to cover the number of hours needed for the portfolio of cases they have, often taking into account continuity of service to each recipient, total number of hours each aide is scheduled per week, frequency of weekend services needed, and the distance between the aide's home residence and the care recipient's. In the home care industry, agencies typically strive to provide services seven days a week and 24 hours a day.

The greatest scheduling challenges to the agencies come from 12-hour and 24-hour (or sleep-in) cases; these cases are also of particular concern with respect to overtime. A 12-hour case is a care recipient who requires services to be provided by a home health aide for a 12-hour block of time; a 24-hour case is a care recipient who requires a home health aide to be present to provide services around the clock. The key scheduling concerns that agencies contend exist with these cases are that:

- Because workers are scheduled to work in lengthy shifts (up to 12 hours), it is difficult to redistribute overtime hours to workers with fewer hours;
- Aides are paid an hourly rate, plus an hourly overtime premium where applicable; however, agencies are often reimbursed for these cases on a flat rate that does not account for overtime premiums or other costs;
- Sleep-in cases usually include an eight-hour period to allow the worker to sleep while on site; however, the aide is not necessarily off-duty because s/he would be expected to assist the client if an urgent need arose. If the agency is required to count sleep hours toward the total number of hours worked per week then it may become costly to provide 24-hour care.

Some agencies take a proactive approach to scheduling these cases in order to manage the total number of hours on duty required from each worker. For example, an agency may split a 12-hour case between two aides by having one aide provide services Sunday through half of the Wednesday shift when the second aide would take over and work through Saturday.[58] This reduces the total number of hours each aide must work, limits the work to one weekend day, and avoids overwhelming the care recipient with too many different care providers. A similar approach may be applied to cases that require 24-hour care.[59]

The workers themselves report working an average of 31 to 35 hours per week and available data suggest that very few work overtime.[60] Based on an analysis of the 2007 National Home Health Aide Survey and the 2009 Annual Social and Economic Supplement of the Current Population Survey, PHI reports that 92 percent of HHAs and 85 percent of PCAs work less than 40 hours per week for an average of 31 hours and 35 hours per week, respectively. By extension, only eight percent of HHAs and 15 percent of PCAs reported working greater than 40 hours per week.

However, this information may not fully capture the total number of hours worked by these individuals because some aides work for multiple employers, many aides work part-time, and some employers do not compensate workers for travel time between clients (because they are not reimbursed for this time). Furthermore, there is very limited information on hours worked by independent providers or those working as live-in, on-call, or night shift aides. The Department assumes that in general independent providers directly employed by families work similar hours as caregivers employed by agencies.

The wages for these workers vary widely by occupation and geographic location. Based on detailed wage data from the BLS Occupational Employment Statistics Survey, the hourly wages of PCAs and HHAs range from about $6.79 to $20.61 (approximately 0.5% earn less than $6.79 and 0.5% earn more than $20.61) with the average wage being approximately $10.14.[61] As discussed above, wages for PCAs tend to be slightly lower on average than those for HHAs. The Department assumes that in general independent providers directly employed by families receive similar hourly wages as caregivers employed by agencies. In 70 percent of states (36 states), average hourly wages for PCAs were below 200 percent of the federal poverty level wage ($10.42) for individuals in one-person households working full-time. Current research suggests that these workers find it difficult to support their households on these wages; approximately 44 percent of PCAs have to rely on public benefits and fewer than 20 percent report having health insurance.[62]

Costs and Transfers

This section describes the costs and transfers associated with the proposed rule and the Department's approach to estimating their magnitude. The primary costs of this rule are expected to be regulatory familiarization. The Department estimates the first-year cost of the rule will total $9.9 million. In following years, regulatory familiarization costs are projected to increase from $3.5 million in year 2, to $4.4 million in year 10 as new firms enter the market and new families hire home health care workers.

Transfers result from the wage increases to comply with minimum wage and overtime pay requirements. Total estimated transfers depend in part on the response of employers to the regulatory changes; in other words, will employers respond by paying overtime to current workers, changing scheduling practices to avoid paying overtime, hiring additional workers, or some combination of these approaches. Based on the methods described below, the Department estimates that first-year transfers from the rule will range from $42.8 to $182.1 million. In years 2 through 10, the lower end of the range is projected to increase from $27.8 million to $45.8 million while the upper end of the range is projected to increase from $172.6 million to $284.6 million.

Total costs and transfers from the rule will range from $52.7 to $192.1 million in the first year. In subsequent years, the lower end of the range is projected to increase from $31.4 million to $50.2 million in total costs and transfers. The upper range of total costs and transfers is projected to increase from $176.2 million to $289.0 million.

Regulatory Familiarization

When a new rule is promulgated, all the establishments affected by the rule will need to invest time to read and understand the components of the new rule; this is commonly referred to as regulatory familiarization. Each establishment will spend resources to familiarize itself with the requirements of the rule and ensure it is in compliance.

Each home health care establishment will require about two hours of an HR staff person's time to read and review the new regulation, update employee

[58] Elsas, M. & Powell, A. 2011. Interview of Michael Elsas, President, and Adria Powell, Executive Vice President of Cooperative Health Care Associates by Calvin Franz and Lauren Jankovic of ERG. April, 2011.

[59] Some agencies have experimented with breaking a 24 hour case into two 12 hour cases that are staffed by four home care aides; this reduces total number of hours worked and eliminates the need for the 8 hour rest period but also increases the number of aides that the client must become comfortable with.

[60] Seavey and Marquand, 2011, pgs. 61–64. Available at: *http://www.directcareclearinghouse.org/download/caringinamerica-20111212.pdf;* HHS, 2011. p. 26.

[61] BLS, 2009.

[62] PHI, 2010a., p. 30, 32.

handbooks and make any needed changes to the payroll systems. Based on our analysis of the industry and occupational data, the Department judges that each employer in HHCS and SEPD likely employs workers who could be classified as companions and therefore will need to review the proposed rule. There are about 73,000 establishments in SEPD and HHCS; assuming a mid-level HR wage of $26.79 per hour over two hours equals about $4 million for regulatory familiarization in the first year following promulgation of the rule.[63]

For independent providers, the employer is considered to be the family that hires them. Therefore, families that directly employ these caregivers will also have to review the regulatory revisions. Because the employer-employee relationship is less complex than for an agency that employs multiple workers caring for multiple clients, the Department expects the burden of regulatory familiarization will be smaller. The Department therefore assumes that each family that directly hires a caregiver will spend one hour on regulatory familiarization. The Department uses the national average hourly wage of $29.07 (loaded) to represent the opportunity cost of reviewing the regulatory revisions.[64]

The Department has found no data to support an estimate of the number of families that directly hire independent providers. The Department assumes each independent provider is hired by a single family, and therefore, because it estimates there are 206,600 independent providers, 206,600 families will incur the cost of one hour to review the revised regulations. These families incur one hour of time at an opportunity cost of $29.07 per hour for a total of about $6 million for regulatory familiarization in the first year following promulgation of the rule. The Department acknowledges this estimate is based on an assumed value and requests from commenters information or data that would allow it to better estimate the number of families that directly hire independent providers.

Wages and Overtime [65]

Many home care workers are already covered by minimum wage and overtime provisions at the state level and will not drive additional costs related to the proposed rule. Sixteen states require minimum wage for all hours worked for most home health care workers and guarantee some type of overtime pay for home health care workers who would otherwise be excluded under the FLSA.[66] Five states and the District of Columbia require minimum wage for all hours worked but do not guarantee overtime. [67] Twenty-nine states do not require minimum wage or overtime. Table 3–1 summarizes the wages for PCA and HHA occupations based on state level minimum wage and overtime coverage.

TABLE 3–1—SUMMARY OF WAGES BY STATE MINIMUM WAGE AND OVERTIME COVERAGE FOR HHAS AND PCAS

Area name	Employment	Hourly wages		
		Minimum 10th percentile wage	Weighted average median wage	Maximum 90th percentile wage
All States	1,585,990	$6.79	$9.71	$20.61
States with MW and OT:				
Total	780,480	7.32	10.39	20.61
PCA	320,010		10.38	
HHA	460,470		10.41	
States with MW but no OT:				
Total	120,610	7.20	9.85	16.40
PCA	30,700		9.95	
HHA	89,910		9.75	
States without MW or OT:				
Total	684,900	6.79	8.90	18.76
PCA	280,060		8.49	
HHA	404,840		9.30	

Source: BLS OES, 2009; Note: based on the hourly wage percentiles, the minimum wage paid to workers is below the Federal minimum wage in some states with minimum wage laws.

In order to define the subset of workers from the table that will be directly affected by the minimum wage and overtime components of the proposed rule, the Department made three primary calculations: (1) Removed from the data set those workers not currently employed as exempt companions (those providing services in facilities rather than homes); (2) added employees of tax exempt organizations in states with overtime coverage to the set of workers without state-level overtime coverage (as they are sometimes exempt from the state overtime laws); and (3) identified the number of workers currently receiving less than the federal minimum wage ($7.25 per hour).

The data presented in Table 3–1 do not differentiate the workers who provide services in the homes of clients (eligible for companionship services exemption) and those that provide services primarily in facility settings (not eligible for companionship services exemption). To identify agency-employed HHAs and PCAs likely to be providing services in facilities and exclude them from the estimation of costs, the Department examined the BLS National Employment Matrix of industries for each occupation. Based on the description of the industry employing the HHA or PCA, the Department made a judgment of

[63] Mid-level HR loaded hourly rate from BLS.

[64] BLS National Compensation Survey, July 2009, Hourly mean wage for full-time Civilian Worker is $22.36; the Department estimates the fully loaded wage at the hourly wage × 1.3. URL: *http://www.bls.gov/eci/*.

[65] These costs to employers are also transfer payments that will benefit employees. See Benefits, below.

[66] California, Colorado, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Jersey, New York, Pennsylvania, Washington, and Wisconsin. NELP, 2011 and SOL internal analysis.

[67] Arizona, Nebraska, North Dakota, Ohio and South Dakota. NELP, 2011.

whether the actual services were being provided in a facility or in a private home; then, the number of workers likely to be providing services in the home were summed and compared to the total number of workers in the occupation to estimate the percent of that occupation providing services in the home. Table 3–2 summarizes the data as well as the determination of whether the industry would be home or facility-based. This percentage, approximately 80 percent of PCAs and 45 percent of HHAs, is used to adjust the number of workers below minimum wage and the number of workers without overtime pay used in the more detailed calculations described below. By definition, the Department assumes that 100 percent of PCAs and HHAs working as independent providers work in the home setting.

TABLE 3–2—SUMMARY OF INDUSTRIES EMPLOYING HHAS AND PCAS IN 2008 AND LIKELIHOOD OF THE AIDE WORKING IN A HOME OR FACILITY

Industry	HHA		PCA	
	Employment (1000)	Facility or home	Employment (1000)	Facility or home
Total, All workers [a]	1	100%	1	100%
Home	0.449172577	45%	0.801039861	80%
Facility	0.550827423	55%	0.198960139	20%
Total, All workers	100	Home	100	Home.
Accounting, tax preparation, bookkeeping, and payroll.	0.06	Facility	0.15	Facility.
Activities related to real estate	NA	NA	0.06	Facility.
Child day care services	0.07	Facility	0.41	Facility.
Civic and social organizations	NA	NA	0.11	Facility.
Community care facilities for the elderly	15.34	Facility	NA	NA.
Community food and housing, and emergency and other relief services.	0.1	Facility	0.28	Facility.
Educational services, public and private	0.25	Facility	0.18	Facility.
Employment services	2.16	Facility	1.84	Facility.
Fitness and recreational sports centers	NA	NA	0.01	Facility.
Grant making and giving services	NA	NA	0.28	Facility.
HHCS	30.94	Home	27.9	Home.
Hospitals, public and private	2	Facility	0.61	Facility.
Hotels, motels and other traveler accommodations.	NA	NA	0.03	Facility.
Lessors of real estate	0.04	Facility	0.2	Facility.
Local government, excluding education and hospitals.	1.33	Facility	NA	NA.
Management of companies and enterprises.	0.14	Facility	0.54	Facility.
Management, scientific, and technical consulting.	NA	NA	0.04	Facility.
Nursing care facilities	5.73	Facility	0.39	Facility.
Offices of all other health practitioners	0.06	Facility	0.06	Facility.
Offices of mental health practitioners (except physicians).	0.04	Facility	0.01	Facility.
Offices of physical, occupational, and speech therapists, and audiologists.	0.11	Facility	0.05	Facility.
Offices of physicians	0.24	Facility	0.07	Facility.
Other ambulatory health care services	0.05	Home	NA	NA.
Other financial investment activities	NA	NA	0.03	Facility.
Other investment pools and funds	NA	NA	0.02	Facility.
Other personal services	NA	NA	0.41	Home.
Other residential care facilities	2.18	Facility	0.4	Facility.
Outpatient mental health and substance abuse centers.	0.27	Facility	0.22	Facility.
Personal care services	NA	NA	0.07	Home.
Residential mental health and substance abuse facilities.	2.16	Facility	0.24	Facility.
Residential mental retardation facilities	16.9	Facility	3.04	Facility.
SEPD	12.3	Home	28.12	Home.
Social advocacy organizations	0.05	Facility	0.97	Facility.
State government, excluding education and hospitals.	1.91	Facility	NA	NA.
Unpaid family workers	NA	NA	0.05	Home.
Vocational Rehabilitation	1.92	Facility	3.78	Facility.

Source: BLS 2008 National Employment Matrix; note that employment does not sum to the total provided by BLS, the percent of the occupation employed in the home versus a facility is calculated based on the actual sum of the number appearing in the table.

[a] Note: this excludes self-employed workers and those employed in private households because they will be added to the population of affected workers separately.

It is important to note that the determination of whether the industry is home- or facility-based is an estimate; some industries that appear to provide services primarily in a nursing facility, for example, may employ a few aides who provide services in the homes of clients to assist with transitioning of the client from the facility back to their home. Also, some industries that appear to provide services primarily in the home, HHCS for example, may also employ aides that work primarily in facilities.

Next, the workers in the states with minimum wage and overtime pay are, in general, already receiving at least the minimum wage and some form of overtime premium for hours worked beyond 40 hours and do not need to be included when calculating the costs associated with additional wages resulting from the application of the federal minimum wage or payment of an overtime premium. The exception is for workers employed by public agencies, non-profit organizations, and other tax exempt entities who are exempt from many of the applicable state laws. To account for these workers, the Department used the 2007 Economic Census to estimate the proportion of workers in those states who are employed in establishments exempt from Federal income tax; this proportion was multiplied by the number of workers in each state to estimate the number of workers likely to be employed by an employer not covered by the state level laws related to minimum wage and overtime.[68] These workers were added to the total number of workers without overtime coverage in order to estimate the costs of providing overtime pay to workers under the proposed rule. States vary widely in terms of exemptions from minimum wage and overtime rules and not all states have these types of exemptions; as a result, this approach results in an overestimate of the number of workers who will receive additional overtime wages as a result of the proposed rule. The Department judges that this is the best available method to estimate these additional workers given available data.

The Department then analyzed the 2009 BLS OES data on PCA and HHA wages by percentile to identify those workers receiving less than the federal minimum wage (usually those in the 10th and 25th percentiles in states without minimum wage coverage).

Finally, due to lack of data, the Department selected the assumptions it would use to analyze independent providers directly employed by families. The Department assumes that independent providers: (1) Generally will not be eligible for overtime wage premiums, and (2) earn less than the current federal minimum wage in the same proportion as agency-employed caregivers.

To be eligible for the overtime wage premium, an independent provider would have to work more than 40 hours per week for the same employer (*i.e.,* family); an agency-employed caregiver is eligible if he or she works more than 40 hours for the agency regardless of the number of families visited. Thus, the Department believes that independent providers are much less likely to be eligible for the overtime premium than agency-employed workers; those independent providers who work more than 40 hours per week are likely to be employed by more than one family.

By assuming that the proportion of independent providers earning less than the federal minimum wage is identical to that for agency-employed caregivers, the Department implicitly assumes independent providers work in similar patterns as agency-employed caregivers. That is, independent providers are distributed across states in the same proportion as agency-employed caregivers, and are as likely to earn less than minimum wage as those employed by agencies.

Table 3–3 summarizes the number of workers estimated to be directly impacted by the minimum wage and overtime provisions of the proposed rule. These numbers reflect the adjustments discussed above that account for employees of tax-exempt organizations not covered by their state's overtime requirements and for the percent of workers likely to be employed in a home versus a facility. These estimates are described in more detail in the following sections.

From the initial total of 1.59 million agency-employed workers, the Department estimates 934,000 are employed in homes as exempt companions. Of all agency-employed PCAs and HHAs, the Department estimates that 738,000, almost 47 percent are unlikely to be covered by current overtime provisions[69] and 31,000 (1.9%) are paid less than the federal minimum wage.

Since 3.9 percent of agency-employed PCAs earn less than minimum wage, the Department assumes 3.9 percent of the 188,500 PCA independent providers also earn less than minimum wage, about 7,350 caregivers. Similarly, because 0.7 percent of agency-employed HHAs earn less than minimum wage, 0.7 percent of the 18,100 HHA independent providers, about 120 workers, also earn less than minimum wage.

TABLE 3–3—SUMMARY OF WORKERS THAT ARE DIRECTLY IMPACTED BY PROPOSED RULE

Affected workers	Number of workers	Source
Agency-employed PCA and HHA	1,585,990	BLS 2009 OES; State-level occupational employment and wages for SOC 39–9021 and 31–1011.
PCA	630,770	
HHA	955,220	
Percent PCA and HHA working in homes:		
PCA	80.1%	BLS 2008 National Employment Matrix for SOC 39–9021 and 31–1011.
HHA	44.9%	
Number of PCA and HHA working in homes:		
PCA	505,272	Total Workers multiplied by percent working in homes; BLS 2009 OES and 2008 National Employment Matrix.
HHA	429,059	

[68] The Department used a proportion of 100 percent for workers in New York to account for the fact that New York law establishes an overtime premium for these workers of one and one-half times the minimum wage (rather than the workers' regular rate). This produces an overestimate of the number of workers who will receive additional overtime pay as a result of the proposed rule.

[69] The total number of workers without overtime coverage does not include the 367,000 providers in California because they are currently covered by an overtime provision under a collective bargaining agreement. If the terms of that agreement change, then costs will be impacted.

TABLE 3–3—SUMMARY OF WORKERS THAT ARE DIRECTLY IMPACTED BY PROPOSED RULE—Continued

Affected workers	Number of workers	Source
Total	934,331	
Workers without OT Coverage:		
Number of PCA and HHA in States without OT Coverage	290,089	Sum of employees working in homes in selected states; BLS 2009 OES.
Number of PCA and HHA in NY	227,100	Employees working in homes in NY; BLS 2009 OES.
Number of PCA and HHA in public agencies and nonprofits in states with OT.	220,589	Total workers in states with OT laws multiplied by proportion of workers in state employed by tax-exempt organizations; BLS 2009 OES and 2007 Economic Census.
Total workers without OT coverage	737,779	
Workers below Minimum Wage		Number of workers with wage below $7.25; BLS 2009 OES. 3.9% of PCA, 0.7% HHA.
Number of PCA and HHA worker below minimum wage	30,955	
Independent Providers employed by families	206,600	BLS 2008 National Employment Matrix for SOC 39–9021 and 31–1011.
PCA	188,500	
HHA	18,100	
Independent Providers below MW		Total number of workers multiplied by percent of agency-employed PCA and HHA that are paid below minimum wage.
PCA	7,345	
HHA	121	

Minimum Wage

Based on BLS data describing the wages of PCAs and HHAs by percentile, there are 14,200 HHAs and 30,700 PCAs in 13 states where the minimum wage is below the federal minimum wage of $7.25. Approximately 32,600 of those workers are providing services in homes rather than facilities (85 percent multiplied by 30,700, plus, 46 percent multiplied by 14,200), and therefore are receiving only their states' minimum wage. The average wage of these workers is $7.02 per hour. As a result of the proposed changes to the companionship exemption, these workers will receive an additional $0.23 per hour. Based on available data on the number of hours worked by PCAs and HHAs, drawn from several nationally representative surveys, the Department judges that 35 hours per week is a reasonable upper-bound assumption of the average number of hours worked per week. Assuming that each of these workers is employed for 52 weeks per year, and works an average of 35 hours per week [70] then the additional cost of wages paid to these workers will be approximately $13.0 million in the first year. Review of BLS data suggests that the number of workers earning less than minimum wage should be negligible in subsequent years.[71]

Since the Department assumes all independent providers are employed by families, then all of the estimated 7,350 PCAs and 120 HHAs earning less than the minimum wage provide service in homes, and no further adjustment to these numbers is necessary. If these 7,470 caregivers also receive an additional $0.23 per hour to raise their wage to the federal minimum, and work an average of 35 hours per week, then the additional cost of wages paid to these workers will be approximately $3.1 million in the first year. With no evidence to the contrary, we maintain our working assumption that wages for self-employed caregivers track those of agency-employed caregivers.

Overtime

Limited data exist on the amount of overtime worked by this population. A PHI analysis of the U.S. Census Bureau's Current Population Survey, Annual Social and Economic Supplement (ASEC) on home health care workers found 8 to 15 percent of PCAs and HHAs may work overtime. Among home health aides, 8 percent worked more than 40 hours per week, and 2 percent worked more than 50 hours per week; 15 percent of personal care attendants appeared to work more than 40 hours per week, although PHI believes this may be an overestimate based on the 2010 ASEC supplement that suggests that approximately 42 percent of aides in HHCS report working full-time year round. [72]

A significant overtime pay issue in this industry is associated with overtime pay for the care of patients requiring 24-hour services. Attending staff may be eligible for pay up to 16 of every 24 hours or even more (if the staff is not provided a bona fide sleep period). The City of New York and New York State Association of Counties filed an amicus brief with the U.S. Supreme Court in *Long Island Care at Home, Inc.* v. *Coke.*[73] The brief asserted that changing the FLSA companionship services exemption would significantly increase the cost to the City and State for providing home healthcare services. The brief included an estimate of the increased costs. The additional costs for home health care workers in New York City attending patients requiring 24-hour attendance is by far the largest component of these costs, exceeding the Department's estimate of nationwide overtime for all workers in all states not currently covered by overtime.

Unfortunately the brief does not adequately describe how the cost estimates were arrived at, nor does it provide estimates of the number of patients requiring 24-hour care or the workers caring for them. The numbers presented in the brief suggest over 33.6 million hours of annual overtime are worked just to care for patients requiring 24-hour care plus an additional 14.6 million hours of overtime hours are worked to care for other patients.[74] This exceeds by 37

[70] Seavey and Marquand, 2011, pgs. 61–64. Available at: *http://www.directcareclearinghouse.org/download/caringinamerica-20111212.pdf.*

[71] BLS, Occupational Employment Statistics Survey, by state, 2000–2010. Available at URL: *http://stats.bls.gov/oes/.*

[72] Seavey and Marquand, 2011, pgs. 61–64. Available at: *http://www.directcareclearinghouse.org/download/caringinamerica-20111212.pdf.*

[73] 551 U.S. 158 (2007). Brief of Amici Curiae City of New York and New York State Association of Counties in Support of Petitioners.

[74] The incremental cost of requiring overtime pay under this regulation is the difference between the current hourly rate paid for home health care workers, and the rate that would be paid if this

Continued

percent the total amount of overtime the Department estimated for the 34 states and Washington, DC that do not currently require overtime pay, based on estimates of hours worked derived from a nationwide, statistically representative sample.[75] Furthermore, this sample, from the Current Population Survey Annual Social and Economic Supplement, should reflect all hours worked, including that of home health care workers caring for patients requiring 24-hour care. In addition, the need to provide a patient with 24-hour care does not necessarily result in 72 hours of overtime per week. Maintaining continuity of care does not require a single care giver in attendance for the entire week; service can be provided with adequate continuity of care by two or four workers.[76] Therefore, because the brief does not explain the basis for the numbers, the Department has not relied upon those estimates, but rather has generally relied upon nation-wide data from BLS in developing this economic impact analysis.

BLS data show there are about 492,000 total home health care workers in facilities and private homes in states without state-mandated overtime coverage, plus 143,000 workers employed in New York, and an additional 136,000 workers employed by tax-exempt organizations in states with overtime coverage who are not eligible for coverage. In total, the Department estimates that there are 770,445 workers without overtime coverage that will be eligible for it as a result of the proposed rule.

Based on the PHI analysis of ASEC data on overtime worked in this industry, the Department calculates that if 10 percent of these 770,445 home health care workers are employed 45 hours per week (5 hours of overtime), and an additional 2 percent are employed 52.5 hours per week (12.5 hours of overtime), then about 30 million hours of overtime are worked per year. Using the weighted median wage of $9.51 per hour, these workers would earn an overtime premium of $4.75 per hour. Under these assumptions the additional cost of overtime pay would be approximately $143 million per year absent changes to employment practices that could reduce or even eliminate overtime for these employees.[77]

As described above, the Department does not expect independent providers to be affected by overtime provisions. It expects few, if any, of these caregivers work more than 40 hours per week for the same family.

Market Response to Overtime Requirement

It is highly unlikely that agencies will simply accept overtime costs without changing operating and staffing policies. Currently, agencies have little incentive to manage overtime because hours worked in excess of 40 per week are paid at the same rate as hours less than 40 per week. Because overtime hours will now cost agencies more, they will have an incentive to manage those hours better to reduce costs.

At least three possible agency responses to overtime pay requirements can be identified. First, the agency might manage existing staff to reduce overtime hours while maintaining the same caseload and staffing levels. However, there is little evidence on which to predict how agencies might reorganize staff time to support the same caseload. It seems doubtful that many agencies can support their caseload without at least some overtime payments, but it is unclear how much overtime might be reduced. In addition, the time spent reorganizing staffing plans is not costless. In this scenario agencies will incur opportunity costs for managerial time in addition to overtime pay, even if management pay is unchanged.

Second, as suggested in the City of New York's amicus brief, agencies might choose not to allow staff to exceed 40 work hours per week.[78] After the Court of Appeals for the Second Circuit concluded in *Coke* that home health care workers were entitled to overtime pay, the experience of New York City indicates this might be a common response in some regions. Such an approach will require increased staffing to cover the existing caseload. The New York City experience suggests it became common for staff that worked more than 40 hours per week at a single agency to continue to work more than 40 hours per week, but for multiple agencies.[79] For example, a home health care worker might work perhaps 25 hours per week at two different agencies, thus not becoming eligible for overtime pay despite working 50 hours per week. Once again, agencies will incur additional managerial costs as they hire and manage additional staff. Employees that begin to work for more than one agency will also incur opportunity costs as they coordinate their schedules with multiple agencies. Finally, agencies might increase staffing by hiring new workers; depending on the tightness of the labor market, this might necessitate increasing hourly wages to attract new workers.

The third scenario comprises a mix of the first and second approach. Neither of those approaches is costless to agencies, therefore, agencies will weigh the cost of hiring additional workers with the cost of paying overtime to existing workers to determine the optimal mix of overtime and new hires appropriate to their circumstances. Agency caseload, current staffing patterns, the cost of hiring new workers, and managerial preferences for staffing mix will affect the final decision.

One factor that may help determine how many employees currently exceeding 40 hours of work per week would receive overtime pay compared to having their hours reduced below 40 per week is the potential for existing workers to absorb additional hours without exceeding 40 hours per week. Available data suggest many employees are working significantly less than 40 hours per week and at least some of those workers are interested in working additional hours. As has been mentioned, studies show that HHAs and PCAs work, on average, 35 hours per week at most, and approximately 45 percent of workers in HHCS work part-time.[80] In addition, the 2010 CPS ASEC asked part-time workers why they did not work full-time; 22 percent of aides indicated they could only find part-time work and 18 percent stated they worked part-time due to business conditions. Thus potentially 40 percent of part-time aides might be interested in increasing their hours worked if more hours were available.

This suggests that of 1.59 million PCAs and HHAs, approximately 720,000 are part-time, and 288,000 might be interested in increasing their hours worked. Employees in this industry currently average at most 35 hours worked per week; if each of the 288,000 part-timers that might like to work

regulation is promulgated (*i.e.,* the overtime differential) applied to hours worked in excess of 40 hours per week. If straight time pay is currently about $10 per hour, the incremental cost will be $5 per hour. New York City projects the rule will cost $168 million per year for care of patients requiring 24 hour care; $168 million divided by $5 suggests that roughly 33.6 million overtime hours per year are worked in New York City alone to care for these patients.

[75] The PHI analysis is based on the U.S. Census Bureau, Current Population Survey, 2009 Annual Social and Economic (ASEC) Supplement.

[76] Elsas & Powell, 2011.

[77] If the 367,000 providers in CA that currently receive overtime coverage under the terms of a collective bargaining agreement lose that coverage due to a change in the terms, the additional costs of overtime would be approximately $75 million under the same assumptions.

[78] Brief of Amici Curiae City of New York, 2007.

[79] Elsas & Powell, 2011.

[80] PHI, 2010a. p. 35. HHS, 2011. P. 26.

additional hours increased their average hours worked by 1.8 per week, they could absorb the estimated 26.8 million hours of overtime currently worked without exceeding 40 hours per week themselves. Not all employers will be able to redistribute hours to interested part-time workers in this way, and it may be difficult for agencies to adjust worker schedules to come close to, but not exceed, 40 hours due to the nature of the work; the types of services they provide do not necessarily fit into one-hour increments. However, those employers who can adjust schedules and redistribute hours can be expected to decrease overtime costs significantly.

Travel Time

The FLSA requires that employees who, in the normal course of work, travel to more than one worksite during the workday be paid for travel time between each worksite. (If the home health care worker travels to the first client directly from home, and returns directly home from the final client, travel time for the first trip and last trip generally are not eligible for pay.) It is clear that at least some home health care workers travel between clients and are thus eligible to be paid for that time. However, the Department has been unable to find evidence concerning how many workers routinely travel as part of the job, the number of hours spent on travel, or what percentage of that travel time currently is compensated.

New York City's amicus brief does suggest, however, that projected travel costs would be about 19.2 percent of the size of overtime costs.[81] With no other data available, this ratio seems reasonable to estimate potential travel costs. A number of qualifications apply to the use of this ratio. First, there is anecdotal evidence that agencies that operate in the city make little effort to minimize travel on the part of their workers; since travel is ''free'' to the agency, there is little incentive to manage travel time. Second, because there is no explanation of how either overtime or travel time estimates were generated, a closer examination of the data might change either or both estimates.[82] Third, it is unclear how work and travel patterns in New York City apply to the rest of the country. For example, anecdotal evidence suggests that home health care workers in rural areas might have to travel further between clients, but their typical caseload patterns and total travel time are unknown. A survey of 131 home health care workers in Maine found companions traveled between 0 to 438 miles per week for an average unreimbursed mileage of 45 miles per week. One survey participant's comment was compelling: ''I had to give up my other clients because the price of gas and low wages I wasn't making ends meet.[83]

The Department expects no independent providers will be affected by the travel time provision. Although the FLSA requires that employees who travel to more than one worksite during the workday be paid for travel time between each worksite, in the case of independent providers, any travel between work sites most likely represents travel from one employer to another, not travel between sites for the same employer. Therefore the Department anticipates independent providers will not be eligible for travel costs.

Subject to the qualifications described above, using New York City's 19.2 percent of overtime figure, the Department estimates that the requirement to pay travel time under the FLSA might add approximately $26.7 million per year to home health care agency costs.[84] Because the Department has assumed that travel costs will maintain a constant proportion to overtime pay (as calculated under Scenario 1), we project that travel pay will increase from $27.8 million to $45.8 million from year 2 through year 10.

Market Response to Travel Time Requirement

As a result of this provision, agencies should have significant incentive to reduce travel between clients for their employees, and therefore costs. It is difficult, however, to predict the potential magnitude of the cost reduction. It might be difficult to reduce travel due to client preferences for specific caregivers, or the geographical dispersion of clients (especially in rural areas).

Agencies might also find alternative methods to reduce the travel costs it pays to employees without reducing actual travel time. For example, an agency might be able to reduce its employees' hourly wage, but increase hours paid by including travel time in such a way that employees' take-home pay is left unchanged. There are, however, some constraints that might limit agencies' ability to utilize such a strategy. First, employees must earn at least the federal minimum wage for all hours worked, including travel time, after this policy is implemented. Second, agencies will expend managerial resources implementing such a policy, which may at least partially offset the savings from reduced wages. Third, management frequently has multiple goals, some of which might conflict with such a policy. If, for example, newer employees are paid a wage closer to the federal minimum, then their hourly wages might be reduced a lesser amount than more senior staff. This might conflict with the agencies' desired pay scale, as well as other goals such as employee retention.

Therefore, although the Department anticipates travel will be reduced as a result of the proposed rule, it cannot predict the magnitude of this reduction. First, there may be some minimum level of necessary travel that is irreducible. Second, although agencies have incentive to more carefully manage costs associated with employee travel, they might be able to do so in such a way that agencies avoid increased costs, but results in little reduction in travel by their employees.

Live-in Domestic Staff

The proposed rule would limit the application of the overtime exemption contained in § 13(b)(21) of the Act to the individual, family or household employing the live-in domestic worker. Third-party employers would no longer be entitled to claim the exemption. In addition, the proposed rule would require employers of live-in domestic workers to maintain an accurate record of hours worked, rather than simply keeping a copy of the agreement made by the employer and employee covering hours of work. The cost to employers of the proposed recordkeeping requirement, discussed more fully in the Paperwork Reduction Act section of this preamble, is estimated to be $22,580,605 (which reflects the amount for the entire information collection-approximately $3,059,650 of which stems from this NPRM). The Department has been unable to identify current data to

[81] Brief of Amici Curiae City of New York, 2007.

[82] Thus, it is plausible that a modification in the assumptions used to generate one estimate might also affect the second estimate. The ratio of travel time to overtime might remain relatively stable even if the absolute values of the estimates change.

[83] Ashley, A., Butler, S., Fishwick, N. Home care aide's voices from the field: Job experiences of personal support specialists. The Maine home care worker retention study. *Home Healthcare Nurse,* July/August 2010, 28(7), 399–405.

[84] It is unknown whether travel hours will be paid at straight time or overtime rates; this will vary according to the circumstances of the individual worker. If we assume all travel hours are overtime hours, and are paid at approximately $15 per hour, then the $31 million in incremental travel costs suggests about 2.1 million hours per year are spent in travel. If we assume all travel hours are straight time hours, and are paid at approximately $10 per hour, then the $31 million in incremental travel costs suggests about 3.1 million hours per year are spent in travel.

estimate the number of live-in domestic workers employed by third-party agencies, but based on historical data, we do not expect the impact of the proposed change concerning third-party employment to be substantial. Although the Department has estimated the number of live-in domestics for purposes of the Paperwork Reduction Act (PRA), we have not included such data in the economic analysis as the Department relied upon aged data for the PRA section. The Department utilized a 1979 study of Domestic Service Employees which incorporated 1974 data and assumed for purposes of the PRA that a similar percentage of the current domestic worker population is employed in live-in domestic work today. The Department specifically invites comments and data on the number of live-in domestic workers and their employers who may be subject to this rule.

Total Transfers

Due to the continuum of different responses to the proposed regulation, the Department analyzed three possible scenarios with respect to overtime. One approach assumes the agency pays employees the overtime premium for all overtime hours worked. Conversely, the employer might change scheduling practices to avoid overtime costs and hire additional workers as necessary to work the extra hours. The final approach is modeled as a combination of the first two, half of employers pay overtime as in the first scenario and half of employers hire more workers, as in the second scenario. As described above, additional managerial costs to agencies might occur as a result of changes in staffing; the Department has no basis for estimating these costs, but believes they are relatively small. Therefore, they are not included in the three scenarios.

The three scenarios in rank order from highest to lowest amount are:

- *OT Scenario 1:* The Department assumes agencies make no adjustments to staffing and pay employees the overtime premium for all hours worked in excess of 40 per week.
- *OT Scenario 2:* The Department assumes agencies make a partial adjustment to staffing; overtime pay is reduced, but not eliminated, by hiring some additional staff or increasing hours to part-time workers. For the purposes of this estimate, the Department assumes agencies evenly split the current overtime hours between current workers (who will thus work 50 percent of the overtime hours they currently work), and new workers (who will not work any overtime hours).
- *OT Scenario 3:* The Department assumes agencies ban overtime and increase staffing to ensure no employee works more than 40 hours per week. In addition, it is assumed that additional staff can be hired at the current going wage rate.

Table 3–4 presents an overview of the total estimated transfers of this rule where the scenarios represent a range of potential outcomes and actual transfers will depend on the response of employers to the proposed rule.

TABLE 3–4—SUMMARY OF TRANSFERS

Transfer components	Total transfers ($ mil.)	Comments
Minimum Wages to Agency-employed Workers	$13.0	
Minimum Wages to Independent Providers	3.1	
Travel Wages	26.7	
Overtime Scenarios:		
OT1	139.3	
OT2	69.7	
OT3	0.0	
Total Transfers by Scenario		
Minimum Wage + Travel + Overtime Scenario 1	182	Employers in states with no coverage begin paying minimum wage and overtime.
Minimum Wage + Travel + Overtime Scenario 2	112	Employers in states with no coverage begin paying minimum wage and adopt a 50:50 mix of OT pay and new hires in response to overtime requirements.
Minimum Wage + Travel + Overtime Scenario 3	43	Employers in states with no coverage begin paying minimum wage and hire new workers to cover overtime.

The Department examined three scenarios representing varying agencies' potential responses to the overtime pay requirement. There is little hard evidence concerning the likelihood that each scenario might occur. However, the Department expects: Scenario 1 is the least likely; there is no reason to believe agencies will simply continue current staffing patterns and pay workers overtime for any hours exceeding 40 per week. Scenario 1 represents an upper bound estimate that projected transfer effects should not exceed.

Scenarios 2 and 3 are more likely to occur.[85] Agencies have alternatives to paying the overtime premium: Spreading existing overtime hours to other workers, either new employees or current employees who want more hours. Thus, the Department believes the true transfer effects resulting from the overtime requirement:

- Will exceed the estimate presented as Scenario 3; agencies are unlikely to be able to perfectly spread all overtime hours. This may result from specific rigidities associated with individual agencies: An inability to divide certain cases among workers so that none exceed 40 hours; insufficient part-time staff willing to take on additional hours, or a local labor pool with workers unwilling to work at the current wage level. Scenario 3 thus represents a lower

[85] National level quantitative analyses have produced results consistent with the Department's qualitative analysis for this labor market:

Barkume, Anthony. 2010. ''The Structure of Labor Costs with Overtime Work in U.S. Jobs,'' Industrial and Labor Relations Review, 64(1): 128–142.

Trejo, Stephen. 1991. ''The Effects of Overtime Pay Regulation on Worker Compensation,'' American Economic Review, 81(4): 719–40.

Trejo, Stephen. 1993. ''Does the Statutory Overtime Premium Discourage Long Workweeks?'' Industrial and Labor Relations Review, 56(3): 530–551.

bound estimate below which projected transfers are unlikely to fall.

The degree to which actual transfer effects will be greater than or less than Scenario 2 is uncertain. However, the Department expects the lower scenario is more likely; there are multiple channels through which hours can be spread to additional workers without significantly increasing non-overtime wages. The extent to which current employees work more than 40 hours per week provides little evidence of a potential labor shortage in this industry; because most agencies are not covered by overtime requirements, they have had no incentive to manage workers in a way to avoid overtime.

Projected Future Costs and Transfer Effects Due to Industry Growth

As documented above in this analysis, the demand for home health care workers has grown significantly over the past decade and is projected to continue growing rapidly. One researcher has projected at least a 200 percent increase in demand for home health care workers over the next 40 years.[86] Therefore, the Department examined how the provisions in the proposed rule might impact a rapidly growing industry.

To estimate projected regulatory familiarization costs, the Department first estimated both the number of agencies and the number of independent providers likely to enter the market. The Department used U.S. Census' Business Dynamics Statistics to estimate an average annual firm ''birth'' rate of 8.6 percent of existing firms.[87] With 73,175 affected agencies in the baseline, this projects to 6,314 new agencies per year that will incur incremental regulatory familiarization costs.

The projected number of families expected to hire independent providers was calculated using U.S. Census population projections by age. Census projected that the number of individuals age 65 and older will increase from 40.2 million in 2010 to 50.8 million in 2020 (36 percent), while those age 85 and older will increase from 5.8 million to 6.6 million (15 percent) over the same time period.[88] The Department selected the midpoint of these two age groups to estimate the growth rate of the population most likely requiring assistance; including all those in their mid 60s and early 70s was judged to be too inclusive and would overestimate the growth of the relevant population, while many requiring assistance might have died before the age of 85, and thus that age group would underestimate growth. This growth rate over 10 years (34 percent) was applied to the number of independent home care providers in the baseline year (206,600) to estimate that 285,900 independent providers would be supplying services by 2020, an average of 7,208 new workers per year from 2010 to 2020.

However, this estimate does not account for turnover among families hiring independent home care providers; the Department accounted for this by assuming that 50 percent of the previous year's independent home health care providers would gain a new client, and that client's family would require regulatory familiarization. Thus, on average, regulatory familiarization costs among families hiring independent providers each year was calculated at 50 percent of the previous year's providers plus 7,208.

Consistent with the baseline estimate, new agencies projected to incur regulatory familiarization costs are assumed to require two incremental hours at a rate $26.79 per hour. Families hiring independent providers are assumed to require one hour of regulatory familiarization at a rate of $29.07. Table 3–5 summarizes the estimation of projected regulatory familiarization costs.

TABLE 3–5—PROJECTED REGULATORY FAMILIARIZATION COSTS

Year	Agencies requiring regulatory familiarization		Families requiring regulatory familiarization				Costs ($ mil.)
	Number	Costs ($ mil.)	Total IPs	New IPs	Turnover	Costs ($ mil.)	
2009	73,175	$3.92	206,600	.....	.....	$6.01	$9.93
2010	6,314	0.34	213,529	6,929	103,300	3.20	3.54
2011	6,314	0.34	214,529	1,000	106,765	3.13	3.47
2012	6,314	0.34	222,457	7,929	107,264	3.35	3.69
2013	6,314	0.34	230,386	7,929	111,229	3.46	3.80
2014	6,314	0.34	238,314	7,929	115,193	3.58	3.92
2015	6,314	0.34	246,243	7,929	119,157	3.69	4.03
2016	6,314	0.34	254,172	7,929	123,122	3.81	4.15
2017	6,314	0.34	262,100	7,929	127,086	3.92	4.26
2018	6,314	0.34	270,029	7,929	131,050	4.04	4.38
2019	6,314	0.34	277,957	7,929	135,014	4.16	4.50
2020	6,314	0.34	285,886	7,929	138,979	4.27	4.61

To estimate the number of incremental home healthcare providers that might earn an overtime wage premium or travel pay under the proposed revisions, the Department utilized BLS Occupational Outlook employment projections for 2018.[89] The Department interpolated employment data for 2011 through 2017, and extrapolated the time series through 2020 using a constant rate of growth assumption. Wage data were directly extrapolated using the time trend from 2000 through 2010. Based on these time series:

- Home Health Aide employment will increase by an average of 4.08 percent per year.[90] Median nominal wage will increase by an average of 1.66 percent per year while median real wage

[86] PHI, 2010a. p. 8. HHS, 2001. Pgs. 4, 5, and 7.

[87] U.S. Census Bureau, Center for Economic Studies. Business Dynamics Statistics: Firm Age by Firm Size. Available at: *http://www.ces.census.gov/index.php/bds/bds_database_list.* Accessed June 17, 2010.

[88] U.S. Census Bureau. 2008 National Population Projections. Table 2: Projections of the Population by Selected Age Groups and Sex for the United States: 2010 to 2050. Available at: *http://www.census.gov/population/www/projections/summarytables.html.* Accessed November 3, 2011.

[89] Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Outlook Handbook, 2010–11 Edition,* Home Health Aides and Personal and Home Care Aides, on the Internet at *http://www.bls.gov/oco/ocos326.htm* (visited September 20, 2011).

[90] Total hours worked and overtime hours worked will increase at the same rate in this model.

will increase by an average of 0.11 percent per year.[91]

• Personal Care Aide employment will increase by an average of 6.95 percent per year. Median nominal wage will increase by an average of 1.88 percent per year, and the median real wage will increase by an average of 0.33 percent per year.

Table 3–6 summarizes the projections of HHA and PCA employment and wages developed for this analysis.

TABLE 3–6—PROJECTED EMPLOYMENT AND HOURLY WAGE, HHAS AND PCAS, 2009–2020 [a]

Year	Home health aides			Personal care aides		
	Total employment (millions)	Median wage		Total employment (millions)	Median wage	
		Nominal	Inflation adjusted [b]		Nominal	Inflation adjusted [b]
2009	0.96	$9.85	$9.85	0.63	$9.46	$9.46
2010	0.98	9.89	9.74	0.69	9.44	9.29
2011	1.03	10.21	9.90	0.75	9.71	9.42
2012	1.08	10.38	9.92	0.81	9.92	9.48
2013	1.13	10.56	9.93	0.88	10.13	9.53
2014	1.18	10.74	9.95	0.94	10.34	9.58
2015	1.23	10.91	9.96	1.00	10.55	9.63
2016	1.28	11.09	9.96	1.07	10.76	9.67
2017	1.33	11.27	9.97	1.13	10.97	9.71
2018	1.38	11.45	9.97	1.19	11.18	9.75
2019	1.43	11.62	9.97	1.26	11.39	9.78
2020	1.48	11.80	9.97	1.32	11.61	9.81

[a] Derived from BLS Occupational Outlook.
[b] Estimate based on 10 year average change in PPI for Home Health Services.

The Department did not project transfer effects associated with minimum wage provisions of the FLSA on these occupations. BLS Occupational Employment Statistics on PCA and HHA wages for 2010 indicate that few, if any, workers are currently paid below minimum wage. BLS found no state in which the tenth percentile wage was below $7.25 per hour.[92]

Projected Cost Impacts

This section draws on the estimates of costs to determine the anticipated impact of the proposed regulations in terms of total cost across all industries as well as estimated cost per firm and per employee. Table 4–1 summarizes the first year costs, transfer effects and impacts of the proposed rule.

TABLE 4–1—SUMMARY OF FIRST YEAR IMPACT OF PROPOSED CHANGES

Impact	Amount
Transfers	Total ($ mil.)
Minimum Wages	$13.0
Minimum Wages to Self-Employed Workers	3.1
Travel Wages	26.7
Overtime Scenarios	
OT1	139.3
OT2	69.7
OT3	0.0
Total Transfers by Scenario	
Minimum Wage + Travel + Overtime Scenario 1	182.1
Minimum Wage + Travel + Overtime Scenario 2	112.5
Minimum Wage + Travel + Overtime Scenario 3	42.8
Deadweight Loss	Total
Disemployment Effect (number of workers)	505
Amount ($)	42,000

Costs	Year 1 ($ mil.)	Years 2–10 ($ mil.)	Annualized at 7% real discount rate ($ mil.)
Regulatory Familiarization	$3.9		
Self-employed Regulatory Familiarization	$6.0		

[91] The Department adjusted nominal wages for inflation using the average increase in the PPI for Home Health Services over the last 10 years (1.55 percent).

[92] BLS Occupational Employment Statistics, 2010 state estimates, at *http://stats.bls.gov/oes/*.

Table 4–2 presents the impact of regulatory familiarization costs on existing agencies and families in the first year. First year regulatory familiarization costs total $9.9 million; when annualized at a 7 percent discount rate over 10 years, total annualized costs are $1.3 million per year. Cost per agency is $54, while families employing independent providers will incur costs of $29 per family.

TABLE 4–2—IMPACT OF REGULATORY FAMILIARIZATION COSTS

Regulatory familiarization costs to:	Total projected compliance costs ($ mil.)			Cost to employers	
	Year 1 [a]	Years 2–10 [b]	Annualized at 7%	Cost per establishment [a]	Cost as percent of revenue
Home Healthcare Agencies	$3.9	$0.30–$0.3	$0.85	$54	0.0049
Families Employing Independent Providers	6.0	3.20–4.0	03.98	29	[b,c]

[a] Regulatory familiarization applies to 73,175 establishments; self-employment regulatory familiarization will impact 77,900 entities.
[b] Average revenue not calculated because for the purpose of this analysis the ''employer'' is the family employing the self-employed worker; therefore, there is no revenue available.
[c] Average revenue not calculated because for the purpose of this analysis the ''employer'' is the family employing the self-employed worker; therefore, there is no revenue data available.

Regulatory familiarization costs are only incurred once by an affected entity; additional regulatory familiarization costs are not incurred by these agencies and therefore do not affect their ability to bear regulatory familiarization costs. The approach to estimate regulatory familiarization costs to new entrants is discussed above in Projected Future Costs.

Market Impacts

The Department anticipates that the proposed rule will have relatively little effect on the provision of companionship services. There are almost no data, such as price elasticities of supply or demand, that can directly be used to model the market for companionship services. Furthermore, because approximately 75 percent of expenditures on home health services are reimbursed by Medicare and Medicaid, the effect of the rule depends vitally on how Medicare and Medicaid respond to the increase in the cost of providing home health services. However, despite these limitations, the Department used available data combined with best professional judgment to appropriately adjust parameter values, to project deadweight loss and disemployment effects of the proposed rule.

In this section, the Department first presents estimated costs and transfer effects for each provision of the proposed rule, along with qualitative discussion of potential market adjustments and impacts of that provision. The Department then presents the projected deadweight loss and disemployment effects of the proposed rule using a market model framework.

The Department estimates:

- Regulatory familiarization and adjustments to managing travel and overtime are projected to cost less than $4 million in the first year, or about $54 per establishment, which is perhaps 0.005 percent of average annual establishment revenue. As noted previously in this analysis, between 8 and 15 percent of PCAs and HHAs may work overtime, and employers currently manage these issues for other occupational categories. Furthermore, while employers of PCAs and HHAs who work overtime may require more time spent in managing travel and overtime, the Department believes, on average, there should be little impact on employment attributable to regulatory familiarization costs.
- Minimum wage provisions total $13.0 million (Table 3–4), a 3.3 percent increase in wage for 31,000 affected workers employed by agencies. In addition, the Department estimates that 7,500 independent providers directly employed by families might also receive a 3.3 percent wage increase attributable to the minimum wage provisions. If the price elasticity of demand for these workers is similar to the national average price elasticity of demand for all workers (−0.3),[93] about 310 agency-employed and 74 independent providers might lose their positions because of this provision. However, because many of these services are paid by Medicare and Medicaid, demand for them might be less elastic than the overall national average; this would reduce the disemployment effect; this will be discussed in greater detail below. Furthermore, it is likely these workers will be able to find new positions due to the overtime pay provisions and because the demand for these workers is projected to grow by 200 percent by 2050.[94]
- Projected travel costs represent a transfer of $27 million per year from agencies to employees (Table 3–4, although this might decline as agencies will now have incentive to more closely manage travel time). If these payments are spread equally over all agencies in this industry, they represent about a 0.06 percent increase in wages to employees. It is more likely that these payments will be distributed less uniformly; employees of some agencies might receive significant travel transfer effects, while others receive less.
- Transfer effects associated with overtime are most difficult to project. If Scenario 2 represents the best point estimate of overtime payments, then the $69.7 million in additional wages compose about 0.17 percent of annual wages if overtime is spread over all workers, or about 0.09 percent of average industry annual revenues if spread over all establishments. Again, it is likely that overtime payments will be distributed less uniformly in a way that is difficult to predict.

However, changes in wages are not the only determinant of how the market might tend to respond to the proposed rule; the demand for home health services, and therefore the demand for workers in this industry, also affects the market response. Conceptually, the demand for companionship services probably has two distinct components: Patients covered by Medicare and Medicaid, and out-of-pocket payers. According to the Medicare Payment Advisory Commission (MEDPAC), Medicare and Medicaid accounted for 35 and 41 percent, respectively, of total spending on home health in 2008.[95] Of the remaining 24 percent, out-of-pocket payers (including private insurance) are 20 percent (the remaining 4 percent is a mix of other governmental sources).[96]

[93] Hamermesh, D.S., Labor Demand. Princeton, N.J.: Princeton University Press. 1993.

[94] HHS 2003, p. v.

[95] Home Health Care Services Payment System. The Medicare Payment Advisory Commission (MedPAC). October 2010, available at: *http://www.medpac.gov/documents/MedPAC_Payment_Basics_08_HHA.pdf.*

[96] U.S. Census Bureau: Health Care and Social Assistance, Estimated Year-to-Year Change in

Continued

Currently, Medicare will cover, without a copayment requirement, all—or almost all—of allowed payment rate for home health care services for patients eligible for Medicare payments. Thus, the demand for services by these patients is likely to be highly inelastic, and the purchase of these services is dependent primarily on need and eligibility rather than price.[97] In addition, Medicare has historically determined the payment rate to providers of these services based in part on regional market prices of inputs, which in home health care services labor constitutes 77 percent of the cost of services.[98] Because minimum wage and travel are unavoidable costs of providing these services, it seems reasonable to assume that these costs will eventually be reflected in payment rates. The impact of overtime pay on reimbursement rates is more uncertain.

Patients that pay all, or a significant share, of costs out-of-pocket might have a significantly different price elasticity of demand for home health care services. Little information is known about this market segment, including the percent of home health care patients paying out-of-pocket, or the extent to which some have private insurance to cover costs. Because Medicare and Medicaid account for about 75 percent of total payments for home health care services, it is likely that the self-pay market segment is significantly smaller. To the extent that these patients are not covered by private insurance and pay out-of-pocket, they are likely to have a more elastic demand for services; if the prices for home health services increases, these patients are more likely to search for lower cost alternatives, including relying on family members to provide care, institutionalizing the patient (but see discussion of Medicare and Medicaid, infra, indicating that this may not occur), or accessing the grey market. However, the size of such an effect is difficult to predict on the basis of extant information.

Because incremental transfers are projected to be small relative to industry wages and revenues, and because the market for these services is dominated by government payers, the Department expects the impact of the proposed rule on the market for home health care services to be relatively small. However, to the extent that some transfers are not reimbursed by government payers, and that agencies might therefore increase price to patients, they might result in some patients seeking alternatives to the organized market for home health care services.

Deadweight Loss

Deadweight loss from a regulation results from a wedge driven between the price consumers pay for a product or service, and the price received by the suppliers of those services. In this case, the transfer of income from agency owners to agency employees through minimum wage and overtime provisions reduces agencies' willingness to provide companionship services at the current market price. Because patients and their families must now pay more to receive the same hours of service, they reduce the number of hours of services they purchase; it is this reduction in services that causes the allocative inefficiency (deadweight loss) of the rule.

To estimate deadweight loss, the Department must estimate the reduction in services agencies are willing to provide at the current market price, the resulting increase in market price paid by patients and families, and their reduced purchases of companion services. To do this, the Department will use: (1) The current market wage and hours purchased of companion services; (2) the estimated regulatory costs and income transfers resulting from the rule; and (3) the price elasticity of demand for and supply of companion services.

As described above, the Department has estimated approximately 353,000 HHAs and 423,000 PCAs work in states without current overtime and/or minimum wage provisions or are directly employed by the home; of these, 339,000 HHAs and 399,000 PCAs are employed in agencies and are potentially affected by the overtime provisions of the proposed rule. These caregivers each provide about 35 hours per week of companion services in the home. The average hourly wage in these states is $9.85 for HHAs and $9.45 for PCAs. The Department used the number of employees affected by overtime provisions in its calculation of deadweight loss because: (1) The populations of affected workers in states without minimum wage and overtime provisions are largely overlapping and thus create potential double-counting; (2) under Scenario 2, overtime premiums are four times larger than projected minimum wage payments, and (3) spreading costs and transfers over a smaller worker population results in a more conservative estimate of deadweight loss (that is, the Department is more likely to overestimate, than underestimate deadweight loss).

The Department estimated a range of regulatory costs and income transfers depending on the assumptions made concerning business response to the regulation. As discussed above, the most probable of the three scenarios considered (Scenario 2) assumes an equal split of overtime costs between agencies, who pay at least some limited amount of overtime, and caregivers, who reduce hours worked at that agency (although they might seek additional hours to work at other agencies). Combining projected costs under Scenario 2, with the amounts due based upon the minimum wage and travel pay provisions, the Department estimated the deadweight loss of the rule based on first year compliance costs of $122.4 million. Thus, the rule might cost $166 per potentially affected worker, or approximately $0.0912 per hour assuming workers average 35 hours per week, about 0.93 percent of current hourly wage for HHAs and 0.96 percent for PCAs.

There are no econometric estimates of the price elasticity of demand or supply for companionship services. The price elasticity of demand for labor services has been estimated as −0.3 (a 1 percent increase in wages will cause a 0.3 percent reduction in hours purchased). However, it is reasonable to expect that the demand for companionship services is less elastic than the demand for general labor services because much of the cost is paid by Medicare and Medicaid. As a result, patients and family members are largely cushioned from the direct effects of changes in price for these services and are thus less likely to change their demand for them. Therefore, the Department assumes the demand for home companionship services is one-half the price elasticity of demand for general labor services, or −0.15.

The price elasticity of supply for hourly labor has been estimated at 0.1 (a 1 percent increase in wages will cause

Revenue for Employer Firms by Source, Table 8.9. Available at: *http://www.census.gov/services/sas_data.html.*

[97] Home Health Care Services Payment System. The Medicare Payment Advisory Commission (MedPAC). October 2010, available at: *http://www.medpac.gov/documents/MedPAC_Payment_Basics_08_HHA.pdf.* Medicare, for example, does not require copayment for eligible patients.

[98] Section 1895 of the Social Security Act required that that the home health prospective payment system (HH PPS) make payment for all costs of home health services. As such, under the HH PPS, Medicare covers and pays for all home health services, including medical supplies, that are reasonable and necessary, for beneficiaries that are eligible for the Medicare home health benefit. The law requires that the HH PPS rates be updated, on an annual basis, by the home health market basket update (plus or minus any percentage legislated by Congress). CMS uses the home health market basket index, which measures (and tracks) inflation in the prices of an appropriate mix of goods and services that HHAs purchase in furnishing home health care. Medicare cost report data are used to construct the cost weights for the blended wage and benefit index. See also Home Health Care Services Payment System. MedPAC. 2010.

a 0.1 percent increase in hours supplied). However, among married women, that price elasticity of supply is estimated to be about 0.14; because hours worked in this labor market are primarily supplied by married women, the Department selected a value of 0.14 to use as the price elasticity of supply of home healthcare services in this analysis.

Based on these price elasticities of supply and demand, the estimated cost per caregiver hour, and baseline employment and wages, the Department projects that for:

• HHAs, hourly wage will increase by $0.044 to $9.89, and employment will decrease by about 227, or about 413,000 hours of companionship services annually; deadweight loss will be $18,800 annually.

• PCAs, hourly wage will increase by $0.044 to $9.50, and employment will decrease by 278, or about 507,000 hours of companionship services annually; deadweight loss will be $23,100 annually.

In addition, transfers to home caregivers will be borne by the patients and their families in the form of higher prices, and by agencies and their owners in the form of reduced income. The determination of who pays these transfers is a function of the relative price elasticities of supply and demand; with inelastic demand and labor supply, these transfers are approximately equally shared between purchasers (about 48.3 percent borne by patients, their families, and Medicare and Medicaid) and agencies (about 51.7 percent). For:

• HHAs, about $27.1 million is estimated to be paid by patients, their families, and Medicare and Medicaid; while $29.1 million is estimated to be paid by agencies and their owners in the form of reduced income.

• PCAs, patients, their families, and Medicare and Medicaid are estimated to pay about $31.9 million, and $34.2 million is estimated to be paid by agencies and their owners in the form of reduced income.

Table 4–3 summarizes both the values of the parameters used in the deadweight loss analysis and the results of the analysis.

TABLE 4–3—SUMMARY OF DEADWEIGHT LOSS ESTIMATION

	HHA	PCA	Total
Values Used in Deadweight Loss Analysis			
Price Elasticity of Demand	−0.15	−0.15	
Price Elasticity of Supply	.14	.14	
Baseline Hourly Wage	$9.85	$9.46	
Baseline Employment[a]	338,801	398,960	737,761
Compliance Costs ($ mil.)[b]			$122.4
Compliance Costs per Hour[c]			$0.0912
Results of Deadweight Loss Analysis			
Post-Rule Hourly Wage	$9.89	$9.50	
Post-Rule Hourly Employment	338,574	398,682	737,255
Change in Hourly Wage	$0.044	$0.044	
Change in Employment	−227	−278	−505
Deadweight Loss	$18,837	$23,096	$41,933
Percent of Costs and Transfers Paid by Purchasers[d]	48.3%	48.3%	48.3%
Costs and Transfers Paid by Purchasers ($ mil.)	$27.1	$31.9	$51.9
Percent of Costs and Transfers Paid by Employers[e]	51.7%	51.7%	51.7%
Costs and Transfers Paid by Employers ($ mil.)	$29.1	$34.2	$63.3

[a] Agency employment in states without minimum wage and/or overtime laws plus independent providers in states without minimum wage laws.
[b] Estimated sum of transfers and costs from overtime scenario 2, travel, minimum wage, and regulatory familiarization costs.
[c] Assumes each caregiver works 35 hours per week 52 weeks per year.
[d] Costs and transfers paid by purchasers in the form of higher prices; includes direct purchase of home health care services and services purchased through Medicare/Medicaid.
[e] Costs and transfers paid by employers in the form of lower profits.
Individual components may not sum to totals due to rounding.

Impact to Medicare and Medicaid Budgets.

In 2009, HHS outlays for Medicare programs totaled $424 billion, and outlays in support of Medicaid totaled $251 billion.[99] Under Medicare, an estimated $18.3 billion went to home health programs, while Medicaid programs accounted for approximately another $38.1 billion (approximately $40 billion inflated to 2009 dollars) through various programs.[100] In 2008, Medicare and Medicaid accounted for nearly 75 percent of home health care services revenue; thus, the impact of the proposed rule on home health care will depend vitally on how Medicare and Medicaid respond to increased labor costs.

Although increased payments to workers associated with minimum wage, travel, and overtime provisions of the proposed rule are considered transfer effects from a societal perspective, the Department expects agencies will try to pass these transfers through to Medicare and Medicaid. Under the three overtime scenarios examined, average annualized payments range from $41.5 to $226.0 million depending on how home health care agencies respond to overtime requirements. If Medicare and Medicaid continue to pay 75 percent of home health care costs, roughly $31.1 million to $169.5 million in costs might be incurred by these government programs. These costs compose 0.06 to 0.29 percent of total HHS and state outlays for home health care programs ($58.1 billion).

We invite comment on the impact of the rule of on Medicaid, Medicare, and the private market, including the impact on the affordability of home health and home and community-based services.

[99] U.S. Department of Health and Human Services (HHS). 2011. FY 2011 Budget, available at *http://dhhs.gov/asfr/ob/docbudget/2011budgetinbrief.pdf*. p. 13.

[100] *Id.*

Projected Future Transfer Effects Due to Industry Growth

This section projects costs, and impacts over 10 years. The Department used several key assumptions to develop these projections. First, the Department assumed that the number of home healthcare workers directly employed in the homes or employed in states without current overtime premium requirements will remain a constant percentage of total employment in those occupations between 2010 and 2020 (about 35.5 percent of HHAs and 63.3 percent of HHAs).

Second, we also maintained the assumptions that 12 percent of workers exceed 40 hours worked per week and that 10 percent of these caregivers work 45 hours per week while 2 percent work 12.5 hours of overtime per week. These overtime assumptions are identical to those used to estimate costs and transfers for 2009, while the percentages used to estimate the number of workers potentially affected in each year were calculated from the 2009 analysis.

Third, consistent with the 2009 analysis, we project two three overtime scenarios: And one for travel costs:

- *Scenario 1:* Employers make no adjustment to hours worked and pay all workers the overtime premium for all hours worked in excess of 40 per week.
- *Scenario 2:* Employers adjust schedules and/or hire additional workers to reduce overtime payment; we assume 50 percent of overtime payments can be avoided through these market adjustments.
- *Scenario 3:* Employers adjust schedules and/or hire additional workers to eliminate overtime payments.

Finally, we continue to estimate travel costs 19.2 percent of Overtime Scenario 1 costs.

The Department excluded potential transfer effects associated with the minimum wage provision from the projections because the current number of workers earning less than the minimum wage is relatively small and will decline steadily as nominal wages increase. Although the Department expects that the parameters used in this analysis will not remain constant, it has no information on which to base estimates of how these key variables might change over time. Therefore, maintaining the assumptions used in the analysis for 2009 provide the best basis for projecting future costs and transfer effects.

Based on the data and assumptions described in this section, and the employment and wage projections in Table 3–6, Table 4–4 presents the Department's projections through 2020 of overtime and travel payments attributable to the revisions to the companionship regulations FLSA proposed in this notice.

TABLE 4–4—PROJECTED HHA AND PCA OVERTIME HOURS, OVERTIME PAY AND TRAVEL PAY ATTRIBUTABLE TO PROPOSED REVISIONS, 2010–2020[a]

Year	Overtime hours worked (millions)[b]		Overtime and travel payments (millions)[c]		
	Scenario 1	Scenario 2	Scenario 1	Scenario 2	Travel/ Scenario 3
			Nominal dollars		
2010	30.5	15.3	$147.1	$73.6	$28.2
2011	32.8	16.4	162.7	81.3	31.2
2012	35.0	17.5	177.2	88.6	34.0
2013	37.3	18.6	192.2	96.1	36.9
2014	39.5	19.8	207.7	103.9	39.9
2015	41.8	20.9	223.6	111.8	42.9
2016	44.0	22.0	240.0	120.0	46.1
2017	46.3	23.2	256.8	128.4	49.3
2018	48.6	24.3	274.0	137.0	52.6
2019	50.8	25.4	291.8	145.9	56.0
2020	53.1	26.5	309.9	155.0	59.5
			Inflation adjusted dollars		
2010	30.5	15.3	144.8	72.4	27.8
2011	32.8	16.4	157.8	78.9	30.3
2012	35.0	17.5	169.3	84.6	32.5
2013	37.3	18.6	180.8	90.4	34.7
2014	39.5	19.8	192.4	96.2	36.9
2015	41.8	20.9	204.0	102.0	39.2
2016	44.0	22.0	215.6	107.8	41.4
2017	46.3	23.2	227.2	113.6	43.6
2018	48.6	24.3	238.8	119.4	45.8
2019	50.8	25.4	250.3	125.2	48.1
2020	53.1	26.5	261.9	130.9	50.3

[a] Calculations based on employment and wage data in Table 3–6 and specified assumptions.
[b] Under Scenario 3, no overtime payments are incurred.
[c] Because overtime payments under Scenario 3 are zero, total payments under Scenario 3 are identical to travel payments. Total payments under Scenarios 1 and 2 are equal to overtime payments under that scenario plus travel payments.

The Department projects that paid overtime hours will increase from 30.5 million to 53.1 million between 2010 and 2020 with a consequent increase in overtime pay from $147.1 million to $309.9 million assuming employers make no adjustment to overtime work patterns (Scenario 1). In inflation-adjusted dollars, overtime pay is projected to increase from $144.8 million to $261.9 million. Assuming employers are able to cover 50 percent of overtime hours through scheduling changes and/or hiring additional workers (Scenario 2), the projected

increase is half that of Scenario 1. Travel pay is projected to increase from $28.2 million to $59.5 million in nominal dollars ($27.8 million to $50.3 million in inflation-adjusted dollars) over that same period.

To place these projected future transfer effects resulting from the proposed rule in context, the Department compared nominal transfer effects to projected Medicare spending over the same period. The Centers for Medicare & Medicaid Services report that in 2010 Medicare expenditures totaled $522.8 billion, $19.1 billion of which was spent on the provision of home health care services, and that annual Medicare expenditures are projected to increase to $932.1 billion by 2020.[101] Assuming that expenditures of home health services as a percent of total Medicare expenditures remains constant, annual home health care expenditures might increase to $34.1 billion by 2020.[102]

However, the total overtime and travel payments projected to result from the proposed rule will not paid by Medicare. On average, about 51.7 percent of projected costs and transfer effects are expected to be paid by providers in the form of lower profits (see discussion of deadweight loss for details). Further, only about 75 percent of payments for home health care services are attributable to Medicare and Medicaid; patients and their families and their private insurance account for 20 percent of payments. About 5 percent is accounted for by a mix of other governmental programs.

After adjusting projected overtime and travel transfer effects, the Department expects incremental Medicare payments attributable to the rule will increase from about $59.8 million in 2010 to $133.8 million in 2020 under Scenario 1, and from $34.7 million to $77.6 million under the more probable Scenario 2, and from $9.6 million to $21.5 million under Scenario 3 (as discussed above, the Department expects the market response to the rule will most likely lie somewhere between Scenario 2 and Scenario 3). These incremental payments compose no more than 0.4 percent of projected Medicare Home Health Care expenditures under Scenario 1, and 0.23 percent of those expenditures under Scenario 2, and 0.06 percent under Scenario 3. Table 4–5 summarizes projected Medicare budgets, incremental payments attributable to the proposed rule, and those payments as a percent of Medicare Home Health Care expenditures from 2010 through 2020.

TABLE 4–5—PROJECTED OVERTIME AND TRAVEL PAY AS PERCENT OF MEDICARE HOME HEALTH CARE EXPENDITURES

Year	Medicare expenditures (billions)[a]		Adjusted overtime & travel payments in nominal dollars (millions)[b]			OT & Travel as % Medicare home health care		
	Total	Home health care	OT 1 + Travel	OT 2 + Travel	OT 3 + Travel	OT 1 + Travel	OT 2 + Travel	OT 3 + Travel
2010	$522.8	$19.1	$59.8	$34.7	$9.6	0.31	0.18	0.05
2011	522.8	19.1	63.5	36.9	10.2	0.33	0.19	0.05
2012	557.4	20.4	70.2	40.8	11.3	0.34	0.20	0.06
2013	572.2	20.9	76.5	44.4	12.3	0.37	0.21	0.06
2014	606.6	22.2	83.0	48.2	13.4	0.37	0.22	0.06
2015	643.4	23.5	89.6	52.0	14.4	0.38	0.22	0.06
2016	675.8	24.7	96.5	56.0	15.5	0.39	0.23	0.06
2017	716.1	26.2	103.6	60.1	16.7	0.40	0.23	0.06
2018	760.3	27.8	110.8	64.3	17.9	0.40	0.23	0.06
2019	809.6	29.6	118.3	68.7	19.1	0.40	0.23	0.06
2020	864.5	31.6	125.9	73.1	20.3	0.40	0.23	0.06

[a] Total Medicare expenditures projected by CMS; Home Healthcare Expenditures extrapolated based on the percent of total Medicare expenditures in 2010.

[b] Projected payments reduced by 9.1 percent to adjust for average percent of costs paid by agencies in the form of lower profits, then reduced by 25 percent to adjust for percent of home health care purchases paid by patients and their families.

The Department also projected deadweight loss and employment impacts over 10 years. These projections are calculated maintaining the assumptions concerning the price elasticities of supply and demand discussed in the first year deadweight loss analysis, projected regulatory familiarization costs summarized in Table 3–5, and projected overtime and travel payments presented in Table 4–4. The Department's calculated deadweight loss and employment impacts over 10 years are summarized in Table 4–6.

TABLE 4–6—PROJECTED DEADWEIGHT LOSS AND EMPLOYMENT IMPACTS

	Year 1 ($ mil.)	Years 2–10 ($ mil.)[a]	Years 2–10 ($ mil.)[a]	Average annualized value ($ mil.)	
				3% Real rate	7% Real rate
Regulatory Familiarization Costs					
Agencies	$3.9	$0.3	$0.3	$0.7	$0.8
Families Hiring Self-employed	6.0	3.2	4.0	3.8	3.9

[101] The Boards of Trustees of the Federal Hospital Insurance and Federal Supplementary Medical Insurance Trust Funds, Washington, DC, May 13, 2011. 2011 Annual Report of the Boards of Trustees of the Federal Hospital Insurance and Federal Supplementary Medical Insurance Trust Funds. Accessed at: *https://www.cms.gov/reportstrustfunds/downloads/tr2011.pdf,* October 7, 2011.

[102] The report indicates that expenditures of home health services as a percent of total Medicare expenditures are expected to increase by a small amount over that period.

TABLE 4–6—PROJECTED DEADWEIGHT LOSS AND EMPLOYMENT IMPACTS—Continued

	Year 1 ($ mil.)	Years 2–10 ($ mil.) [a]		Average annualized value ($ mil.)	
				3% Real rate	7% Real rate
Transfers					
Minimum Wages (MW)					
to Agency-Employed Workers	13.0	0.0	0.0	1.5	1.7
to Self-Employed Workers	3.1	0.0	0.0	0.4	0.4
Travel Wages	26.7	27.8	45.8	35.4	34.7
Overtime Scenarios					
OT 1	139.3	144.8	238.8	184.2	180.7
OT 2	69.7	72.4	119.4	92.1	90.4
OT 3	0.0	0.0	0.0	0.0	0.0
Total Costs and Transfers by Scenario					
Reg Fam + MW + Travel + OT 1	192.1	176.2	289.0	226.0	222.2
Reg Fam + MW + Travel + OT 2	122.4	103.8	169.6	133.9	131.9
Reg Fam + MW + Travel + OT 3	52.7	31.4	50.2	41.8	41.5
Deadweight Loss					
Reg Fam + MW + Travel + OT 1	0.103	0.080	0.132	0.105	0.103
Reg Fam + MW + Travel + OT 2	0.042	0.027	0.044	0.036	0.036
Reg Fam + MW + Travel + OT 3	0.008	0.002	0.004	0.003	0.003
Disemployment (number of workers)					
Reg Fam + MW + Travel + OT 1	793	739	1,169	938 [b]	
Reg Fam + MW + Travel + OT 2	505	435	686	555 [b]	
Reg Fam + MW + Travel + OT 3	218	132	203	172 [b]	

[a] These costs are a range where the first number represents the estimate for Year 2; the second estimate for Year 10.
[b] Simple average over 10 years.

Total average annualized regulatory familiarization costs, and minimum wage, overtime premium, and travel payments range from $41.5 million to $226.0 million per year based on how employers adjust to the requirement to pay overtime wage premiums. These costs and transfers are projected to cause average annualized deadweight loss ranging from $3,000 to $105,000 per year. These costs and transfers are also projected to cause disemployment impacts ranging from 172 to 938 workers per year.

Non-monetized Projected Impact

Two additional aspects of home health care services might be affected by the proposed rule. First, the proposed rule might result in increased purchases of home health care services through the informal, or ''grey,'' market. Second, although the hours of care received by patients might be unaffected by the increased costs of care, the quality of that care might suffer (however, the quality of care also may increase due to increased professionalism and decreased turnover). These are discussed in turn below.

The Grey Market

An unknown number of patients receive home care services through more informal arrangements with care providers, sometimes called the ''grey'' market. Here, informal agreements are reached between the patient (or patient's family) and the caregiver regarding hours of care and hourly pay rates. Because income and payroll taxes can be avoided, services can be provided at lower cost than when provided through agencies.

The proposed rule will increase costs to home health care agencies that offer services in states where they are not required to pay the minimum wage and/or overtime pay and an unknown percentage of those costs might be reimbursed by Medicare and Medicaid. If the costs are not fully reimbursed, home health care agencies might increase the rates they charge patients, have their profit margin squeezed, or both. If costs are passed through to patients and their families, they will have incentive to look for lower cost alternatives such as the grey market. In addition, workers who desire to work more than 40 hours per week might have opportunities to provide services through the grey market rather than work for multiple agencies. Although the proposed rule might increase incentives on both sides to use the grey market, there is no information available to project potential changes to that market.

Continuity of Care

Continuity of care ''is commonly framed as being composed of provider continuity (a relationship between a patient and provider over time), information continuity (availability and use of data from prior events during current client encounters) and management continuity (coherent delivery of care from different doctors).'' [103] In the home care scenario, concerns have been raised that continuity of care, specifically provider continuity, may suffer if employers opt not to pay overtime for aides who, for example, work more than 40 hours per week for a single client and instead employ other aides to also provide companionship to that client in the same workweek. Some are concerned that a break in the continuity of care

[103] Walraven, C., Oake, N., Jennings, A., *et al.* The association between continuity of care and outcomes: a systematic and critical review. *Journal of Evaluation in Clinical Practice,* April 2009, 947–956.

may result in a reduction in the quality of care.

The Department understands that home health care involves more than the provision of impersonal services; when a caregiver spends significant time with a client in the client's home, the personal relationship between caregiver and patient can be very important. Certain clients may prefer to have the same caregiver(s), rather than a sequence of different caregivers. The extent to which home health care agencies choose to spread employment (hire more companions) rather than pay overtime may cause an increase in the number of caregivers for a client; the client may be less satisfied with that care, and communication between caregivers might suffer, affecting the quality of care for the client.[104]

Although matching client and caregiver in a long-term personal relationship is the ideal for many clients, it may not be the norm. For instance, the turnover rate (those leaving and entering home care work) for workers in the home health care industry has been estimated to range from 44 to 65 percent per year.[105] Other studies have found turnover rates to be much higher, up to 95 percent [106] and, in some cases, 100 percent annually.[107] Thus, many clients already experience a sequence of different caregivers, and it is not apparent that the proposed rule will necessarily worsen the turnover rate. In fact, coverage under the FLSA may reduce turnover rates. Frequent turnover is costly for employers in terms of recruitment costs and training of new aides and also in terms of the likelihood of a reduction of quality care or not being able to provide care at all. The employee turnover rate in this industry is high because of low wages, poor or nonexistent benefits, and erratic and unpredictable hours. Job satisfaction, and the desire to remain in a given position, is highly correlated with wages, workload, and working conditions. Increased pay for the same amount of work and overtime compensation likely would aid in employee retention and attracting new hires. Those employers who choose not to pay overtime essentially would need to spread the hours among their employees, resulting in more consistent work hours for many aides. Moreover, any extra wages earned may be used to pay for other benefits, such as health insurance coverage. As one study found, for this low-income workforce, ''compensation accounts for more actual job turnover. [Therefore, h]igher wages, more hours, and travel cost reimbursement are found to be significantly associated with reduced turnover.'' [108] Another report determined that ''increases in the federal or state minimum wage can make home care employment more desirable.'' [109]

For the estimated 8 to 15 percent of aides who work more than 40 hours per week, only a portion of that percentage likely provides services for the same client. Many who work overtime accrue long hours in the service of at least a few clients, traveling between client homes during the workweek. It is also conceivable that in a minority of cases, the aide provides companionship services around the clock for a stretch of a few or several days. Most, however, have been estimated to work 45 hours per week on average, not including travel time between client homes.

Provider continuity that results in overtime work, however, has drawbacks. From the aide's perspective, the long work hours can be a burden. For instance, ''it cannot be denied shifts beyond the traditional 8 hours have been associated with increased risk of errors, incidents, and accidents.'' [110] Many studies have shown that extended work hours result in increased fatigue, decreased alertness and decreased productivity, negatively affecting employee health and well-being. Long work hours in the healthcare field ''have adverse effects on patient outcomes and increase health care errors and patient injuries.'' [111] For example, nurses working more than 8 hours report more medication errors, falling asleep at work, a decrease in productivity, and impaired critical thinking abilities. The error rates double when nurses work 12.5 or more consecutive hours. A 2004 National Institute for Occupational Safety and Health report found that ''12-hour shifts combined with more than 40 hours of work per week reported increases in health complaints, deterioration in performance, or slower pace of work.'' [112] One study that analyzed 13 years worth of data and nearly 100,000 job records notes that ''long working hours indirectly precipitate workplace accidents through a causal process, for instance, by inducing fatigue or stress in affected workers.'' [113] It is therefore telling that ''[d]irect care workers have the highest injury rate in the United States, primarily due to work-related musculoskeletal disorders.'' [114] One of the purposes of the FLSA's overtime pay requirement is to induce employers to hire more people to work fewer hours each. Doing so in those circumstances where excessive overtime hours are worked may therefore result in better care provided.

Many regard having the same home care aide for long hours as a cornerstone of ''continuity of care'' and having more aides to cover the same number of companion hours for a client as negatively impacting quality of care. As discussed above, however, the opposite may be true. Working extended hours may affect the quality of care that the aide is able to provide and even the aide's own health and well-being. Coverage for companions under wage and hour laws may also result in improved retention and hiring, which saves the employer costs related to turnover rates; job satisfaction; and increase in pay. Attendant benefits of spreading work hours more evenly may include job stability for companions, decreased risk of fatigue, errors and work-related injuries, and better overall job performance, resulting in improved client care and outcomes.

Furthermore, it has been shown that paying employees below minimum wages, not paying for all hours worked or overtime, and providing no training or benefits is not the only path to success that an employer has in the home care industry. Another business model, in which employees receive training, an overtime wage differential, and health care benefits, has been

[104] Brief of Amici Curiae City of New York. 2007.

[105] PHI, 2010a.

[106] Zontek, T., Isernhagen, J., Ogle, B. Psychosocial factors contributing to occupational injuries among direct care workers. *American Association of Occupational Health Nurses Journal,* August 2009, 338–347.

[107] Ashley, A., Butler, S., Fishwick, N. Home care aide's voices from the field: Job experiences of personal support specialists. The Maine home care worker retention study. *Home Healthcare Nurse,* July/August 2010, 28(7), 399–405.

[108] Morris, L. Quits and job changes among home care workers in Maine: The role of wages, hours and benefits. *The Gerontologist,* 2009, 49(5), 635–650.

[109] Burbridge, L. The labor market for home care workers: Demand, supply, and institutional barriers. *The Gerontologist,* 1993, 33(1), 41–46.

[110] Keller, S. Effects of extended work shifts and shift work on patient safety, productivity, and employee health. *American Association of Occupational Health Nurses Journal,* December 2009, 57(12), 497–502.

[111] Keller, S. 2009.

[112] Caruso, C., Hitchcock, E., Dick, R., *et al.* Overtime and extended work shifts: Recent findings on illnesses, injuries, and health behaviors. *National Institute for Occupational Safety and Health, U.S. Department of Health and Human Services.* April 2004.

[113] Dembe, A., Erickson J., Delbos, R., *et al.* The impact of overtime and long work hours on occupational injuries and illnesses: new evidence from the United States. *Occupational and Environmental Medicine,* 2005, 62, 588–597.

[114] Zontek *et al,* 2009. Psychosocial Factors Contributing to Occupational Injuries Among Direct Care Workers. AAOHN Journal, 2009, Vol. 57, No. 8, 338–347. In this study, direct care workers includes nursing aides, orderlies, and attendants in any setting (institutional or residential).

successful. Cooperative Home Care Associates (CHCA), based in New York, for example, has always paid workers overtime. Although overtime at CHCA is carefully managed, it can still be substantial (*e.g.,* 30 percent or more of employees exceed 40 work hours per week); allowing, even expecting overtime, permits CHCA, however, to use a staffing plan that maintains continuity of care. These policies have driven CHCA's turnover rate far below the industry average, a major factor in its financial success.[115] In terms of employee coverage, CHCA cases requiring weekday and weekend coverage are assigned permanent aides who work on alternate weekends. Also, cases requiring 24-hour coverage, seven days per week, are shared among four aides, requiring only some overtime hours.[116] Other agencies such as Community Care Systems, Inc., in Springfield, Illinois, have reduced overtime costs by distributing extra hours more evenly among workers through better tracking of work hours. Close monitoring of employee workloads and spreading of work hours also curbed overtime use for Illinois-based Addus HealthCare, one of the nation's largest home care employers. These employers pay overtime even in those states that do not require it, demonstrating that ''wage and hour protections are economically realistic for the industry, and can be achieved without excessive use of costly overtime hours.'' [117] These examples suggest that requiring overtime pay in this industry does not inevitably cause disruption of employer-employee relationships and caregiver-patient relationships leading to higher turnover, discontinuity of patient care, and increased use of the grey market.

Benefits

This section describes the expected benefits of the proposed change to the companionship exemption. Potential benefits of this revision to the ''companionship services exemption'' flow from the transfer of regular and overtime wages to workers from their employers, and include: Reduced worker turnover, reduced worker injury rates, and decreased worker reliance on public assistance programs.

Transfer Effects

Perhaps the most significant effect of the proposed rule is the transfer of income from businesses and their owners to workers, and potentially, from one group of workers to another group of workers. In economics, a transfer payment is broadly defined as a redistribution of income in the market system that does not affect output.

Transfer Effects Associated With Minimum Wage and Travel Provisions

The proposed rule leads to an unambiguous transfer from employers to employees in those states that currently do not require agencies to pay minimum wage to employees who provide this type of home health care services. Similarly, payment for travel time is also an unambiguous transfer of income from businesses and their owners to workers. These are estimated to be approximately $39.7 million. In addition, the $3.1 million in minimum wage payments to independent providers directly employed by families represent an unambiguous transfer from families to caregivers.

Two factors could change the dynamics of this transfer scenario. First, increased wages and travel cost might be passed through to patients in the form of higher prices for home health care services. If those higher prices result in patients finding alternatives to home health care services (*e.g.,* accessing the grey market for services or institutionalizing the patient), then the income transfer through travel and overtime pay is partially offset because the provision of home health services is reduced, resulting in reduced revenues to agencies, and the deadweight loss to the economy. This reduction in demand by households will be less pronounced if the demand for home health care services is inelastic (*i.e.,* the hours of home health care services purchased does not change when price increases), as assumed in this analysis. The Department believes the market response to the proposed rule will be relatively small, but did not estimate the response due to lack of information.

Second, the Department expects that over time some of these costs may be reimbursed to agencies through increased Medicare and Medicaid payments. To the extent that Medicare and Medicaid increase reimbursement rates to cover these costs, the transfer is from the federal and state agencies to workers.

Transfer Effects Associated With Overtime Provisions

The transfer of income associated with the payment of the overtime differential is more ambiguous. Employers are likely to respond to overtime pay requirements along a spectrum ranging from (1) banning all overtime and spreading hours to other workers or hiring new workers to fill the available hours, to (2) maintaining current staffing patterns and paying overtime for all work hours exceeding 40 per week. To the extent that employers choose to pay overtime, the income transfer is from businesses and their owners to workers. However, to the extent that employers eliminate overtime and spread the now available hours to other employees or new hires, the transfer is from worker to worker. Employees who used to exceed 40 hours of work per week will work fewer hours, transferring income to fellow workers who will absorb the extra hours. It is also possible that those employees working greater than forty hours may distribute those hours among multiple employers.

Potential Macroeconomic Impacts of Transfer Effects

In the first year, the proposed rule is expected to transfer $42.8 million in income from businesses and families to home health care workers due to minimum wage and travel time pay requirements. Up to $139.3 million more might be transferred in the first year to workers due to the overtime provisions, although the total amount transferred, and the percent transferred from owners versus other workers depends on how owners modify staffing plans in response to the rule.

Because employees in this industry earn on average hourly wages of approximately $10.14, it is reasonable to assume that a high percentage of the extra income would be spent by the employees and their families. The percent spent of each additional dollar earned is the marginal propensity to consume (MPC) out of income. It is also reasonable to assume that the MPC for these employees is higher than the MPC of their employers; for example, employees might spend $0.90 of each additional dollar earned, while their employers, with significantly higher incomes, might spend only $0.50 of each additional dollar earned. Thus, the transfer of income from employers to employees is likely to result in increased aggregate consumption because of employees' higher MPC.

The additional consumption might stimulate the economy an amount that exceeds the initial expenditure through the multiplier effect (*e.g.,* the increased purchases by home health care workers generate additional income for those businesses, whose owners then increase their own spending). Moody's Economy.com model suggests the multiplier effect for low-income consumers ranges from 1.64 for income associated with food stamps to 1.73 for

[115] Elsas & Powell, 2011.

[116] NELP report, page 26.

[117] NELP report, page 25–26.

income from unemployment benefits.[118] Thus, $1 of food stamps given to low income consumers increases GDP by $1.64 dollars.

The key unknowns in estimating any multiplier effect associated with the proposed rule include:

- Estimating income transfers strictly from employers to employees, excluding transfers from one group of employees to another group of similar employees.
- The difference between the MPC of employers and employees; the Department was unable to find estimates of MPC by annual income.
- The size of the multiplier.

The Department did not estimate the multiplier effect due to the uncertainty associated with key variables and parameters for the calculation.

Reduction in Employee Turnover Rates

Researchers have found that lower wages are associated with higher turnover and lower quality of care, and that increases in wages for home health care workers result in decreased turnover rates. Excessive employee turnover is costly to businesses, and as mentioned earlier, studies have found turnover rates in the home health care industry range from 44 to 95 percent per year, and even approach 100 percent per year.[119]

Frequent turnover is costly for employers in terms of recruitment costs and training of new aides and also in terms of the likelihood of a reduction in the quality of care or not being able to provide care at all. The employee turnover rate in this industry is high because of low wages, poor or nonexistent benefits, and erratic and unpredictable hours. Job satisfaction, and the desire to remain in a given position, is highly correlated with wages, workload, and working conditions. Increased pay for the same amount of work and overtime compensation likely would aid in employee retention and attracting new hires. Those employers who choose not to pay overtime essentially would need to spread the hours among their employees, resulting in more consistent work hours for many aides.

Decreasing the rate of employee turnover may result in significant cost savings to employers. For example, an agency employing 50 workers with a turnover rate of 35 percent replaces about 18 workers per year. The new workers hired to replace the workers who left must be recruited, interviewed and trained to perform the job tasks, requiring a significant investment of time and resources by the employer. If the turnover rate decreases by 10 percent to 25 percent per year, then only about 13 workers would be replaced annually.

Reduction in Worker Injuries and Illnesses

Many studies have shown that extended work hours result in increased fatigue, decreased alertness, and decreased productivity, negatively affecting employee health and well-being. A 2004 National Institute for Occupational Safety and Health report found that ''12-hour shifts combined with more than 40 hours of work per week reported increases in health complaints, deterioration in performance, or slower pace of work.'' [120] One study that analyzed 13 years worth of data and nearly 100,000 job records notes that ''long working hours indirectly precipitate workplace accidents through a causal process, for instance, by inducing fatigue or stress in affected workers.'' [121] It is therefore telling that ''[d]irect care workers have the highest injury rate in the United States, primarily due to work-related musculoskeletal disorders.'' [122] The rate of days away from work (work days missed due to on-the-job injuries) for nursing aides, orderlies, and attendants was almost four times greater than the all-worker rate—449 per 10,000 compared to 113 per 10,000 for all workers.[123] One of the results of the FLSA's overtime pay requirement is to induce employers to hire more people to work fewer hours each. Doing so in those circumstances where excessive overtime hours are worked may therefore result in fewer injuries and illnesses incurred.

Reduced Reliance on Public Assistance

An increase in wages might reduce home care worker reliance on public assistance programs to meet the needs of their own households. Recent research finds that approximately 40 percent of home health care workers receive public assistance.[124] Almost 90 percent of these workers are women.[125]

Assuming these workers are in a family consisting of themselves and two children, the average amount of public assistance for such families is about $10,300.[126] In addition, many minimum wage workers also receive food stamps. The federally-assisted Supplemental Nutrition Assistance Program (SNAP, previously referred to as the Food Stamp Program) provided aid to 33.5 million participants in 2009 with total expenditures of $50.4 billion, an average of $1,500 in food stamps expenditures per participant.[127] This would entail $4,500 per family for an assumed family of three. In total, the average home health services worker might receive $14,800 in public assistance and food stamps to provide for her/his family.

Increased wages should reduce demand for public assistance services resulting in a savings to these programs; however, the Department is unable to quantify the savings due to lack of data on how the benefits of these programs vary with income. The savings associated with the minimum wage provisions under the proposed rule might be small; the Department estimated that the average below-minimum wage worker would receive a raise of $0.23 per hour to reach minimum wage. If such employees work the average 35 hours per week for 52 weeks per year, their additional income will be about $400 per year. To the extent that the employees' work requires significant travel time and overtime, or added hours of work due to employer schedule adjustments, they will also receive additional income. The Department did not estimate this portion of the potential economic impact due to uncertainty about the number of workers who would receive payment for travel time or additional hours of work.

Improved Quality of Care

As has been stated previously, one of the main benefits of this proposed rule is that the professionals who are entrusted to care for the elderly, disabled, and sick in their homes will have the same protections in the labor market as almost all other employees. Guaranteed minimum wage and overtime pay for home care jobs, comparable to similar occupations, will also more likely attract more qualified workers to the home care industry, which will improve the quality of care overall. The increased availability of home care workers will allow employers

[118] Nallari, R. Re-thinking Fiscal Mulitpliers. World Bank. Growth and Crisis Blog. April 20, 2010. Accessed at: *http://blogs.worldbank.org/growth/re-thinking-fiscal-multipliers.*

[119] PHI 2010a; Zontek, T., Isernhagen, J., Ogle, B., 2009; Ashley, A., Butler, S., Fishwick, N., 2010.

[120] Caruso, C., Hitchcock, E., Dick, R., *et al.* Overtime and extended work shifts: Recent findings on illnesses, injuries, and health behaviors. *National Institute for Occupational Safety and Health, U.S. Department of Health and Human Services.* April 2004.

[121] Dembe, A., Erickson J., Delbos, R., *et al.* 2005.

[122] Zontek and Isernhagen, 2009.

[123] NELP report (p. 27, FN45).

[124] PHI 2010a, p. 36

[125] PHI 2010a, p. 26

[126] TANF Eight Annual Report to Congress.

[127] Characteristics of Supplemental Nutrition Assistance Program Households: Fiscal Year 2009. U.S. Department of Agriculture, Food and Nutrition Service. October 2010.

to not only meet significant demand for home care services, but also spread employment, so that (1) workers are working fewer overtime hours which will result in less fatigue and more energy devoted to their clients; and (2) more workers will be serving fewer clients, which is a desire of many customers seeking home care. In addition, with the standard of pay raised, more highly trained and certified workers will seek out and remain in the HHA and PHA occupations, and a higher quality service will be provided to the client. While a monetary value cannot be placed on increased professionalism and improved care, those expected benefits are noteworthy.

Initial Regulatory Flexibility Analysis

The Regulatory Flexibility Act of 1980 (RFA) as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), hereafter jointly referred to as the RFA, requires agencies to prepare regulatory flexibility analyses and make them available for public comment, when proposing regulations that will have a significant economic impact on a substantial number of small entities. *See* 5 U.S.C. 603. If the rule is not expected to have a significant economic impact on a substantial number of small entities, the RFA allows an agency to certify such, in lieu of preparing an analysis. *See* 5 U.S.C. 605.

For the reasons explained in this section, the Department believes this NPRM is not likely to have a significant economic impact on a substantial number of small entities, and therefore an initial regulatory flexibility analysis is not required by the RFA. However, in the interest of transparency and to provide an opportunity for the public to comment, the Department has prepared the following initial regulatory flexibility analysis to assess the impact of this regulation on small entities. The Department specifically invites comment on the impacts of the proposed rule on small businesses, including whether alternatives exist that will reduce burden on small entities while still meeting the objectives of the FLSA. The Chief Counsel for Advocacy of the Small Business Administration (SBA) was notified of a draft of this rule upon submission of the rule to the Office of Management and Budget under E.O. 12866, as amended, ''Regulatory Planning and Review'' 58 FR 51735, 67 FR 9385, 72 FR 2763.

1. Reasons Why Action by the Agency Is Being Considered

The home care industry has undergone a dramatic transformation since the Department published the implementing regulations in 1975. There has been a growing demand for long-term in-home care for persons of all ages, in part because of the rising cost of traditional institutional care, and because of the availability of funding assistance for in-home care under Medicare and Medicaid. The growing demand for long-term in-home care for persons is also partly due to the significant increase in our aging population.[128]

In response to the growing demand for long-term in-home care, the home health care services industry has grown. According to the National Association of Home Care (NAHC) publication, *Basic Statistics About Home Care* (March 2000), data from the Department of Health and Human Services' Health Care Financing Administration (HCFA) showed that the number of Medicare-certified home care agencies increased from 2,242 in 1975 to 7,747 in 1999. In the NAHC 2008 update, this number increased to 9,284 by the end of 2007. The number of for-profit agencies not associated with a hospital, rehabilitation facility, or skilled nursing facility, *i.e.,* freestanding agencies, increased more than any other category of agency from 47 in 1975 to 4,919 in 2006. These for-profit agencies grew from 2 percent of total Medicare-certified agencies in 1975 to 68 percent by 2006, and now represent the greatest percentage of certified agencies. Public health agencies, which constituted over one-half of the certified agencies in 1975, now represent only 15 percent.

Public funds pay the overwhelming majority of the cost for providing home care services. Medicaid payments represent nearly 40 percent of the industry's total revenues; other payment sources include Medicare, insurance plans, and direct pay. Based on data from the Centers for Medicare and Medicaid Services (CMS), Office of the Actuary, National Health Care Expenditures Historical and Projections: 1965–2016, Medicare and Medicaid together paid over one-half of the funds to freestanding agencies (37 and 19 percent, respectively). State and local governments account for 20 percent, while private health insurance accounts for 12 percent. Out-of-pocket funds account for 10 percent of agency revenues.

There has been a similar increase in the employment of home health aides and personal care aides in the private homes of individuals in need of assistance with basic daily living or health maintenance activities. Bureau of Labor Statistics' (BLS) national occupational employment and wage estimates from the Occupational Employment Statistics (OES) survey show that the number of workers in these jobs tripled during the decade between 1988 and 1998, and by 1998 there were 430,440 workers employed as home health aides and 255,960 workers employed as personal care aides. The combined occupations of personal care and home health aides constitute a rapidly growing occupational group. BLS statistics demonstrate that between 1998 and 2008, this occupational group has more than doubled with home health aides increasing to 955,220 and personal care aides increasing to 630,740. (*http://www.bls.gov/oes/current/oes399021.htm*).

The growth in demand for in-home care and in the home health care services industry has not resulted in growth in earnings for workers providing in-home care. The earnings of employees in the home health aide and personal care aide categories remain among the lowest in the service industry. Studies have shown that the low income of direct care workers including home care workers continues to impede efforts to improve both jobs and care.[129] Protecting domestic service workers under the Act is an important step in ensuring that the home health care industry attracts and retains qualified workers that the sector will need in the future. Moreover, the workers that are employed by home care staffing agencies are not the workers that Congress envisioned when it enacted the companionship exemption *i.e.,* neighbors performing elder sitting, but are instead professional caregivers entitled to FLSA protection. In view of the dramatic changes in the home health care sector in the 36 years since these regulations were first promulgated and the growing concern about the proper application of the FLSA minimum wage and overtime protections to domestic service employees, the Department believes it is appropriate to reconsider whether the scope of the regulations are now too broad and not in harmony with Congressional intent.

2. Statement of Objectives and Legal Basis for the Proposed Rule

Section 13(a)(15) of the FLSA exempts from its minimum wage and overtime

[128] *See* Shrestha, Laura, *The Changing Demographic Profile of the United States,* Congressional Research Service p. 13–14 (2006).

[129] *See* Brannon, Diane, *et al.,* ''Job Perceptions and Intent to Leave Among Direct Care Workers: Evidence From the Better Jobs Better Care Demonstrations'' *The Gerontologist,* Vol. 47, No. 6, p. 820–829 (2007).

pay provisions domestic service employees employed ''to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary).'' Due to significant changes in the home health care industry over the last 36 years, workers who today provide in-home care to individuals are performing duties and working in circumstances that were not envisioned when the companionship services regulations were promulgated. Section 13(b)(21) provides an exemption from the Act's overtime pay requirements for live-in domestic workers. The current regulations allow an employer of a live-in domestic worker to maintain a copy of the agreement of hours to be worked and to indicate that the employee's work time generally coincides with that agreement, instead of requiring the employer to maintain an accurate record of hours actually worked by the live-in domestic worker. The Department is concerned that not all hours worked are actually captured by such agreement and paid, which may result in a minimum wage violation. The current regulations do not provide a sufficient basis to determine whether the employee has in fact received at least the minimum wage for all hours worked.

The Department has re-examined the regulations and determined that the regulations, as currently written, have expanded the scope of the companionship services exemption beyond those employees whom Congress intended to exempt when it enacted § 13(a)(15) of the Act, and do not provide a sufficient basis for determining whether live-in workers subject to § 13(b)(21) of the Act have been paid at least the minimum wage for all hours worked. Therefore, the Department proposes to amend the regulations to revise the definitions of ''domestic service employment'' and ''companionship services,'' and to require employers of live-in domestic workers to maintain an accurate record of hours worked by such employees. In addition, the proposed regulation would limit the scope of duties a companion may perform, and would prohibit employees of third-party employers from claiming the exemption.

3. Description of and, Where Feasible, an Estimate of the Number of Small Entities To Which the Proposed Rule Will Apply

Definition of Small Entity

The RFA defines a ''small entity'' as a (1) small not-for-profit organization, (2) small governmental jurisdiction, or (3) small business. The Department used standards defined by SBA to classify entities as small for the purpose of this analysis. For the two industries that are the focus of this analysis, the SBA defines a small business as one that has average annual receipts of less than $13.5 million for HHCS and $7 million for SEPD.

Data Sources and Methods

The Department combined Quarterly Census of Employment and Wages data for the HHCS and SEPD industries, then used the Statistics of US Business (SUSB), 2002, data set to distribute establishments and employees to the following size categories: 0, 1–4, 5–9, 10–19, 20–99, 100–499, and 500+ employees. Therefore, the Department analyzed small business impacts using establishment size as a proxy for firm size.

Although basing this analysis on establishment size will bias results, the bias will tend to overestimate the number of small business affected by the rule and the impacts to those small businesses. First, the analysis overestimates the number of small entities; a firm composed of multiple establishments might earn aggregate revenues that exceed the threshold the SBA used to define ''small'' in these industries. Second, costs are in part a function of the number of firms in the industry due to the need for each firm to become familiar with the proposed rule. Our cost model thus assigns those familiarization costs to each establishment. Again, to the extent firms own multiple establishments, compliance costs associated with regulatory familiarization will be smaller than estimated here. Third, compliance costs are also a function of the number of establishment employees. Because there are no data linking the failure to pay minimum and overtime wages to establishment size, the Department assumed compliance costs associated with meeting those requirements would be proportionate to the number of establishment employees. Therefore, these costs increase in proportion to establishment size (as measured by the number of employees), and smaller establishments are not unduly impacted relative to larger establishments.

Number of Small Entities Impacted by Proposed Rule

Based on the estimated average annual revenues per establishment in each employment size category derived from SUSB data and attributed to the establishments in the HHCS and SEPD industries, it appears that no employers exceed the SBA size standards of $13.5 million in annual revenues for HHCS and $7 million in annual revenues for SEPD. Thus, for the purposes of this analysis, the entire HHCS and SEPD industries are composed of small businesses. Although in reality it is highly likely that there are some firms in the 100–499 and 500+ employee categories that earn revenues in excess of the SBA standard for their industry, we have not underestimated the number of small firms affected by the rule. We also believe we have not mischaracterized this sector in any meaningful way; we believe these industries are primarily, if not completely, composed of small businesses by SBA standards.

Table 6–1 presents the estimated number of establishments, employees, and revenue by establishment size, although the Department is analyzing and presenting the impacts to small businesses without identifying any of the employers as large (in the 100–499 and the 500+ employee categories). Table 6–1 shows that the 500+ employee category employs 42 percent of workers, and accounts for 19 percent of establishments and 42 percent of revenue for the combined industries. Conversely, establishments with fewer than 20 employees account for only six percent of employment but nearly 44 percent of establishments.

TABLE 6–1—AFFECTED ESTABLISHMENTS, WORKERS, AND REVENUE BY EMPLOYMENT SIZE CATEGORIES.

Number of employees	Total employees (1000)	Percent of total employment	Workers without MW	Workers without OT	Total estab.	Percent of estab.	Revenue ($ mil)	Percent industry revenue	Average revenue per estab. ($1000)
0	0	0.0	0	0	5,604	7.7	$645	0.8	$115
1–4	20	1.2	388	9,157	14,061	19.2	1,404	1.7	100
5–9	29	1.7	544	12,843	6,219	8.5	1,758	2.2	283

TABLE 6–1—AFFECTED ESTABLISHMENTS, WORKERS, AND REVENUE BY EMPLOYMENT SIZE CATEGORIES.—Continued

Number of employees	Total employees (1000)	Percent of total employment	Workers without MW	Workers without OT	Total estab.	Percent of estab.	Revenue ($ mil)	Percent industry revenue	Average revenue per estab. ($1000)
10–19	57	3.3	1,089	25,730	6,088	8.3	3,082	3.8	506
20–99	351	20.5	6,681	157,824	14,856	20.3	16,140	20.1	1,086
100–499 ...	539	31.4	10,250	242,147	12,777	17.5	23,894	29.7	1,870
> 500	718	41.9	13,662	322,745	13,570	18.5	33,559	41.7	2,473
Total ..	1,714	100.0	32,614	770,446	73,175	100.0	80,482	100.0	1,100

4. Projected Reporting, Recordkeeping and Other Compliance Requirements of the Proposed Rule

The FLSA sets minimum wage, overtime pay, and recordkeeping requirements for employment subject to its provisions. Unless exempt, covered employees must be paid at least the minimum wage and not less than one and one-half times their regular rates of pay for overtime hours worked. Workers performing domestic service but not meeting the proposed definition of companionship services and companions and live-in domestic service workers employed by third parties will need to be paid in accordance with the FLSA's minimum wage and overtime pay provisions.

Every covered employer must keep certain records for each non-exempt worker. The regulations at 29 CFR part 516 requires employers to maintain records for employees subject to the minimum wage and overtime pay provisions of the FLSA. As indicated in this analysis, the NPRM would expand minimum wage and overtime pay coverage to approximately 776,000 workers. The recordkeeping requirements under 29 CFR part 516 are not new requirements, however, some employees would be included in the universe of covered employees if the NPRM were to be made final without change. This would result in an increase in employer burden and is estimated in the Paperwork Reduction Act (PRA) section of this NPRM. Note that the burdens reported for the PRA section of this NPRM include the entire information collection and not merely the additional burden estimated as a result of this NPRM.

Cost to Small Entities

Tables 6–2 through 6–4 present the results of the first year, recurring year, and annualized cost and impact analyses as distributed by establishment size. The figures in these tables include the costs of regulatory familiarization, complying with minimum wage requirements, travel pay, and overtime pay assuming employers respond to work in excess of 40 hours per week by paying the overtime premium (Scenario 1). This scenario is the most costly of the three examined, and thus the results presented here show the upper bound limit anticipated.

TABLE 6–2—FIRST YEAR COMPLIANCE COSTS BY ESTABLISHMENT SIZE

Size category	Cost ($1000)	Percent of total cost	Cost per establishment	Cost per establishment as a percent of average revenue (percent)
0	300	0.2	54	0.05
1–4	2,881	1.6	205	0.21
5–9	3,317	1.8	533	0.19
10–19	6,305	3.4	1,036	0.20
20–99	37,467	20.5	2,522	0.23
100–499	56,949	31.1	4,457	0.24
> 500	75,719	41.4	5,580	0.23
Total	182,938	100.0	2,500	0.23

TABLE 6–3—RECURRING COMPLIANCE COSTS BY ESTABLISHMENT SIZE

Size category	Cost ($1000)	Percent of total cost	Cost per establishment	Cost per establishment as a percent of average revenue (percent)
0	0	0.0	0	0.00
1–4	2,128	1.2	151	0.15
5–9	2,984	1.7	480	0.17
10–19	5,978	3.3	982	0.19
20–99	36,671	20.5	2,468	0.23
100–499	56,264	31.4	4,403	0.24
> 500	74,992	41.9	5,526	0.22

TABLE 6–3—RECURRING COMPLIANCE COSTS BY ESTABLISHMENT SIZE—Continued

Size category	Cost ($1000)	Percent of total cost	Cost per establishment	Cost per establishment as a percent of average revenue (percent)
Total	179,018	100.0	2,446	0.22

TABLE 6–4—ANNUALIZED COMPLIANCE COSTS BY ESTABLISHMENT SIZE

Size category	Cost ($1000)	Percent of total cost	Cost per establishment	Cost per establishment as a percent of average revenue (percent)
0	40	0.0	7	0.01
1–4	2,228	1.2	158	0.16
5–9	3,029	1.7	487	0.17
10–19	6,022	3.4	989	0.20
20–99	36,777	20.5	2,476	0.23
100–499	56,355	31.4	4,411	0.24
>500	75,088	41.8	5,533	0.22
Total	179,539	100.0	2,454	0.22

First year costs range from $54 for entities where the owner has no employees in addition to him- or herself (a 0 employee establishment), to $5,600 per establishment for entities with more than 500 employees (Table 6–2). Annual recurring costs are somewhat smaller, ranging from $151 per year per establishment in the 1 to 4 employee class, to $5,500 in the 500 employee or more size class (Table 6–3). Over ten years, the rule is projected to cost establishments an annual average ranging from $7 for 0 employee establishments to $5,500 for 500+ employee establishments per year when costs are annualized using a 7 percent real interest rate (Table 6–4).

Total costs and cost per establishment are consistently proportionate to establishment size as measured by either revenues or employment regardless of cost type (first year, recurring, or annualized). For example, employers with more than 500 employees are projected to incur 41 percent of total first year costs, which is proportionate to their share of the industry employment and revenues (see Table 6–2). In addition, the ratio of compliance costs to average establishment revenue is relatively similar regardless of establishment size. For example, Table 6–4 shows that average annualized compliance costs vary between 0.16 and 0.24 percent of average annual revenues for all establishments ranging from the 1 to 4 employee class to the 500+ employee class.

In summary, first-year compliance costs do not exceed $2,600 for establishments with fewer than 100 employees, and do not exceed $5,600 for those with more than 100 employees; first-year compliance costs do not exceed 0.24 percent of establishment revenue for all establishment size classes; average annualized compliance costs do not exceed $2,600 for establishments with fewer than 100 employees, and do not exceed $5,600 for those with more than 100 employees; and average annualized compliance costs do not exceed 0.24 percent of establishment revenue regardless of establishment size.

Impacts to small businesses are unlikely to vary significantly over time. Existing firms incur regulatory familiarization costs once, and these costs do not impose a significant economic burden. Recurring costs such as overtime and travel pay (transfer payments in the E.O. 12866 analysis) are proportionate to firm size. These costs will increase if the firm grows, but in proportion to the firm's ability to bear them. As new firms enter the market, they will bear the same costs: one-time regulatory familiarization costs, and recurring payments for overtime and travel. Again, recurring costs will be proportionate to firm size. Therefore, if the proposed revisions to the companionship regulations are affordable for existing firms, they will be affordable to new market entrants as well.

There are limitations to this analysis. It is assumed that the distribution of employees by establishment size has not changed significantly since 2002 (although the number of employees has increased significantly). We also assume that the occupations of HHA and PCA are distributed by establishment size similarly to other occupations in the HHCS and SEPD industries. With the exponential growth in these industries, it is possible that the distribution of workers by employment size class has shifted. In addition, the cost analysis conducted in this report is unable to capture the difference in costs for urban versus rural home health care agencies.

Differing Compliance and Reporting Requirements for Small Entities

This NPRM provides no differing compliance requirements and reporting requirements for small entities. The Department has strived to minimize respondent recordkeeping burden by requiring no order or specific form of records that are required under the FLSA and its corresponding regulations. Moreover, employers would normally maintain the records under usual or customary business practices.

Least Burdensome Option or Explanation Required

The Department believes it has chosen the most effective option that updates and clarifies the rule and which results in the least burden. Among the options considered by the Department, the least restrictive option was taking no

regulatory action and the most restrictive was defining companionship services as fellowship and protection of the aged or infirm individual accompanied by a five percent allowance for assistance with ADLs only. Taking no regulatory action does not address the Department's concerns discussed above under Need for Regulation. The Department found the most restrictive option to be overly burdensome on business in general and specifically small business.

Pursuant to section 603(c) of the RFA, the following alternatives are to be addressed:

i. Differing compliance or reporting requirements that take into account the resources available to small entities. The FLSA creates a level playing field for businesses by setting a floor below which employers may not pay their employees. As discussed elsewhere in this IRFA, the annualized cost of the proposed rule is estimated to be $158 for an employer with 1–4 employees and $5533 for an employer with more than 500 employees. See Table 6–4. To establish differing compliance or reporting requirements for small businesses would undermine this important purpose of the FLSA and appears to not be necessary given the small annualized cost of the rule. The Department makes available a variety of resources to employers for understanding their obligations and achieving compliance. Therefore the Department declines to establish differing compliance or reporting requirements for small businesses.

ii. The clarification, consolidation, or simplification of compliance and reporting requirements for small entities. This proposed rule simplifies and clarifies compliance requirements for employers of workers performing companionship services. The proposed rule imposes no reporting requirements. The recordkeeping requirements imposed by this proposed rule are necessary for the Department and domestic service employees to determine the employer's compliance with the law. The recordkeeping provisions apply generally to all businesses—large and small—covered by the FLSA, no rational basis exists for creating an exemption from compliance and recordkeeping requirements for small businesses in the HHCS and SEPD industries. The Department makes available a variety of resources to employers for understanding their obligations and achieving compliance.

iii. The use of performance rather than design standards. Under the proposed rule, the employer may achieve compliance through a variety of means. The employer may elect to provide companionship services as defined in the proposed rule and maintain the exemption; or hire additional workers and/or spread employment over the employer's existing workforce to ensure employees do not work more than 40 hours in a workweek, and/or pay employees time and one-half for time worked over 40 hours in a workweek. In addition, the FLSA recordkeeping provisions require no particular order or form of records to be maintained so employers may create and maintain records in the manner best fitting their situation. The Department makes available a variety of resources to employers for understanding their obligations and achieving compliance.

iv. An exemption from coverage of the rule, or any part thereof, for such small entities. Creating an exemption from coverage of this rule for businesses with as many as 500 employees, those defined as small businesses under SBA's size standards, is inconsistent with Congressional intent in expanding FLSA coverage to domestic service workers and its creation of the companionship services exemption.

5. Identification, to the Extent Practicable, of all Relevant Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed rule

The Department is not aware of any federal rules that duplicate, overlap, or conflict with this NPRM.

Unfunded Mandates

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L.104–4; UMRA) establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments as well as on the private sector. Under Section 202(a)(1) of UMRA, the Department must generally prepare a written statement, including a cost-benefit analysis, for proposed and final regulations that ''includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate or by the private sector'' in excess of $100 million per year.

State, local and tribal government entities are within the scope of the regulated community for this proposed regulation to the extent government agencies employ HHAs and PCAs to provide home health care services, and claim these employees are exempt from minimum wage and overtime requirements because of the companionship services exemption under the FLSA. State governments might also be affected by the rule because Medicaid payments for such services might increase as a result of these proposed revisions to the exemption.

The Department has determined that this rule contains a Federal mandate that is likely to result in expenditures of $100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any one year. Total costs are projected to exceed $100 million in the first year of the rule and in average annualized costs (see Tables 4–1 and 4–2) under two of the three scenarios examined.

The Department has determined that the rule does not significantly affect a substantial number of small business entities that provide home health care services. Although it has not estimated the number of government agencies that provide similar services, there is insufficient basis for expecting that costs and impacts to government agencies that provide these services will differ significantly from private business. Identified compliance costs consist of a one-time cost for regulatory familiarization, and potential additional costs per employee should the agency choose to pay overtime rather than increase employment to cover hours worked in excess of 40 hours per week by its employees. The data show that a relatively small percent of employees in these professions work more than 40 hours per week for the same employer. The Department expects that compliance costs for government agencies will be a similar magnitude as for private businesses.

Finally, on average, about 75 percent of home health care costs are paid by Medicare and Medicaid, and the government agencies spent about $58.1 billion on home health care programs in 2009. The Department projects the average first year cost of the rule ranges from $43 to $182 million depending on how home health care agencies respond to overtime requirements. If Medicare and Medicaid continue to pay 75 percent of home health care costs, roughly $32 million to $137 million in costs might be incurred by these government agencies. These costs compose 0.06 to 0.24 percent of total HHS and state outlays for home health care programs.

VIII. Executive Order 13132 (Federalism)

The proposed rule does not have federalism implications as outlined in Executive Order 13132 regarding federalism. The proposed rule does not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and

responsibilities among the various levels of government.

IX. Executive Order 13175, Indian Tribal Governments

This proposed rule was reviewed under the terms of Executive Order 13175 and determined not to have ''tribal implications.'' The proposed rule does not have ''substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes.'' As a result, no tribal summary impact statement has been prepared.

X. Effects on Families

The undersigned hereby certifies that this proposed rule will not adversely affect the well-being of families, as discussed under section 654 of the Treasury and General Government Appropriations Act, 1999.

XI. Executive Order 13045, Protection of Children

Executive Order 13045, dated April 23, 1997 (62 FR 19885), applies to any rule that (1) is determined to be ''economically significant'' as defined in Executive Order 12866, and (2) concerns an environmental health or safety risk that the promulgating agency has reason to believe may have a disproportionate effect on children. This proposal is not subject to Executive Order 13045 because it has no environmental health or safety risks that may disproportionately affect children.

XII. Environmental Impact Assessment

A review of this proposal in accordance with the requirements of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.;* the regulations of the Council on Environmental Quality, 40 CFR part 1500 *et seq.;* and the Departmental NEPA procedures, 29 CFR part 11, indicates that the proposed rule will not have a significant impact on the quality of the human environment. As a result, there is no corresponding environmental assessment or an environmental impact statement.

XIII. Executive Order 13211, Energy Supply

This proposed rule is not subject to Executive Order 13211. It will not have a significant adverse effect on the supply, distribution, or use of energy.

XIV. Executive Order 12630, Constitutionally Protected Property Rights

This proposal is not subject to Executive Order 12630, because it does not involve implementation of a policy ''that has takings implications'' or that could impose limitations on private property use.

XV. Executive Order 12988, Civil Justice Reform Analysis

This proposed rule was drafted and reviewed in accordance with Executive Order 12988 and will not unduly burden the Federal court system. The proposed rule was: (1) Reviewed to eliminate drafting errors and ambiguities; (2) written to minimize litigation; and (3) written to provide a clear legal standard for affected conduct and to promote burden reduction.

TABLE A–1—PUBLIC MATCHING REGISTRIES BY STATE

State	Matching Service	Name	Maintained by	Eligibility	Consumer/ provider count
AR	State-wide	Arkansas Direct Service Worker Registry.	Arkansas Department of Human Services, Division of Aging and Adult Services.	All consumers	(–/669)
CA	State-wide	In-Home Supportive Services, Regional Registries.	In-Home Supportive Services Public Authority.	Free for IHSS participants, small fee for private pay consumers.	(–/–)
CT	State-wide	Rewarding Work Resources	Connecticut Department of Disability Services and Rewarding Work Resources, Inc.	Free for individuals receiving services from CT Dept of Developmental Services (DDS), small fee for private pay consumers.	(720/2,347)
FL	State-wide	Florida Developmental Disabilities Resources-Provider Search.	Delmarva Foundation, the State of Florida Agency for Health Care Administration, and the Agency for Persons with Disabilities.	Free for all consumers	(–/–)
ID	Regional	Idaho Disability Action Center (registry Web site).	CIL–Disability Action Center	Free for all consumers	(–/–)
IL	Regional	Advocates for Access Center for Independent Living (registry Web site).	CIL–Advocates for Access	Free for all consumers	(–/–)
		Lake County Center for Independent Living (registry Web site).	CIL-Lake County	Free for all consumers	(–/–)
		LIFE Center for Independent Living (registry Web site).	CIL-LIFE	Free for all consumers	(–/–)
		Southern Illinois Center for Independent Living (registry Web site).	CIL-Southern Illinois	Free for all consumers	(–/–)
KS	Regional	Kansas Independent Living Resource Center-Registry of PAS.	CIL-Kansas Independent Living Resource Center.	Free for all consumers	(–/–)
ME	State-wide	Alpha One Center for Independent Living-PCA Registry.	CIL-Alpha One	Free for all consumers	(–/–)

TABLE A–1—PUBLIC MATCHING REGISTRIES BY STATE—Continued

State	Matching Service	Name	Maintained by	Eligibility	Consumer/ provider count
MA	State-wide	Massachusetts PCA Directory	PCA Workforce Council and Rewarding Work Resources, Inc.	Free for MassHealth PCA consumers, small fee for private pay consumers.	(2,133/8,800)
MI	State-wide	Michigan Quality Community Care Council (registry Web site).	CREATED BY: Michigan Department of Community Health and Tri-Area Aging Consortium.	Free for Medicaid Home Help consumers.	(–/–)
NH	State-wide	Granite State Independent Living-Personal Care Attendant Registry.	CIL-Granite State Independent Living.	Free for all consumers	(–/–)
NJ	State-wide	Rewarding Work Resources	New Jersey Division of Disability Services and Rewarding Work Resources, Inc.	Small fee for all consumers	(450/2,486)
NY	Regional	AIM Independent Living Center-Personal Assistants Finder's Help Page.	CIL-AIM Independent Living Center.	Free for all consumers	(–/–)
ND	State-wide	North Dakota Personal Assistance Registry.	Minot State University	Free for all consumers	(–/–)
OH	Regional	Ohio Home Care Program Provider Directory.	Ohio Department of Job and Family Services.	Free for all consumers	(–/–)
OR	State-wide	Oregon Home Care Commission Online Registry and Referral System.	Oregon Home Care Commission.	Free for all consumers	(–/–)
PA	Regional	Tri-County Patriots for Independent Living-Direct Care Workers' Registry.	CIL-Tri-County Patriots	Free for all consumers	(–/–)
RI	State-wide	Rewarding Work Resources	Rhode Island Department of Human Services and Rewarding Work Resources, Inc.	Free for consumers in the following programs: Personal Choice, Respite, or PASS, small fee for private pay consumers.	(535/1,422)
SC	State-wide	South Carolina Personal Care Worker Listing.	South Carolina Department of Health and Human services, and the Lieutenant Governor's Office on Aging.	Free for all consumers	(–/–)
VT	State-wide	Rewarding Work Resources	Vermont Department of Disabilities, Aging and Independent Living, and Rewarding Work Resources, Inc.	Free for all consumers	(990/1,333)
WA	State-wide	Washington Home Care Referral Registry.	Washington Home Care Quality Authority.	Free for publicly-funded in-home service consumers.	(–/–)
WI	Regional	Wisconsin Quality Home Care Commission-Care Registry.	Wisconsin Quality Home Care Commission.	Free for all consumers	(–/–)
Total					(4,828/17,057)

Source: PHI, 2011a.

Appendix B: Payment of Family Members To Provide Care

TABLE B–1—PAYMENT OF FAMILY MEMBERS TO PROVIDE CARE

Program		Services family members can be paid to provide						Types of family members who cannot be paid to provide care			
Type [a]	Name [b]	Respite care	Personal care	Home-maker/chore	Any service needed	Other	None	Spouses	Parents/ guardians of minors	Primary caregivers	Other
Alabama											
FC	Alabama CARES						x				
MC	Elderly & Disabled Waiver		x	x				x	x		
Alaska											
FC	NFCSP						x				
SC	Innovative Respite						x				
Arizona											
FC	NFCSP	x									
MC	AZ Long-Term Care System (ALTCS).	x	x					x	x		
SC	Non-Medical HCBS						x				
Arkansas											
FC	Caring for the Caregiver Arkansas Caregivers.		x					x	x		
MC	ElderChoices Medicaid Waiver	x		x				x	x		
California											
FC	NFCSP	x	x		x						
MC	Multipurpose Senior Services Program (MSSP).						x				
SC	Adult Day Health Care Program						x				
SC	Alzheimer's Day Care Resource Center (ADCRC).						x				
SC	Caregiver Resource Centers (CRCs).	x									
SC	In-Home Supportive Services (IHSS).	x	x					x			x
Colorado											
FC	NFCSP HCBS for the						x				
MC	Elderly, Blind and Disabled		x					x			
Connecticut											
FC	NFCSP						x				
MC	Home Care Program for Elders		x					x	x		
SC	Statewide Respite Care Program.						x				
SC	Personal Care Assistance State-Funded Pilot Program.		x	x				x			x
Delaware											
FC	CARE Delaware						x				
MC	Elderly & Disabled Waiver						x				
District of Columbia											
FC	NFCSP	x	x							x	
MC	Elderly & Physical Disabilities Waiver.	x	x					x	x		x
Florida											
FC	NFCSP	x		x							
MC	Aged & Disabled Adult Medicaid HCBS Waiver Respite for Elders.	x	x						x		
SC	Living in Everyday Families (RELIEF).						x				
SC	Home Care for the Elderly	x	x		x						
SC	Community Care for the Elderly						x				
SC	Alzheimer's Disease Initiative						x				
Georgia											
FC	NFCSP	x	x								x
MC	Community Care Services Program (CCSP).						x				

TABLE B–1—PAYMENT OF FAMILY MEMBERS TO PROVIDE CARE—Continued

Program		Services family members can be paid to provide						Types of family members who cannot be paid to provide care			
Type [a]	Name [b]	Respite care	Personal care	Home-maker/chore	Any service needed	Other	None	Spouses	Parents/ guardians of minors	Primary caregivers	Other
Hawaii											
FC	NFCSP						x				
MC	Nursing Home Without Walls		x			x		x	x		
SC	Kupuna Care						x				
Idaho											
FC	NFCSP						x				
MC	HCBS Aged & Disabled Waiver		x					x	x		
SC	Senior Services Act, Respite Program.						x				
Illinois											
FC	NFCSP	x	x							x	
MC	Community Care Program (CCP).			x				x		x	x
MC	Home Services Program		x					x	x		
Indiana											
FC	Caring and Compassion	x									
MC	Aged & Disabled Medicaid Waiver.		x					x	x		
SC	CHOICE						x				
Iowa											
FC	Iowa Family Caregiver	x	x								
MC	Elderly Waiver		x					x	x		
Kansas											
FC	NFCSP						x				
MC	Home & Community-Based Frail Elder Waiver.	x	x			x		x			
SC	Senior Care Act Program		x	x				x			
Kentucky											
FC	NFCSP	x				x		x			
SC	Adult Day/Alzheimer's Respite	x	x								
Louisiana											
FC	NFCSP						x				
MC	Medicaid Home and Community-Based Waiver.		x					x	x		x
Maine											
FC	Family Caregiver Program	x						x			
MC	MaineCare	x	x					x			
SC	Home-Based Care	x	x								x
SC	Partners in Caring	x	x								
Maryland											
FC	NFCSP	x									
MC	Medicaid Waiver for Older Adults.	x	x					x			
SC	Respite for Caregivers of Adults with Functional Disabilities.						x				
Massachusetts											
FC	NFCSP		x	x				x			
MC	Home and Community-Based Waiver.						x				
SC	Home Care Program		x	x				x	x		
Michigan											
FC	NFCSP						x				
MC	MI Choice		x	x				x			
SC	State/Escheat Respite						x				
SC	Caregiver Respite Program						x				
Minnesota											
FC	NFCSP	x	x							x	

MC	Elderly Waiver						x				
SC	Alternative Care Program	x	x					x	x		
Mississippi											
FC	NFCSP						x				
MC	Elderly & Disabled Waiver						x				
Missouri											
FC	NFCSP	x								x	
MC	Aged & Disabled Waiver						x				
Montana											
FC	Family Caregiving Support						x				
MC	HCBS Program for Elderly & Physically Disabled.		x		x			x	x		
Nebraska											
FC	NFCSP	x						x	x		
MC	Aged & Disabled Waiver	x		x		x		x	x	x	x
SC	Respite Subsidy Program Across the Lifespan.	x						x	x	x	
Nevada											
FC	NFCSP						x				
MC	Community Home-Based Initiatives Program.						x				
SC	Independent Living Grant						x				
SC	Community-Based Care Caregiving Training						x				
New Hampshire											
FC	NFCSP	x	x	x						x	
MC	Elderly and Chronically Ill Waiver.	x	x					x	x		
New Jersey											
FC	NFCSP						x				
MC	Community Care Program for the Elderly & Disabled.						x				
MC	Enhanced Community Options (ECO).		x	x		x		x	x		x
SC	New Jersey Statewide Respite Care Program (SRCP).				x						
SC	Adult Day Services Program for Persons with Alzheimer's Disease or Related Dementias.						x				
SC	Jersey Assistance for Community Caregiving.		x	x				x	x		x
New Mexico											
FC	NFCSP	x	x					x			
MC	Disabled & Elderly HCBS Waiver.		x					x	x		
New York											
FC	Eldercare Family Support Program (EFSP).						x				
SC	Respite Program	x									
North Carolina											
FC	NFCSP	x	x								
MC	Community Alternatives Program for Disabled Adults (CAP/DA).	x	x	x				x			
SC	Respite Care Program	x	x	x							x
North Dakota											
FC	NFCSP	x									
MC	Aged & Disabled Waiver	x	x	x				x	x		
SC	Family Home Care	x	x						x		
Ohio											
FC	NFCSP	x	x								
MC	PASSPORT HCBS Waiver Program.						x				
SC	Alzheimer's Respite Program	x									
Oklahoma											
FC	NFCSP	x								x	x

TABLE B–1—PAYMENT OF FAMILY MEMBERS TO PROVIDE CARE—Continued

Program		Services family members can be paid to provide						Types of family members who cannot be paid to provide care			
Type [a]	Name [b]	Respite care	Personal care	Home-maker/chore	Any service needed	Other	None	Spouses	Parents/ guardians of minors	Primary caregivers	Other
MC	Advantage Program		x					x	x		
SC	Respite Resource Network	x								x	
Oregon											
FC	NFCSP						x				
MC	Medicaid Waiver/In-Home Care	x	x			x					
SC	Lifespan Respite Care Networks						x				
Pennsylvania											
FC	NFCSP						x				
MC	PA Department of Aging 60+ Medicaid Waiver.						x				
SC	PA FCSP						x				
SC	OPTIONS						x				
SC	BRIDGE						x				
Rhode Island											
FC	Partners in CaRIng	x						x		x	
MC	Home & Community-Based Waiver.						x				
South Carolina											
FC	NFCSP	x	x					x	x	x	
MC	Elderly/Disabled Home and Community-Based Waiver.		x					x	x	x	
South Dakota											
FC	Caregiver Program	x						x	x		x
MC	Home & Community-Based Elderly Waiver.						x				
Tennessee											
FC	NFCSP						x				
SC	Home & Community-Based Long-Term Care for Non-Medicaid Elderly & Adults with Disabilities.						x				
Texas											
FC	NFCSP	x						x		x	
MC	Community-Based Alternatives	x	x					x			
SC	Respite Care Program						x				
SC	In-Home & Family Support Program.						x				
Utah											
FC	Caregiver Support Program	x						x			
MC	Medicaid Aging Waiver	x	x					x			
SC	Home & Community-Based Alternatives.	x	x		x			x			
Vermont											
FC	NFCSP	x									
MC	Home-Based Medicaid Waiver	x	x					x			
Virginia											
FC	NFCSP						x				
MC	Elderly & Disabled Waiver	x	x					x	x		
SC	Caregiver Grant Program	x	x		x						
SC	Respite Care Initiative Grant						x				
SC	Respite Care Grant Program 2003.						x				
Washington											
FC	NFCSP						x				
MC	Community Options Program Entry System (COPES).		x					x	x		
SC	WA FCSP						x				

SC	Respite Care Services						x				
West Virginia											
FC	Family Caregiver Support						x				
MC	Medicaid Aged & Disabled Waiver.		x					x			
Wisconsin											
FC	NFCSP Community Options	x	x								
MC	Program Waiver (COP–W)	x	x	x		x		x	x		
SC	Alzheimer's Family & Caregiver Support Program.	x	x								
Wyoming											
FC	NFCSP	x									
MC	HCBS Waiver for Elderly & Physically Disabled.		x	x				x	x		
SC	Community Based In-Home Services Program (CBIHS).						x				

[a] Program Type: FC = National Family Caregiver Support Program; MC = Aged/Disabled Medicaid HCBS Waiver; SC = State-Funded Program
[b] Program Name: NFCSP= National Family Caregiver Support Program; HCBS = Home and Community-Based Services Sources: Feinberg *et al.,* 2004; Feinberg & Newman, 2005.

List of Subjects in 29 CFR Part 552

Domestic service workers, Companionship, Employment, Labor, Minimum wages, Overtime pay, Reporting and recordkeeping requirements, Wages.

Signed at Washington, DC on this 16th day of December.

Nancy J. Leppink,

Deputy Administrator, Wage and Hour Division.

For the reasons discussed in the preamble, the Wage and Hour Division proposes to amend 29 CFR part 552 as follows:

PART 552—APPLICATION OF THE FAIR LABOR STANDARDS ACT TO DOMESTIC SERVICE

1. The authority citation for part 552 continues to read as follows:

Authority: 29 U.S.C. 213(a)(15), (b)(21), 88 stat. 62; Sec. 29(b) of the Fair Labor Standards Act Amendments of 1974 (Pub. L. 93–259, 88 Stat. 76).

2. Revise § 552.3 to read as follows:

§ 552.3 Domestic Service Employment.

The term ''domestic service employment'' means services of a household nature performed by an employee in or about a private home (permanent or temporary). The term includes services performed by employees such as companions, babysitters, cooks, waiters, butlers, valets, maids, housekeepers, nannies, nurses, janitors, laundresses, caretakers, handymen, gardeners, home health aides, personal care aides, and chauffeurs of automobiles for family use. This listing is illustrative and not exhaustive.

3. Revise § 552.6 to read as follows:

§ 552.6 Companionship services for the aged or infirm.

(a) As used in section 13(a)(15) of the Act, the term ''companionship services'' means the provision of fellowship and protection for a person who, because of advanced age or physical or mental infirmity, is unable to care for themselves. The provision of *fellowship* means to engage the person in social, physical, and mental activities, including conversation, reading, games, crafts, walks, errands, appointments, and social events. The provision of *protection* means to be present with the person in their home or to accompany the person when outside of the home to monitor the person's safety and well-being.

(b) The term ''companionship services'' may include intimate personal care services that are incidental to the provision of fellowship and protection for the aged or infirm person. Intimate personal care services that are incidental to the provision of fellowship and protection for the aged or infirm person must be performed attendant to and in conjunction with the provision of fellowship or protection. The performance of incidental intimate personal care services must not exceed 20 percent of the total hours worked in the workweek. These incidental intimate personal care services include tasks assisting the person being cared for, such as:

(1) occasional dressing, such as assistance with putting on and taking off outerwear and footwear;

(2) occasional grooming, including combing and brushing hair, assisting with brushing teeth, application of deodorant, or cleansing the hands and face of the person, such as before or after meals;

(3) occasional toileting, including assisting with transfers, mobility, positioning, use of toileting equipment and supplies (such as toilet paper, wipes, and elevated toilet seats or safety frames), changing diapers, and related personal cleansing;

(4) occasional driving to appointments, errands, and social events;

(5) occasional feeding, including preparing food eaten by the person while the companion is present and assisting with clean-up associated with such food preparation and feeding;

(6) occasional placing clothing that has been worn by the person in the laundry, including depositing the person's clothing in a washing machine or dryer, and assisting with hanging, folding, and putting away the person's clothing; and

(7) occasional bathing when exigent circumstances arise.

(c) Incidental intimate personal care services does not include household work benefiting other members of the household, such as general housekeeping, making meals for other members of the household or laundering clothing worn or linens used by other members of the household. Similarly, household services performed by, or ordinarily performed by, employees such as cooks, waiters, butlers, valets, maids, housekeepers, nannies, nurses, janitors, laundresses, caretakers, handymen, gardeners, home health aides, personal care aides, and chauffeurs of automobiles for family use, are not ''companionship services'' unless they are performed only incidental to the provision of fellowship and protection as described in paragraph (b) of this section.

(d) The term ''companionship services'' does not include medical care (that is typically provided by personnel with specialized training) for the person, including, but not limited to, catheter and ostomy care, wound care, injections, blood and blood pressure testing, turning and repositioning, determining the need for medication, tube feeding, and physical therapy. Performing such medical care in or about a private household is included in the category of domestic service employment. The term ''companionship services'' however, includes reminding the aged or infirm person of a medical appointment or a predetermined medicinal schedule. Such a reminder is part of the intimate personal care services that are incidental to the provision of fellowship and protection for the aged or infirm person.

§ 552.102 [Amended]

4. Revise § 552.102 (b) to read as follows:

* * * * *

(b) If it is found by the parties that there is a significant deviation from the initial agreement, the parties should reach a new agreement that reflects the actual facts.

5. Amend § 552.109 to revise paragraphs (a) and (c) to read as follows:

§ 552.109 Third Party Employment.

(a) Third party employers of employees engaged in companionship services within the meaning of § 552.6 may not avail themselves of the minimum wage and overtime exemption provided by section 13(a)(15) of the Act, even if the employee is jointly employed by the individual or member of the family or household using the services. However, the individual or member of the family or household, even if considered a joint employer, is still entitled to assert the exemption, if the employee meets all of the requirements of § 552.6.

(b) * * *

(c) Third party employers of household workers engaged in live-in domestic services within the meaning of § 552.102 may not avail themselves of the overtime exemption provided by section 13(b)(21) of the Act, even if the employee is jointly employed by the individual or member of the family or household using the services. However, the individual or member of the family or household, even if considered a joint employer, is still entitled to assert the exemption.

§ 552.110 [Amended]

6. In § 552.110 revise paragraphs (b), (c), and (d) and add new paragraph (e) to read as follows:

* * * * *

(b) The employer shall keep a copy of the agreement specified by § 552.102 of this part and make, keep, and preserve a record showing the exact number of hours worked by the live-in domestic employee. The provisions of § 516.2(c) of this title shall not apply to live-in domestic employees.

(c) With the exception of live-in domestic employees, where a domestic service employee works on a fixed schedule, the employer may use a schedule of daily and weekly hours that the employee normally works and either the employer or the employee may: (1) Indicate by check marks, statement or other method that such hours were actually worked, and (2) when more or less than the scheduled hours are worked, show the exact number of hours worked.

(d) With the exception of live-in domestic employees, the employer may require the domestic service employee to record the hours worked and submit such record to the employer.

(e) No records are required for casual babysitters as defined in § 552.5 of this chapter.

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Part VI

Department of Commerce

National Oceanic and Atmospheric Administration

50 CFR Part 679

Fisheries of the Exclusive Economic Zone Off Alaska; Groundfish of the Gulf of Alaska; Amendment 88; Final Rule

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 110314196–1725–02]

RIN 0648–BA97

Fisheries of the Exclusive Economic Zone Off Alaska; Groundfish of the Gulf of Alaska; Amendment 88

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule.

SUMMARY: NMFS issues regulations implementing Amendment 88 to the Fishery Management Plan for Groundfish of the Gulf of Alaska (GOA FMP). Amendment 88 is the Central Gulf of Alaska Rockfish Program (Rockfish Program). These regulations allocate exclusive harvest privileges to a specific group of license limitation program license holders who used trawl gear to target Pacific ocean perch, pelagic shelf rockfish, and northern rockfish during particular qualifying years. The Rockfish Program retains the conservation, management, safety, and economic gains realized under the Central Gulf of Alaska Rockfish Pilot Program (Pilot Program) and resolves identified issues in the management and viability of the rockfish fisheries. This action is necessary to replace particular Pilot Program regulations that are scheduled to expire at the end of 2011. This action is intended to promote the goals and objectives of the Magnuson-Stevens Fishery Conservation and Management Act, the GOA FMP, and other applicable law.

DATES: Effective on December 27, 2011.

ADDRESSES: Electronic copies of Amendment 88, the final Environmental Assessment (EA) and Regulatory Impact Review (RIR), and the Initial Regulatory Flexibility Analysis (IRFA) prepared for the Central Gulf of Alaska Rockfish Program are available from the NMFS Alaska Region Web site at *http://alaskafisheries.noaa.gov.* The proposed rule to implement Amendment 88 also may be accessed at this Web site.

FOR FURTHER INFORMATION CONTACT: Gwen Herrewig, (907) 586–7228.

SUPPLEMENTARY INFORMATION: The groundfish fisheries in the exclusive economic zone of Alaska are managed under the GOA FMP and the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (BSAI FMP). The North Pacific Fishery Management Council (Council) prepared both FMPs under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (MSA), 16 U.S.C. 1801 *et seq.* Regulations implementing the FMPs appear at 50 CFR part 679. General regulations governing U.S. fisheries also appear at 50 CFR part 600. This final rule implements Amendment 88, the Rockfish Program, to manage the rockfish fisheries in the Central GOA, which covers an area from 147° W. long. to 159° W. long.

Background

Prior to 2007, the Central GOA rockfish fisheries were managed under the License Limitation Program (LLP). The LLP required harvesters to hold an LLP license to participate in GOA fisheries, but did not provide specific exclusive harvest privileges to LLP license holders. Harvesters with LLP licenses competed with each other in a ''race for fish'' to harvest the total allowable catch (TAC) assigned to the fishery. Processors also competed with each other. The competition created economic inefficiencies and incentives to increase harvesting and processing capacity. Harvesters increased the fishing capacity of their vessels and accelerated their rate of fishing to outcompete other vessels. Similarly, processors increased their processing capacity to outcompete other processors. The rapid pace of fishing reduced the ability of harvesters and processors to improve product quality and extract more value from the fishery by producing high-value products that require additional processing time.

Since 2007, NMFS has managed the rockfish fisheries under the Pilot Program. Under the Pilot Program, NMFS allocated exclusive harvesting and processing privileges for a specific set of rockfish species and for associated species harvested incidentally to those rockfish in the Central GOA. A detailed description of the Pilot Program is provided in the preamble to the Pilot Program's proposed rule (71 FR 33040; June 7, 2006).

The Pilot Program was designed to enhance resource conservation and improve economic efficiency in the Central GOA rockfish fisheries by establishing cooperatives that receive exclusive harvest privileges. Section 802 of the Consolidated Appropriations Act of 2004 (Section 802, Pub. L. 108–199) required that the Secretary of Commerce (Secretary), in consultation with the Council, establish a program for the rockfish fisheries that recognized the historical participation of fishing vessels and fish processors in the Central GOA rockfish fisheries. Following extensive public comment, the Council recommended the Pilot Program to the Secretary on June 6, 2005. NMFS published regulations implementing Amendment 68 and the Pilot Program on November 20, 2006 (71 FR 67210). Fishing began under the Pilot Program on May 1, 2007. It created a structure for fishery participants to form cooperatives to efficiently manage harvesting activities. The allocation of cooperative quota (CQ), which is the annual catch limit that may be harvested by rockfish cooperatives, removes the incentives to maximize catch rates to capture a share of the available catch. As a result, vessel operators make operational choices to improve fishing practices.

The Council adopted the proposed Central GOA Rockfish Program on June 14, 2010, to replace the existing Pilot Program that will expire December 31, 2011. The Pilot Program and the Rockfish Program are a type of a limited access privilege program (LAPP) developed to enhance resource conservation and improve economic efficiency in the Central GOA rockfish fisheries. LAPPs, also called catch share programs, are limited access systems in which Federal permits are issued to harvest a quantity of fish representing a portion of the TAC. As noted earlier, the Pilot Program was authorized under 2004 appropriations legislation. Since that time, the Magnuson Stevens Fishery Conservation and Management Reauthorization Act of 2006 (MSRA) (Pub. L. 109–479) was enacted. The MSRA amended the MSA to include a new section 303A describing requirements for LAPPs initiated after January 12, 2007. The Council designed the Rockfish Program to meet the requirements of section 303A.

The Rockfish Program implemented by this final rule includes similar implementation, management, monitoring, and enforcement measures to those developed under the Pilot Program. For example, the Rockfish Program will (1) continue to assign rockfish quota share (QS) and CQ to participants for rockfish primary and secondary species; (2) allow a participant holding an LLP license with rockfish QS to form a rockfish cooperative with other persons; (3) allow holders of catcher/processor LLP licenses to opt-out of rockfish cooperatives each year; (4) include an entry level longline fishery; (5) establish sideboard limits, which are limits designed to prevent participants in the Rockfish Program from increasing their historical effort in other GOA

groundfish fisheries; and (6) include monitoring and enforcement provisions.

After considering management issues identified under the Pilot Program, and new program requirements to ensure the Rockfish Program complies with section 303A of the MSA, the Council recommended a Rockfish Program that includes modified provisions of the Pilot Program as well as new provisions. This recommendation was based on the analysis of rockfish management under the LLP, the Pilot Program, and anticipated changes under the Rockfish Program. The rationale underlying the Council's decision and details of this analysis are briefly discussed in this preamble and are contained in the Analysis prepared for this action (see **ADDRESSES**).

Key Differences Between the Pilot Program and the Rockfish Program

Table 1 outlines some key differences between the Pilot Program and the Rockfish Program. In summary, the Rockfish Program will, in contrast to the Pilot Program:

- Change the qualifying years for eligibility for QS;
- Use a different suite of years to determine sideboard limits and the allocation of QS;
- Assign to rockfish cooperatives a specific portion of the Central GOA TAC of species historically harvested in the rockfish fisheries;
- Assign a specific amount of halibut prohibited species catch (PSC) to cooperatives and conserve a portion of the halibut that will remain unallocated;
- Restrict the entry level fishery to longline gear only;
- Relax the requirements to form a cooperative;
- Specify the location where harvesters in cooperatives must deliver rockfish;
- Remove the requirement that harvesters in a catcher vessel cooperative deliver to a specific processor;
- Discontinue the limited access fishery;
- Simplify sideboards, and slightly modify sideboards for catcher/processors;
- Implement a cost recovery program for all participants except for opt-out vessels and the entry level longline fishery;
- Establish a catch monitoring and control plan (CMCP) specialist staff position; and
- Be authorized for 10 years, from January 1, 2012, until December 31, 2021.

TABLE 1—KEY DIFFERENCES BETWEEN THE PILOT PROGRAM AND THE ROCKFISH PROGRAM

Management provision	Pilot program	Rockfish program
Eligibility to receive QS	Participants must have made targeted legal landings of rockfish primary species during the qualifying years 1996–2002.	Participants must have made targeted legal landings of rockfish primary species during the qualifying years 2000–2006, or participated in the Pilot Program entry level trawl fishery in 2007, 2008, or 2009.
• Voluntary exclusion from the Rockfish Program.	May not apply for or receive initial allocation of QS, but may still have sideboard limitations.	LLP license holder may forgo QS and be exempted from specific sideboard limits if legal landings were made both in 2000–2006 and in the entry level trawl fishery during 2007, 2008, or 2009. Must apply for exclusion during initial application process.
Initial QS Allocations	Based on landings (best 5 of 7) years between 1996 and 2002.	97.5% of the initial allocation is based on landings (best 5 of 7 years) between 2000 and 2006.
• Entry level trawl "transition" QS allocation.	N/A	Participants in the Pilot Program entry level trawl fishery will be transferred into catch share management whereby 2.5% of the allocation will be given to licenses that participated in the Pilot Program entry level trawl fishery in 2007, 2008, 2009.
Rockfish Cooperatives	Yes	Yes.
• Forming a catcher vessel (CV) cooperative.	May only form cooperatives with other CVs and the processor to whom they historically delivered catch from 1996–2000. No minimum number of LLP licenses required for CVs to form a cooperative.	May only form a cooperative with other CVs with an association with any shoreside processor located within the geographic boundaries of the City of Kodiak. No minimum number of LLP licenses required.
• Annual CV allocation of CQ:		
Primary	Based on member QS	Based on member QS.
Secondary	• Pacific cod based on QS • Sablefish based on QS • Rougheye/shortraker maximum retainable amount (MRA), may not exceed 9.72% of TAC. • Thornyhead based on QS	• 3.81% of Pacific cod TAC. • 6.7% of sablefish TAC. • 7.84% of thornyhead TAC. • Rougheye/shortraker MRA may not exceed 9.72% of TAC.
Halibut PSC	Based on member QS. Calculation based on 1996–2002 data.	Based on member QS. Calculation based on 2000–2006 data with a 12.5% reduction. 117.3 mt to cooperatives. 16.8 mt remains unallocated and stays "in the water."
• Forming a catcher/processor (C/P) cooperative.	May join a cooperative with other C/Ps. Minimum of 2 LLP licenses required for C/Ps.	May join a cooperative with other C/Ps. No minimum number of LLP licenses required.
• Annual C/P allocation of CQ		
Primary	Amount based on member QS	Amount based on member QS.
Secondary	• Pacific cod MRA • Sablefish based on QS • 30.03% of shortraker TAC • 58.87% of rougheye TAC • Thornyhead based on QS	• Pacific cod MRA. • 3.51% of sablefish TAC. • 40% of shortraker TAC. • 58.87% of rougheye TAC. • 26.50% of thornyhead TAC.

TABLE 1—KEY DIFFERENCES BETWEEN THE PILOT PROGRAM AND THE ROCKFISH PROGRAM—Continued

Management provision	Pilot program	Rockfish program
Halibut PSC	Based on member QS. Calculation based on 1996–2002 data.	Amount based on member QS. Calculation based on 2000–2006 data with a 12.5% reduction. 74.1 mt allocated. 10.6 mt remains in the water.
Transfer of CQ	• C/P may transfer to C/P or CV • CV may transfer to CV only. No minimum number of LLP licenses required to transfer CQ.	• C/P may transfer to C/P or CV, except no shortraker or rougheye may transfer from C/P to CV. • CV may transfer to CV only • Minimum of 2 LLP licenses in each cooperative required to transfer CQ.
Limited access fishery	Yes	None.
Opt-out option for C/Ps	Yes, but subject to opt-out sideboards	Yes, but subject to opt-out sideboards.
Halibut PSC % rollover of unused CQ.	100% of unused CQ halibut PSC will be added to the last seasonal apportionment during the current fishing year.	55% of unused CQ halibut PSC will be added to the last seasonal apportionment during the current fishing year. Resulting 45% of unused CQ halibut PSC remains in the water.
Use caps for rockfish primary species.	A person may not hold or use more than: • 5% of the QS assigned to the CV sector • 20% of the QS assigned to the C/P sector CV cooperative may not hold or use more CQ than: • 30% QS assigned to CV sector A vessel may not harvest more than: • 60% CQ issued to the C/P sector Processors may not receive or process more than: • 30% CQ issued to CV sector (rockfish primary species only).	A person may not hold or use more than: • 4% of the QS assigned to the CV sector • 40% of the QS assigned to the C/P sector. CV cooperative may not hold or use more CQ than: • 30% QS assigned to CV sector. A vessel may not harvest more than: • 8% CQ issued to the CV sector. • 60% CQ issued to the C/P sector. Processors may not receive or process more than: • 30% CQ issued to CV sector (rockfish primary species, Pacific cod, and sablefish).
Sideboards (in effect July 1–31)	Yes	Yes.
• Catcher vessel	Exemption from sideboard limits: (1) Any American Fisheries Act (AFA) CVs not exempt under AFA regulations.	Exemptions from sideboard limits: (1) Any AFA CVs not exempt under AFA regulations; (2) vessels that have been selected as being voluntarily excluded from the Rockfish Program; and (3) any vessels assigned an LLP license that has been selected as being voluntarily excluded from the Rockfish Program.
• C/P	• Prohibited from fishing in the BSAI groundfish fisheries and limits on Pacific cod. • Prohibited from fishing in the West Yakutat/Western GOA (for rockfish). • Deep and shallow water complex halibut PSC • Prohibited from fishing in the BSAI groundfish fisheries and non-program groundfish fisheries in the GOA. • Deep and shallow water halibut PSC limit	Prohibited fishing restrictions: • West Yakutat District/Western GOA (rockfish primary species). • Deep-water complex—arrowtooth flounder, deep water flatfish, rex sole. • West Yakutat/Western GOA limitation (rockfish primary species). • Deep and shallow water halibut PSC limit. • Prohibited from fishing rockfish primary species in the Western GOA and West Yakutat District for non-Amendment 80 vessels.
• C/P Opt-out vessels	Subject to sideboards and receives the portion of each rockfish sideboard limit not assigned to rockfish cooperatives.	
	Prevents directed fishing in GOA groundfish fisheries without previous participation in 1996–2002.	• Prevents directed fishing in GOA groundfish fisheries without previous participation in 2000–2006. • Prohibit directed fishing for rockfish primary species in Western GOA and West Yakutat for non-Amendment 80 vessels.
Entry level fishery	Yes, trawl and longline gear	Yes, longline gear only.
• Annual application	Yes. Processor affirmation required	None. May deliver to any shoreside processing facility in the GOA.
• TAC	5% of the rockfish primary species TAC goes to the entry level fishery, divided equally between trawl (2.5%) and longline gear (2.5%).	Annual set aside of the TAC increases annually, to a predetermined cap, if the fishery harvests ≥ 90% of their allocation of a species in the previous year.
Monitoring and enforcement	Observer coverage: • 100% CV in July and when checked-in • 200% C/P cooperative for CQ or sideboards, and • 100% C/P opt-out vessels in July only.	• 100% CV when checked-in.
• Shoreside/stationary processors:	Catch Monitoring and Control Plan (CMCP) is required except for the entry level longline fishery.	

TABLE 1—KEY DIFFERENCES BETWEEN THE PILOT PROGRAM AND THE ROCKFISH PROGRAM—Continued

Management provision	Pilot program	Rockfish program
	Notify the observer at least one hour prior to off-loading of each delivery of groundfish harvested in a Pilot Program fishery. An observer must be available to monitor each delivery.	In the CMCP, describe how the CMCP specialist will be notified of deliveries.
Cost recovery	None	Yes, fee liability payment is a maximum of 3% of the ex-vessel value of rockfish primary and secondary species. Payment due on February 15 of the following year. No fees for the entry level longline fishery.
Duration	5 years	10 years.

Rockfish Program Overview

A detailed review of the provisions of Amendment 88 and its implementing rule is provided in the preamble to the proposed rule (76 FR 52148, August 19, 2011), and is not repeated here. The proposed rule is available from the NMFS Alaska Region Web site (see **ADDRESSES**). The following section provides a brief overview of the Rockfish Program.

The rockfish fisheries are conducted in Federal waters near Kodiak, Alaska, primarily by trawl vessels, and to a lesser extent by longline vessels. Exclusive harvesting privileges are allocated under the Rockfish Program for rockfish primary and secondary species. The rockfish primary species are northern rockfish, Pacific ocean perch, and pelagic shelf rockfish. The rockfish secondary species include Pacific cod, rougheye rockfish, shortraker rockfish, sablefish, and thornyhead rockfish. The Rockfish Program also allocates halibut PSC, which is a portion of the total GOA halibut mortality limit annually specified under § 679.21. Halibut PSC is allocated to participants based on historic halibut mortality rates in the primary rockfish species fisheries.

Eligibility for Rockfish QS

The Rockfish Program allocates harvest privileges to holders of LLP groundfish licenses with a history of Central GOA rockfish legal landings associated with those licenses (Rockfish legal landings are groundfish caught and retained in compliance with state and Federal regulations). The allocation of legal landings to an LLP license allows the holder of that LLP license to participate in the Rockfish Program and receive an exclusive harvest privilege under certain conditions. The Rockfish Program assigns QS to LLP licenses for rockfish primary and secondary species based on legal landings associated with that LLP. LLP license holders are eligible to receive rockfish QS if the LLP license was used to make legal landings of rockfish primary species during the qualifying years 2000 through 2006, or participated in the Pilot Program entry level trawl fishery in 2007, 2008, or 2009. An application to receive rockfish QS must be submitted to NMFS by 5 p.m. on January 17, 2012, or be postmarked by that date. Rockfish QS that is assigned to a specific LLP license cannot be divided or transferred separately from that LLP license, unless the QS is in excess of a use cap specified in § 679.82(a)(2).

LLP licenses that receive initial allocations based on legal landings (best 5 of 7 years) between 2000 and 2006 are given 97.5 percent of the total allowable catch (TAC). While selecting qualifying years, and in balancing the interests of historic and recent participants, the Council considered fishing patterns over the 11-year period before the Pilot Program, from 1996 through 2006. The Council also considered how modifying the Pilot Program's 1996 through 2002 qualifying years might potentially affect rockfish Pilot Program QS holders under the new Rockfish Program. The Council explained throughout the development of the Rockfish Program that, given the limited duration of the Pilot Program established by Congress, the Council could use different qualifying years to allocate rockfish QS under a new program. Ultimately, the Council selected the qualifying years of 2000 through 2006 after (1) considering both historic and more recent fishing patterns; (2) changes in the management of the fishery with the implementation of the LLP in 2000; and (3) the fishing patterns of catcher/processor vessels beginning in 2000.

LLP licenses used to make rockfish legal landings in the Pilot Program entry level trawl fishery, in 2007, 2008, or 2009, will receive an initial allocation of 2.5 percent of the TAC under the Rockfish Program. In the Pilot Program, the entry level trawl fishery had a small amount of TAC. The Council chose to eliminate the entry level trawl fishery in the Rockfish Program due to concerns about the potential for more than a limited number of participants to register for, and participate in, the entry level trawl fishery. Given the small amount of TAC assigned to the entry level trawl fishery in the Pilot Program, NMFS may need to close the fishery as a precautionary measure to avoid exceeding the entry level trawl allocation if more than two or three vessels participated in the fishery. As recommended by the Council, the final rule eliminates the entry level trawl fishery but provides an opportunity for LLP license holders who participated in the Pilot Program entry level trawl fishery in 2007, 2008, or 2009 to receive rockfish QS. The Council determined that assigning rockfish QS to participants in the Pilot Program entry level trawl fishery will reduce the need for NMFS to establish and manage a separate ''race for fish'' fishery. The potential fishing effort in such a fishery could exceed the limited allocation available to the fishery. The Rockfish Program assigns rockfish QS to the Pilot Program entry level trawl fishery participants to ensure that those participants benefit from catch share management under the Rockfish Program.

LLP license holders who made rockfish legal landings in both of the specified seasons—2000 through 2006 and in the entry level trawl fishery during 2007, 2008, or 2009—can choose to forgo rockfish QS and avoid specific sideboard limitations. The Council recommended this provision to address a situation in which a limited number of LLP license holders, possibly no more than one, would prefer to have the option to forego an allocation of rockfish QS in order to continue to participate in the West Yakutat District and Western GOA rockfish fisheries consistent with recent participation patterns. An LLP license holder must apply for the voluntary exclusion during the initial application process.

Rockfish Cooperative Fishing Quota

Rockfish QS may only be harvested through cooperative membership. No minimum number of LLP licenses is required to form a cooperative. On an annual basis, an LLP holder will assign the LLP license and rockfish QS for use in a rockfish cooperative. Catcher/processors may only form a cooperative with other catcher/processors. Catcher vessels may only form a cooperative with other catcher vessels in association with any shoreside processor located within the geographic boundaries of the City of Kodiak. The Council included the port delivery requirement to address industry concern that harvesters participating in the Rockfish Program continue to deliver catch to the traditional port of Kodiak. The association requirement between the catcher vessel cooperative and the shoreside processor only indicates that a processor may be willing to take delivery of the catch. The association requirement does not limit a catcher vessel cooperative to only one processor, and it does not obligate the cooperative to deliver catch to that specific processor. See Eligibility for Processors below for more information on the association between a catcher vessel cooperative and shoreside processors.

The designated representative of a rockfish cooperative must submit a timely application to NMFS each fishing year. The annual application for cooperative fishing quota is due to March 15, 2012, for the first year of the program, and then March 1 for all subsequent years. Each rockfish cooperative will receive an annual CQ, which is an amount of rockfish primary and secondary species, and halibut PSC that may be harvested by that rockfish cooperative in that fishing year. NMFS will base rockfish CQ on the collective rockfish QS of the LLP licenses held by the cooperative members. To reduce total halibut mortality in the Rockfish Program, NMFS will allocate halibut PSC to each sector based on an 87.5 percent reduction of the average total halibut PSC used from 2000 through 2006. The Council considered a range of alternative approaches to reduce the total halibut PSC CQ assigned to each sector. Ultimately, the Council recommended reducing the amount to 87.5 percent of the 2000 through 2006 average annual usage. This decision balances the need to provide adequate halibut PSC for use by rockfish cooperatives, while recognizing patterns of reduced halibut PSC use once exclusive harvest privileges are established, and meeting broader goals to reduce halibut mortality. The Council combined this reduction in the amount of halibut CQ initially available to rockfish cooperatives with other measures detailed later in this preamble to reduce the amount of halibut PSC that may be reassigned to non-Rockfish Program fisheries. The fishing season for vessels participating in a rockfish cooperative is authorized each year from May 1 through November 15.

Rockfish cooperatives may transfer all or part of their CQ to other rockfish cooperatives, with some restrictions. A minimum of 2 LLP licenses in each cooperative is required to transfer CQ. Transfer of CQ would be valid only during the calendar year of the transfer. All post-delivery transfers must be completed by December 31 of the calendar year of the transfer. Halibut PSC CQ is not available for transfer after November 15 of each year, or after a cooperative termination of fishing declaration has been submitted to NMFS.

Eligibility for Processors

Processors are not required to meet historical eligibility requirements to receive primary or secondary species fish harvested by rockfish cooperatives. The Council recommended that a catcher vessel cooperative may only form if a ''rockfish processor'' is an ''associate'' of the rockfish cooperative and is designated on the application for CQ. A rockfish processor is any shoreside processor with a Federal processor permit that receives groundfish harvested under the authority of a rockfish CQ permit. In order to receive rockfish CQ, the shorebased processor must be located within the boundaries of the City of Kodiak and have an approved CMCP. Any processor may qualify to receive CQ and is not required to be in business at the effective date of this rule. The association requirement is intended to encourage harvesters and processors to discuss and possibly coordinate fishing plans as part of the application process to form a rockfish cooperative, but without the specific mandate established under the Pilot Program. Membership agreements must specify that processor affiliated cooperative members cannot participate in price setting negotiations except as permitted by antitrust laws.

The Council also sought to address concerns raised by processors that allocation of exclusive harvest privileges would provide an undue competitive advantage for harvesters and could reduce the incentive for harvesters to continue to deliver to the traditional port of Kodiak. As a result, this final rule requires harvesters to deliver all rockfish primary and secondary species CQ in the catcher vessel sector to a shorebased processor operating within the geographic boundaries of the City of Kodiak. The port delivery requirement is intended to protect the fishing community of Kodiak and the traditional shorebased processors from changes in the location of shorebased processing activities that could occur under the Rockfish Program. This provision ensures that Kodiak processors and the community continue to benefit from the fishery. During the 2000 through 2006 period, all catch was delivered within Kodiak to shorebased processors; therefore, this provision does not represent a change from traditional harvest patterns. NMFS defines the boundaries of the City of Kodiak using the boundary specified by the State of Alaska on the date this final rule is published.

During the development of the Rockfish Program the Council reviewed and considered a range of options to address concerns raised by shorebased processors about potential consolidation of processing capacity under catch share management and the effects of catch share allocations on processing operations. The Council considered management measures that included the linkage between shorebased processors and catcher vessel cooperatives required under the Pilot Program, regional landing requirements, allocating harvest shares to processors, an annual cooperative/processor association (that may be changed, without penalty or forfeiture), and caps on the amount of landings that may be processed by any single processor. Ultimately, the Council recommended a specific landing requirement within the City of Kodiak and processing caps to preserve flexibility for harvesters to deliver to multiple markets. The purpose of the port landing requirement is to maintain the traditional shorebased processing activity within Kodiak and limit the consolidation of processing effort among rockfish processors that may be detrimental to existing processors and harvesters.

Overall, the purposes of the Rockfish Program are to stabilize the processing work force, increase shoreside deliveries of rockfish, and remove processing conflicts with GOA salmon production. The Council determined that fixed linkages between harvesters and processors that require a harvester to deliver to a particular processor, or allocating harvest quota to processors, were not necessary or appropriate to meet the overall goals and purposes of the Council for the Rockfish Program.

The Council and NMFS expect cooperatives to coordinate with processors under the Rockfish Program as they have under the Pilot Program. These relationships have reduced processing capacity conflicts between the rockfish fishery and the salmon fishery, which is active during summer months; and have provided a stable processing workforce by ensuring rockfish deliveries during months when other fisheries are less active. Section 2.4.6 of the EA/RIR/IRFA describes the likely benefits to processing operations under the Rockfish Program.

Reassignment of Halibut PSC CQ to the Last Seasonal Apportionment

In an effort to reduce halibut mortality and provide incentives for participants in rockfish cooperatives to continue to operate in ways to minimize halibut mortality, the Council recommended reducing the amount of halibut PSC CQ that NMFS may add to the last seasonal apportionment during the current fishing year. The last seasonal apportionment is October 1 through December 31 of each year. Some of the participants eligible for the Rockfish Program are also active in a number of flatfish trawl fisheries that occur after November 1. Vessel operators that are active in rockfish cooperatives and these flatfish trawl fisheries have consistently undertaken efforts to conserve their halibut PSC CQ while fishing in a rockfish cooperative in order to provide additional halibut PSC during the latter portion of the year. The Council recognized the importance of reassigning halibut PSC to provide additional harvest opportunities in these flatfish trawl fisheries. The Council recommended that NMFS add 55 percent of unused halibut PSC CQ to the last seasonal apportionment during the current fishing year. In the interest of reducing halibut bycatch in these fisheries, the remaining 45 percent of halibut PSC CQ will not be available for the last season apportionment, or for transfer, or for the commercial halibut IFQ fishery. This amount of halibut is conserved and contributes to the halibut biomass. The Rockfish Program limits halibut mortality both by limiting the amount of halibut PSC that is initially allocated as halibut PSC CQ and by limiting the amount of halibut PSC that may be reassigned.

Opt-Out Vessels

Each fishing year, catcher/processors may opt-out of participating in rockfish cooperative. Participants that choose to ''opt-out'' forgo the opportunity to fish rockfish primary species. NMFS will assume a rockfish eligible harvester has opted-out of participating in a rockfish cooperative if their LLP license with assigned rockfish QS is not named on a timely Annual Application for Cooperative Fishing Quota. Catcher/processor opt-out vessels are subject to opt-out sideboards and will receive the portion of each rockfish sideboard limit not assigned to rockfish cooperatives.

Use Caps

The Rockfish Program applies four types of use caps to limit the amount of rockfish QS and CQ that may be harvested by harvesters and processors: (1) A cap on the amount of QS an eligible rockfish harvester may hold; (2) a cap on the amount of rockfish primary species CQ that a rockfish cooperative may hold; (3) a cap on the amount of rockfish primary species CQ that a vessel may harvest; and (4) a limit on the amount of rockfish primary species an eligible rockfish processor may receive and process. The intent of the use caps under the Rockfish Program is to limit the degree of consolidation that could occur in the Central GOA rockfish fisheries. The Rockfish Program includes grandfather provisions that will allow persons to retain amounts of initial allocations of rockfish QS in excess of the use caps. Grandfather provisions apply to persons that held QS in excess of the use caps prior to the date of final Council action, June 14, 2010.

Sideboard Limitations

Sideboards limit the ability of rockfish harvesters to expand their participation into other fisheries during the month of July when the Central GOA rockfish fishery was traditionally open. Sideboards apply to Federally-permitted vessels fishing in Federal waters and waters adjacent to the Central GOA when the harvest of rockfish primary species by that vessel is deducted from the Federal TAC. They limit both the LLP license with rockfish QS assigned to it, and the vessel used for the legal landings that generated the rockfish QS. Sideboard limitations fall into two broad categories: (1) A limit that constrains the amount of harvest in specific regions and fisheries during July; and (2) directed fishery closures that prohibit fishing in specific fisheries and regions during July. The catcher vessel and catcher/processor sectors as well as catcher/processor opt-out vessels are all subject to sideboards.

Monitoring and Enforcement

Monitoring and enforcement provisions will ensure that harvesters maintain catches within annual allocations and do not exceed sideboard limits. NMFS uses 5 primary tools for monitoring participants in the Rockfish Program. Specifically, NMFS:

1. Requires observers aboard vessels that are operating in a rockfish cooperative or a rockfish sideboard fishery to adequately account for catch and bycatch in the fishery;
2. Requires that vessels participating in a rockfish cooperative or a rockfish sideboard fishery carry and use a NMFS-approved vessel monitoring system (VMS) transmitter;
3. Requires that catcher/processors in a rockfish cooperative or rockfish sideboard fishery follow specified catch handling procedures prior to processing;
4. Requires the weighing of all catch from rockfish cooperatives on NMFS or State approved scales; and
5. Requires that shoreside processors receiving rockfish CQ operate under a NMFS approved Catch Monitoring and Control Plan (CMCP).

Cost Recovery

The Rockfish Program is established under the provisions of section 303A of the MSA. Section 303A requires that NMFS collect fees for limited access programs to recover the actual costs directly related to the management, data collection and analysis, and enforcement activities. NMFS will use a portion of the cost recovery fees collected under the Rockfish Program to hire personnel to monitor rockfish landings. The rockfish CMCP specialist will monitor program deliveries to ensure compliance with the CMCP by any processor receiving program landings, assist processors with rockfish species identification to ensure accurate catch sorting and quota accounting, and report the findings to NMFS. Section 304(d)(2) of the MSA also limits the cost recovery fee so that it may not exceed 3 percent of the ex-vessel value of the fish harvested under the Rockfish Program. NMFS will assess fees on the ex-vessel value of rockfish primary species and rockfish secondary species CQ harvested by rockfish cooperatives in the Central GOA and waters adjacent to the Central GOA when rockfish primary species caught by that vessel are deducted from the Federal TAC. The cost recovery fees will not apply to halibut PSC CQ since that halibut cannot be retained for sale and, therefore, does not have an ex-vessel value. The cost recovery fees will not apply to the entry level longline fishery and opt-out vessels because those participants do not receive rockfish CQ.

Entry Level Longline Fishery

The entry level fishery is available for harvesters who are fishing for rockfish

primary species using longline gear only. The entry level longline fishery did not create the same level of concern under the Pilot Program as the entry level trawl fishery because longline harvests never exceeded one percent of the TAC for any of the rockfish primary species during the qualifying years. Therefore, the entry level longline fishery will continue under the Rockfish Program and the season is from January 1 to November 15 of each year. A participant is not required to submit an application to NMFS. Participants in the entry level longline fishery may deliver their harvest to any shorebased processing facility in any community in the GOA. The annual set aside of the TAC for the entry level longline fishery will increase annually, to a predetermined cap as specified in Table 28e to Part 679, if the fishery harvests at least 90 percent of their allocation of a species in the previous year. The smaller TAC allocation is more in line with historical catch rates among the longline sector in the entry level fishery, since the sector has had minimal participation in the entry level fisheries.

Rockfish Program Duration and Review

The Rockfish Program is authorized for 10 years, from January 1, 2012, until December 31, 2021. The Council will conduct a formal review of the Rockfish Program 3 years after implementation to assess whether the program is achieving the goals of the MSA and the problem statement, as identified in the Analysis (ADDRESS). All permits will expire after 10 years and will not be renewed unless the Council and the Secretary take action to continue the Rockfish Program. Section 303A(f)(1) of the MSA states that permits are renewable unless revoked, limited, or modified. If the Council does not recommend continuing the Rockfish Program, all Rockfish Program permits will expire 10 years after the implementation of the Rockfish Program and will not be renewed.

Anticipated Changes in the Pelagic Shelf Rockfish Complex

The Rockfish Program allocates QS based on harvests of all three species in the pelagic shelf rockfish (PSR) complex—dusky, widow, and yellowtail rockfish. At the October 2011 meeting, the Council recommended the removal of widow and yellowtail rockfish from the PSR species group and the placement of these two species in the ''other rockfish'' species group. Extensive GOA trawl survey data and other information now exist that indicate dusky rockfish does not generally share the same geographic distribution and habitat with the other two PSR species, yellowtail and widow rockfish. Upon the removal of widow and yellowtail rockfish, the PSR species group would then consist of a single species, dusky rockfish. NMFS intends to propose GOA FMP and regulatory amendments to dissolve the PSR species group and substitute a description of the dusky rockfish target fishery, and revise the description of the ''other rockfish'' fishery in the GOA FMP. If approved by the Secretary, NMFS would change every occurrence of ''pelagic shelf rockfish'' that appears in the Rockfish Program regulations and tables to ''dusky rockfish.'' The management measures associated with PSR and dusky rockfish would be identical. NMFS noted in the Rockfish Program proposed rule (76 FR 52148, August 19, 2011) that this action would not affect, or change, QS eligibility for rockfish primary species in the Rockfish Program.

Removal of the Limited Access Fishery

The Council recommended eliminating the limited access fishery for the catcher/processor sector in the Rockfish Program because the EA/RIR/IRFA showed the limited access fishery created incentives for the catcher/processor sector to avoid joining a cooperative. The Central GOA limited access fishery under the Pilot Program opened in the beginning of July, and then closed when NMFS estimated that participants fully harvested the target rockfish allocations in that fishery. Participants with small allocations of rockfish QS could choose to fish in the limited access fishery and harvest rockfish in an amount greater than their individual historical allocation. Additionally, NMFS could not predict participation in the limited access fishery from year to year. The Council recognized the possibility of a ''race for the fish'' that could result in the fishery exceeding the TAC before the fishery could be closed. Ultimately, the Council decided to discontinue the limited access fishery. NMFS published a notice of availability for Amendment 88 on July 28, 2011 (76 FR 45217). The public comment period on Amendment 88 ended on September 26, 2011, and the Secretary approved Amendment 88 on October 26, 2011. On August 19, 2011, NMFS published a proposed rule to implement Amendment 88 (76 FR 52148). The public comment period ended on September 19, 2011. Additional information on this action was provided in the preamble of the proposed rule and is not repeated here.

NMFS received 13 comment letters from 11 unique individuals regarding Amendment 88 and the proposed rule. These letters contained a total of 55 unique comments. These comments are addressed below.

Response to Comments

Comment 1: The definitions for the catcher vessel sector and catcher/processor sector at § 679.2 are wrong. The catcher vessel sector statement ''those rockfish eligible harvesters who hold an LLP without a catcher/processor designation'' would preclude catcher/processor LLP licenses that have generated legal rockfish landings but have only operated as a catcher vessel. The catcher/processor sector definition does not separate out the issue of catcher/processor LLP licenses operating as catcher vessels, but appears to lump all catcher/processor licenses together. The Pilot Program definitions were a better fit.

Response: NMFS agrees. The definitions in the proposed rule were based on an initial review of rockfish legal landings data. NMFS did not anticipate that any catcher/processor LLP licenses generated rockfish legal landings while operating as catcher vessels, but the definition should allow for such a circumstance. Under the Rockfish sector definition, at § 679.2, NMFS has replaced the proposed definitions for catcher vessel sector and the catcher/processor sector with the definitions used in the Pilot Program for the reasons indicated above.

Comment 2: Rockfish CQ accounts should not be set to zero for rockfish primary or secondary species after a cooperative submits a Declaration of Termination of Fishing to NMFS as suggested in the preamble text on page 52178. CQ should be available for transfer until the end of the calendar year as specified in the proposed regulatory text at § 679.4(n)(1)(ii) and (iv). Additionally, halibut PSC CQ may need to be available for transfer to cover cooperative overages. Observer data can change after debriefing and a halibut CQ overage could occur if no halibut PSC is available for transfer.

Response: NMFS agrees, in part. The preamble text to the proposed rule is incorrect and does not accurately explain the proposed regulations for a termination of fishing declaration, as specified in § 679.4(n)(2). In addition, some of the proposed regulatory text is conflicting. The cooperative rockfish CQ accounts for rockfish primary and secondary species will not be set to zero upon a party's submission of a Declaration of Termination of Fishing. A cooperative may transfer rockfish primary species and rockfish secondary species CQ until the end of the calendar

year, even after submitting a Declaration of Termination of Fishing. However, halibut PSC CQ may not be used for transfer after a termination of fishing declaration is submitted to NMFS, or after November 15 of each year. The Council recommended that 55 percent of the halibut PSC would be reassigned and made available for vessels fishing during the last halibut PSC apportionment period, which is October 1 through December 31 of each year. However, in the interest of reducing halibut bycatch in these fisheries, the remaining 45 percent halibut PSC CQ will not be available for the last season apportionment or for transfer. If a halibut PSC overage occurs after a cooperative submits a termination of fishing declaration, the adjustment will be made in the amount of halibut PSC reassigned for the last halibut PSC apportionment. In the case of an overage, the halibut PSC reassignment would be reduced.

NMFS made a number of regulatory changes in the final rule in response to this comment. NMFS deleted proposed text at § 679.4(n)(2)(iii) through (v) instead of only paragraph (n)(2)(v), to clarify that rockfish CQ accounts will not be set to zero for rockfish primary and secondary species after a rockfish cooperative termination of fishing declaration is submitted to NMFS. To clarify and remove duplicate provisions, NMFS moved regulatory language from § 679.4 regarding the reapportionment of halibut PSC and the transfer of CQ to §§ 679.21 and 679.81 of the final rule. Provisions at § 679.4(n)(1)(iv)(A) and (B) are specific to limitations on transfers of CQ after November 15, or upon approval of a rockfish cooperative termination of fishing declaration. NMFS has determined that this is more appropriately covered under § 679.81(i)(4)(ii)(H), which is the section regulating transfers of CQ between cooperatives. Provisions at § 679.4(n)(1)(iv)(C) duplicate regulatory text proposed at § 679.21(d)(5)(iii)(B); therefore, paragraph (n)(1)(iv)(C) has been removed from the final rule. Section 679.4(n)(1)(iv)(D) is specific to the reallocation of prohibited species bycatch management under the Rockfish Program. Such reallocation is covered in regulations on prohibited species bycatch management at § 679.21; therefore, paragraph (n)(1)(iv)(D) has been moved to § 679.21(d)(5)(iii)(C).

Comment 3: The 48-hour check-in requirement, as specified in § 679.5(r)(8)(i)(A) and (B), is operationally very difficult for catcher/processors when a vessel is changing areas from the Rockfish Program to Central GOA fishing, or vice versa. Perhaps the 48-hour requirement is a good management tool for the catcher vessel sector, but since the catcher/processor sector submits the check-ins electronically, the 48-hour delay seems unnecessary and does not seem worth the operational cost. We recommend eliminating this requirement altogether, or at least reducing the lead time from 48 hours to 12 hours.

Response: NMFS agrees. NMFS reduced the 48-hour check-in requirement for catcher/processor cooperatives, to a one hour check-in requirement, as specified in § 679.5(r)(8)(i)(A)(*2*). This one hour check-in requirement will still provide adequate time for NMFS to properly track and account for catch against a cooperative CQ permit. Catcher vessel cooperatives are still subject to the 48-hour check-in requirement, as specified in § 679.5(r)(8)(i)(A)(*1*).

Comment 4: The proposed rule is confusing regarding check-out requirements for the catcher/processor sector. Check-out notification is required within 6 hours after the last haul of rockfish CQ, but does not take effect at the end of a weekly reporting period or offload, whichever comes first. With two observers on board and real-time reporting, the check-out should take effect upon submission of the notice itself.

Response: NMFS agrees. The effective date for check-out designations in the catcher/processor sector, as specified in § 679.5(r)(8)(i)(B), has been changed to be effective upon submission of the check-out designation to NMFS. Catcher/processors are encouraged to retain the submission receipt to ensure that the check-out designation was received by NMFS.

Comment 5: In § 679.5(r)(8)(ii), the captain of the vessel should be able to submit the check-in and check-out designations, instead of the cooperative designated representative, because a vessel may want to check-out at midnight when the representative is unavailable or unaware that the vessel decided to finish. The vessel also might have an operational reason where they had to check-out unplanned.

Response: NMFS disagrees. The cooperative designated representative must coordinate fishing plans with their members. This is because the cooperative designated representative is responsible for ensuring that once a vessel is checked in, it is used to harvest fish under the CQ permit, and once a vessel is checked-out it can no longer be used to fish for that cooperative's CQ unless checked in again. Cooperative managers should be able to coordinate fishing schedules with their members to avoid subjecting them to monitoring and enforcement requirements beyond those required to effectively manage the Rockfish Program. No change to this provision has been made.

Comment 6: NMFS should clarify the resulting difference between someone who timely submits an application affirming their exclusion from the Rockfish Program and someone who does not apply for rockfish QS by the regulatory deadline.

Response: The voluntary exclusion from the Rockfish Program, as specified under § 679.80(d)(4)(ii), is available only during the initial QS application process for a person who holds an LLP license that made rockfish legal landings during the specified seasons from 2000 to 2006 and during the entry level trawl fishery in 2007, 2008, or 2009. If a person eligible for the exclusion submits a timely Application for Rockfish QS to NMFS, and that application is approved, that person will be permanently excluded from the Rockfish Program, and ineligible for rockfish QS from that time forward. A person excluded from the Rockfish Program will not receive rockfish QS and sideboards will not apply to the applicant's LLP license or vessel. If a person fails to submit a timely Application for Rockfish QS, then the LLP license and vessel that made rockfish legal landings during the qualifying years will not receive Rockfish QS, but will still be subject to applicable sideboard limitations as specified in § 679.82. NMFS made no changes to this provision.

Comment 7: An LLP license holder with a catcher vessel designation who chooses to be excluded from the Rockfish Program should still be held to the sideboard fisheries so that his or her participation is limited to those fisheries in which the license holder had history. It is unclear why a vessel being excluded from the entire program upon initial allocation is not subject to the same catcher/processor sideboards in the opt-out provisions, as specified in § 679.82(e)(7), (8), (10), and (11).

Response: The Council recommended specific provisions, based on public testimony, to allow a particular LLP license with a history of fishing in the West Yakutat District, to forgo rockfish QS and be exempt from sideboards in order to continue fishing in the West Yakutat District. This is a fishery in which this LLP license had history, but would be sideboarded and thus excluded from under the Rockfish Program. This LLP license not only has history in the West Yakutat District, but also made rockfish legal landings in both 2000 through 2006 and the entry

level trawl fishery in 2008, 2008, or 2009. NMFS anticipates that this LLP license is eligible to be excluded from the Rockfish Program. The LLP license holder has a one-time opportunity to be excluded and must submit a timely Application for Rockfish QS affirming his or her exclusion from the Rockfish Program.

Comment 8: The season dates are incorrect in Table 28b to Part 679—Qualifying Season Dates for Central GOA Rockfish Primary Species. The season dates should read as follows: Pacific ocean perch: May 1–May 17; July 1–Aug. 1 (2007), July 1–27 (2008), July 1–Nov. 15 (2009). Pelagic shelf rockfish: Sept. 1–Nov. 15 (2007), Sept. 1–Nov. 15 (2008), Sept. 1–Nov. 15 (2009). Northern rockfish: Sept. 1–Nov. 8 (2007), Sept. 1–Nov. 15 (2008), Sept. 1–Nov. 15 (2009).

Response: NMFS agrees. Table 28b to Part 679 has been corrected to reflect the qualifying season dates above. NMFS also corrected all landed by dates in the table to 7 days after the close of the season.

Comment 9: Some commenters expressed uncertainty about how QS is redistributed during the initial application process if a rockfish eligible harvester chooses to be voluntarily excluded from the Rockfish Program. Others believe that the catch history from that LLP license should flow back into the catcher vessel and catcher/processor pool, as indicated in the Council motion, and not into the 2.5 percent entry level trawl pool. Another commenter asserts that the real conflict is in the Council motion, and that Council intent is for the catch history to be divided among the remaining entry level trawl transition LLP licenses, to ensure the entry level trawl pool remains at 2.5 percent of the rockfish primary species total qualified catch. The commenter then suggests that Council intent could be directly altered by another section of the Council motion that appears to indicate that the catch history should be divided among all the other catcher vessels and catcher/processors.

Response: As recommended by the Council, rockfish QS will be available to the catcher/processor and catcher vessel sectors in proportion to individual license holders' QS holdings if a rockfish eligible harvester chooses to be voluntarily excluded from the Rockfish Program. The rockfish QS will not be divided among the remaining entry level trawl transition LLP licenses. NMFS addresses how rockfish QS and CQ is calculated in Comment 10. A discussion of QS redistribution on page 52161 of the preamble to the proposed rule refers to a different circumstance during the initial application process where a rockfish eligible harvester does not submit a timely Application for Rockfish QS based on rockfish legal landings during the entry level trawl fishery in 2007, 2008, or 2009. In this case, the rockfish QS that would have been assigned to that LLP license will be available to all other eligible LLP licenses held by persons who applied to receive rockfish QS based on rockfish legal landings during the entry level trawl fishery in 2007, 2008, or 2009. No change to this provision has been made.

Comment 10: If NMFS does not receive an Application for Rockfish QS from a rockfish eligible harvester for an initial allocation of QS in the Rockfish Program, is the catch history reallocated to other Rockfish Program participants? Do sideboards still apply to both the vessel and the LLP license for the rockfish eligible harvester who did not apply for QS?

Response: If NMFS does not receive a timely Application for Rockfish QS from a rockfish eligible harvester who qualifies for the Rockfish Program with landings between 2000 and 2006, the catch history is reallocated to other program participants by distributing the entire annual sector pound allocation to cooperatives as CQ, and not by adding additional QS units during initial allocations of QS. (This is because the initial QS award calculation, as specified in § 679.80(e), is based on the highest 5 years per species per license rather than a percentage of the rockfish QS pool, whereas the allocation of rockfish primary species CQ to rockfish cooperatives, as specified in § 679.81(b), is based on the sector's TAC and is calculated with the rockfish QS pool.) However, the calculation for initial allocation of QS for the entry level trawl transition fishery is based on a percentage of the total entry level trawl transition fishery rockfish QS pool. For the entry level trawl transition fishery, the QS is redistributed within the 2.5 percent allocation in proportion to the number of years the participant made deliveries to an entry level processor from 2007 to 2009. For both quota and entry level sectors, the sideboards still apply to both the vessel and the LLP license if a rockfish eligible harvester does not submit a timely Application for Rockfish QS for an initial allocation.

Comment 11: Would it be possible for NMFS to release new denominators to account for interim license and entry level allocations for eligible participants to evaluate NMFS' Rockfish Program official record?

Response: No. Restricted Access Management (RAM) will mail each rockfish eligible harvester an Application for Rockfish QS along with an estimated summary of eligibility during the initial application process. Rockfish QS is based on the highest five years for each LLP license. NMFS does not use a denominator to determine rockfish QS issuance, except in the issuance of QS in the entry level trawl transition fishery. For more information on the calculation of initial allocations of rockfish QS, see comment 12. A list of eligible harvesters issued rockfish QS and the initial rockfish QS pool will be posted after February 14, 2012 at *www.alaskafisheries.noaa.gov.*

Comment 12: The calculations for allocating catcher/processor QS and CQ are quite confusing. We would like to confirm that Council intent was not to change the underlying methodology for calculating each LLP and each sector QS. The years for qualification changed, but the harvest history of each primary species is based on best 5 of 7 years at the individual LLP and at the sector level.

Response: The underlying methodology to calculate initial allocations of rockfish QS is similar to the methodology in the Pilot Program, but it is not based on a percent of the rockfish QS pool. In the Rockfish Program, the initial allocation of QS, per species, is based on the harvest history of the applicant's best 5 of 7 years between 2000 and 2006. Specifically, the calculation to allocate rockfish QS, as specified in § 679.80(e)(2), sums rockfish legal landings to determine the Rockfish Total Catch for each eligible LLP license for each year, per rockfish primary species (the seasons are established in Table 28a). The highest 5 years of the Rockfish Total Catch is then summed for each eligible LLP license, per rockfish primary species. This amount is equal to the number of rockfish QS units for that LLP license per rockfish primary species. Each sector will receive a percentage of the cooperative TAC for each rockfish primary species, as specified in § 679.81(b). The percentage of the cooperative TAC is equal to the sum of the rockfish QS units assigned to all LLP licenses that receive rockfish QS in that sector divided by the rockfish QS pool for that rockfish primary species. Although this response clarifies the underlying methodology for calculating initial allocations of rockfish QS, the comment does not require a change to the regulations.

Comment 13: The qualifying years to receive initial rockfish QS in the Rockfish Program, 2000 to 2006, are a logical representation of the past and present dependence on the Central GOA rockfish fisheries.

Response: NMFS agrees. The rationale for allocating Rockfish QS based on legal landings from 2000 through 2006 and to the entry level trawl participants is described briefly in the Rockfish Program Overview of this preamble and in detail in the preamble to the proposed rule and is not repeated here (See **ADDRESSES**).

Comment 14: The concept of distributing qualified catch to entry level trawl LLP licenses based on deliveries made ''to an entry level processor'' from 2007 to 2009, appears to be completely missing in the proposed rule. Requiring delivery of entry level fish harvested by entry level trawlers to an entry level processor was an integral part of the Pilot Program, and was a regulatory requirement. The Council recognized that requirement and made it an element of their motion as one of the means of distribution of qualified catch. We request this element of the motion be reflected in the preamble and the regulatory language in the final rule, by adding the proportional calculation in every reference to the distribution process.

Response: NMFS disagrees. The Pilot Program defined a rockfish entry level processor as a person who is authorized by NMFS to receive and process fish harvested under the rockfish entry level fishery, and who is not an eligible rockfish processor. The definition for entry level processor has been removed from Rockfish Program regulations because participants in the entry level longline fishery may deliver to any shoreside processing facility in the GOA. The Council intent to require the delivery of entry level fish to an entry level processor, as described above, was already captured in the proposed regulatory text at § 679.80(e)(1)(ii), and (e)(3)(i). Specifically, an entry level trawl participant was required to deliver all harvested fish in the entry level fishery to an entry level processor in order to generate rockfish legal landings, which are used to assign rockfish QS in the regulatory text.

As specified in § 679.80(e)(1)(ii), NMFS proposed that rockfish QS be distributed to entry level trawl applicants based on the number of years during which a person made a rockfish legal landing under the authority of an LLP license in the entry level trawl fishery during 2007, 2008, or 2009. Proposed regulatory text at § 679.80(e)(3)(i), also captured the Council intent by assigning ''one Rockfish Landing Unit to an LLP license for each year a rockfish legal landing of any rockfish primary species was made to an entry level processor under the authority of an LLP license during the season dates for the entry level trawl fishery in 2007, 2008, or 2009 as established in Table 28b to this part.'' Adding the phrase ''to an entry level processor'' to regulatory text at § 679.80(e)(1)(ii), and (e)(3)(i), would be redundant and unnecessary because the use of ''rockfish legal landings'' already encompasses deliveries made to an entry level processor and would not change the distribution of rockfish QS to entry level trawl participants. NMFS made no changes to these provisions.

Comment 15: Some commenters support the elimination of the entry level trawl fishery in the Rockfish Program and believe that assigning the entry level trawl participants 2.5 percent of the rockfish primary species total qualified catch is fairly accurate for the entry level fleet.

Response: NMFS agrees. No changes in the regulations are required. This comment is consistent with the Council's recommendation and the proposed rule.

Comment 16: The maximum retainable amount (MRA) limits that apply to non-rockfish primary and secondary species, under § 679.81(h)(4)(i) and (h)(5), and in the preamble on page 52168, are described as a percentage of the total allocated rockfish primary species and rockfish secondary species onboard the vessel. It should be clarified that the rockfish secondary species are only those that are allocated as QS under the Rockfish Program. They do not include species that are not allocated under the Rockfish Program.

Response: NMFS agrees. When a cooperative is checked-in and fishing under a CQ permit only rockfish primary species and rockfish secondary species allocated as CQ can be used as basis species to calculate an MRA for non-allocated species. For both the catcher/processor and catcher vessel sector the rockfish primary species are dusky rockfish, northern rockfish, and Pacific ocean perch. For the catcher/processor sector the rockfish secondary species that can be used as a basis species to calculate MRAs are sablefish, thornyhead, rougheye, and shortraker rockfish. For the catcher vessel sector the rockfish secondary species that can be used as a basis species to calculate MRAs are sablefish, thornyhead, and Pacific cod. This clarification does not require changes to the regulations. Rockfish primary and secondary species are defined for the catcher vessel and catcher/processor sector at § 679.2.

Comment 17: The preamble to the proposed rule states on page 52156 that ''LLP license holders would be eligible to receive rockfish QS if they demonstrate participation in the Central GOA entry level trawl fishery during the first 3 years of the Pilot Program (1996,1997,1998) and prior to the Council's final action (2007, 2008 or 2009).'' But it should read: ''LLP license holders would be eligible to receive rockfish QS if they demonstrate participation in the Central GOA entry level trawl fishery during the first 3 years of the Pilot Program (2007, 2008, or 2009) and prior to the Council's final action.''

Response: NMFS agrees. The dates provided in the preamble to the proposed rule for the first three years of the Pilot Program and the Council's final action were incorrect and the sentence should have been written as the commenter indicated above. All regulatory text is correct and, therefore, no changes were made to regulations.

Comment 18: The deadline for the Application for Rockfish Cooperative Fishing Quota, as specified at § 679.81(f)(3), should be extended to April 1, 2012, for the first year, and then March 1 for all subsequent years to allow participants more time to organize under the new Rockfish Program. After the January 3, 2012, deadline for the initial Application for Rockfish QS, actual allocations will not be known for some time. The organization of cooperatives will not be fully understood until a list of LLP licenses with QS is released by NMFS. The processing and harvesting sectors will need to define their associations under the new program, which will take some negotiation.

Response: The March 1 deadline for the Application for Rockfish Cooperative Fishing Quota in the first year of the Rockfish Program is consistent with requirements in the first year under the Pilot Program, when participants were in similar circumstances. However, NMFS changed the deadline for the Application for Rockfish QS to January 17, 2012. This change will provide potential participants additional time to prepare their applications after the effective date of this rule. To ensure rockfish cooperatives are allotted the same amount of time to apply for CQ as indicated in the proposed rule, NMFS changed the deadline for the Application for Rockfish Cooperative Fishing Quota, as specified at § 679.81(f)(3), to March 15, 2012, for the first year and then March 1 for all subsequent years. This change will allow 30 days for Rockfish Program participants to prepare for the fishing season, join rockfish cooperatives, and apply for CQ after NMFS revises and distributes LLP licenses.

Comment 19: What happens to the rockfish QS for LLP license holders that are not designated on a timely Application for Cooperative Fishing Quota?

Response: When an LLP license with assigned rockfish QS is not named on an Annual Application for Cooperative Fishing Quota, as specified in § 679.81(b), the QS associated with that LLP license is not included in the calculation of the percentage of TAC assigned to each cooperative. Therefore, the percentage of the TAC for each cooperative is greater because the total rockfish QS assigned to the cooperatives is smaller.

Comment 20: Since cooperative formation is voluntary and multiple cooperatives may form under the proposed cooperative formation rules, can a cooperative refuse membership to an eligible QS holder even if they agree to the same conditions as other members?

Response: Yes. A rockfish cooperative may refuse membership to an eligible QS holder, even if that holder is willing to agree to the same conditions as other members of the rockfish cooperative. The reason is that multiple cooperatives with a varying number of members may form under the Rockfish Program, including a cooperative of one member. Cooperative formation is voluntary.

Comment 21: Can any trawl vessel with a Central GOA endorsed LLP license harvest rockfish QS for a cooperative?

Response: A Central GOA LLP license must be assigned to a cooperative and assigned rockfish QS to harvest rockfish for that cooperative. Additionally, as specified in § 679.7(n)(1), a person may not operate a vessel assigned to a rockfish cooperative in any other rockfish cooperative other than the rockfish cooperative to which that vessel was initially assigned for that fishing year. The rockfish cooperative contract agreed upon among the members determines which members of the rockfish cooperative may harvest the rockfish CQ, as specified in § 679.81(i)(3)(xvi).

Comment 22: It is unclear why an Application to Opt-out of Rockfish Cooperative, as described at § 679.81(e)(2), is needed in the new Rockfish Program. If no Application for Rockfish Cooperative Fishing Quota is received by NMFS, then the default appears to be the same as opting-out. Are the observer coverage and monitoring requirements identical for both the opt-out vessels and participants that do not submit a timely application? Please explain. If there is no difference, then the opt-out application seems unnecessary.

Response: NMFS agrees and has removed the Application to Opt-out of Rockfish Cooperative for the catcher/processor sector from all regulatory text in the final rule in §§ 679.81 and 679.82. Instead, a catcher/processor vessel that would like to opt-out of the Rockfish Program for any given year is not required to submit an Application to Opt-out of Rockfish Cooperative to NMFS. The Application to Opt-out of Rockfish Cooperative had a purpose in the Pilot Program where catcher/processors could choose between three participation options: (1) Join a rockfish cooperative; (2) participate in the limited access fishery; or (3) opt-out of the Pilot Program. The Council did not recommend the limited access fishery in the Rockfish Program, so it was not included in the proposed rule. Two options are available for catcher/processors: (1) join a rockfish cooperative; or (2) opt-out of the rockfish cooperative. Therefore, NMFS will consider that a catcher/processor has opted-out of participating in a rockfish cooperative if their LLP license with assigned rockfish QS is not named on an Annual Application for Cooperative Fishing Quota. No changes were made to observer coverage and monitoring requirements for catcher/processor opt-out vessels.

Comment 23: The processor association for a catcher vessel cooperative does not create stability for processors. Each delivery could depend on who is willing to pay the highest ex-vessel price on any particular day, which offers no stability for the processor. With a 30 percent use cap, it is possible for four processors to process the entire fishery and exclude processors that have historically been in the rockfish fishery. Processors need an annualized delivery requirement to meet market obligations for products and to provide employment and stability for their workforce.

Response: NMFS disagrees. As discussed in the preamble to the proposed rule, the association between a catcher vessel cooperative and processor is a requirement in order to form a rockfish cooperative as part of the application process. This association encourages harvesters and processors to discuss and possibly coordinate fishing plans for the upcoming season. The Council considered an annual delivery requirement whereby a cooperative would be required to deliver to a specific processor during its development of alternatives for the Rockfish Program but did not advance the measure for analysis. The Council discussed that the existing Pilot Program requires that a cooperative associate with the processor to which the catcher vessel delivered the most pounds in a specified qualifying period. In developing the Rockfish Program alternatives, the Council considered that structure as well as other structures that could qualify catcher vessels for specific cooperatives and establish penalties or forfeitures payable on changing cooperatives and processor associations. The Council recognized that these associations could be used to protect processor and community interests by recognizing historical relationships in the fishery. The Council considered incorporating these or similar structures into its alternatives. However, due to requirements of section 303A of the MSA the Council elected to consider other measures to protect community and processor interests in the Rockfish Program, including possible regional landing requirements, allocations of harvest shares to processors, annual cooperative/processor associations that may be changed without penalty or forfeiture, and caps on the amount of landings that may be processed by any single processor. Section 303A of the MSA and the Council's recommendation for shoreside processors is addressed in Comment 49.

The Council ultimately recommended the port delivery requirement implemented by this final rule. The requirement is intended to protect the fishing community of Kodiak and traditional shorebased processors from changes in delivery location under the Rockfish Program. In addition, the processing cap the commenter notes limits the possible degree of consolidation among processors. These clear limits will reduce the potential instability to processing operations if no limits were established. As noted in the preamble to the proposed rule, the Council considered and rejected a number of measures to constrain processing operations.

Comment 24: It wasn't the Council's intent at final motion to create additional barriers to the transferability of American Fisheries Act (AFA) derived LLP licenses. The non-severability provision could diminish the value of an AFA vessel as well as its AFA fishing rights, and limits an entity's opportunity to acquire AFA pollock harvest shares up to the limit specified at § 679.20(a)(5)(i)(A)(*6*). The lack of severability of the rockfish QS from the LLP license for the purpose of transferring an AFA derived LLP license has significant negative consequences: (1) It limits the pool of potential purchasers who would otherwise be

eligible to purchase an AFA qualified catcher vessel operation; and (2) it limits the pool of AFA qualified catcher vessels that are available for purchase by someone that already holds some rockfish QS. The current pool of catcher vessel sector rockfish Pilot Program participants includes a number of AFA qualified catcher vessels with AFA derived LLPs. An AFA derived LLP may only be transferred to an AFA qualified vessel, thus limiting the pool of transferees to someone who owns an AFA qualified vessel but needs an AFA derived LLP (unlikely), or someone who wishes to purchase the transferor's AFA operation including the AFA qualified vessel and AFA fishing rights (the usual circumstance). Under the proposed regulations, an AFA derived LLP with rockfish QS attached to it could not be transferred if the transfer would cause the transferee to exceed the proposed 4% use cap. NMFS should revise the proposed regulations to allow for the severability or suppression of rockfish QS from an AFA derived LLP license, when necessary, to allow an LLP transfer that would otherwise be legal except for the non-severability of all or part of the rockfish QS.

Response: The Council motion does not provide for severability or surrender of rockfish QS, except as provided for under § 679.80(f)(2), and this is reflected in the Rockfish Program regulations. The proposed rule did not consider such a provision. The commenter may approach the Council with suggestions for future regulatory amendments to the Rockfish Program. No change has been made to the final rule.

Comment 25: The non-severability of QS from LLP licenses forces inefficiencies and cumbersome leasing agreements within the Rockfish Program. Many vessels have allocations too small to be fished effectively and much of the QS remains unharvested. This is contrary to National Standard 1, which requires managing each fishery to achieve optimum yield.

Response: The Council recommended the non-severability of rockfish QS from LLP licenses, except as provided for under § 679.80(f)(2). This is consistent with Pilot Program provisions. LLP license endorsements are typically non-severable from LLP licenses under other NMFS programs. As specified under the provisions to transfer an LLP license in § 679.4(k)(7)(viii), area/species endorsements are not severable from the license and must be transferred with the license. Non-severability is consistent with the Council's intent to limit effort. Part of what makes the LLP effective is that a vessel may concentrate on only one gear, area, and fishery at a time. If an LLP license's endorsements could be severed, owners of other vessels could maximize use of each endorsement, potentially vastly increasing effort in many areas, fisheries, and with numerous gears. NMFS does not have a system to manage endorsements separately from LLP licenses. The only exception to this provision is with Aleutian Island area endorsements on a groundfish license with a trawl gear designation issued under the provisions of § 679.4(k)(4)(ix)(A). This exception was intended to increase effort in the Aleutian Island area to support the development of fisheries.

Small allocations of Rockfish QS to specific LLP licenses should not result in unharvested CQ under cooperative management. As with the Pilot Program, LLP license holders with rockfish QS join rockfish cooperatives and the cooperative members can assign specific harvesting responsibilities to specific members of the cooperative. In the Rockfish Program as in the Pilot Program, LLP license holders will not be required to forgo harvesting the CQ derived from relatively small QS allocations. National Standard 1 states that ''conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry.'' NMFS has determined that this final rule meets the MSA national standards, including National Standard 1. Additionally, the final EA/RIR addresses issues related to the national standards.

Comment 26: The Secretary should disapprove two elements of the Rockfish Program that restrict consolidation in the Rockfish Program: (1) The inability to sever QS history from the LLP license; and (2) the low ownership use cap of 4 percent for the catcher vessel sector. The ideal program would allow LLP license holders to sweep-up QS that are severable from an LLP license so that participants remaining in the fishery are economically sound. The 5 percent ownership use cap for the catcher vessel sector in place for the Pilot Program was more appropriate because it was more appropriate to increase efficiency in the fishery.

Response: NMFS disagrees. The inability to sever QS history from the LLP license was addressed in Comment 25. The 4 percent vessel use cap in the catcher vessel sector, as recommended by the Council, limits consolidation to a reasonable level determined by the Council. The use caps help balance the Rockfish Program goals to improve economic efficiency, maintain employment opportunities for vessel crew, and provide financially affordable access opportunities for new participants. The Council acknowledged that allowing the fleet to consolidate may enable the remaining companies to operate more efficiently. However, the Council also recognized that harvests may be liberally redistributed among vessels in cooperatives, and it is likely that gains in efficiency may be achieved without further ownership concentration of share in the fishery. As specified in the Analysis, in section 2.4.2, on page 124, the vessel use cap ensures that harvest activity does not exceed the threshold, specified by the Council, so that a certain minimum number of vessels remain active in the rockfish fisheries; under a 4 percent cap, this number is 25 vessels. The Council noted that under the 4 percent use cap, up to 5 LLP license holders would be grandfathered at a higher level and be able to continue to harvest rockfish consistent with their current harvesting practices.

Comment 27: Please explain how a QS use cap assignment based on a percentage of the initial pool works, and the difference between the two following statements in the preamble to the proposed rule: (1) Pages 52170 and 52171, ''These QS use caps would be based on the aggregate initial QS pool assigned to each sector * * *. NMFS would establish a QS use cap that would not fluctuate with the changes in the QS pool that could occur due to the resolution of appeals * * *.'' and (2) page 52171 ''The QS use cap would be based on a percentage of the initial QS pool.''

Response: These two statements make the same point. The QS use cap for a sector is a fixed percentage of the initial QS pool assigned to a sector. The initial rockfish QS pool is based on the Rockfish Program official record on February 14, 2012. As an example, the use cap for the catcher/processor sector is equal to 40 percent of the initial QS pool assigned to that sector. No changes to the regulations are required.

Comment 28: Several commenters asked for clarification on language in the preamble to the proposed rule that suggested use caps will be unaffected by the resolution of appeals or other operations of law. The proposed rule provided rationale that this will bring stability to QS holders. The commenters believe this process will affect the value of the LLP licenses since the use cap and the actual tonnage allocation will be different after any appeals are won. One commenter requested responses to two hypothetical situations that would help clarify the practical impacts of such an approach.

1. QS pool. Based on applications received for Rockfish Program participation in the catcher/processor sector, RAM determines that 100 total QS units should be awarded to that sector. Applicant A is given credit for 40 QS units, and B is given credit for 10 QS units. RAM denies B credit for certain contested landings data, and B appeals to the National Appeals Office (NAO). NAO agrees with B and awards B an additional 10 QS units. We note that if the QS pool remains at 100 QS units, A's percentage of the pool would stand at the maximum 40 percent, notwithstanding B's successful appeal that might otherwise have increased the number of QS units in the QS pool and thus decreased A's percentage to 36 percent (40 QS units out of 110 QS units).

2. CQ Calculation. What is the impact of B's successful appeal on calculating CQ each year? Is the total QS pool for purposes of annually determining CQ for each Rockfish Program participant 100 QS units (before B's appeal) or 110 QS units (after B's appeal)? How many QS units do A and B have for purposes of calculating CQ—is it 40 QS units for A and 20 QS units for B?

Response: NMFS has established use caps based on a percentage of a fixed QS pool (typically, the initial pool) for all of its catch share programs, including the Pilot Program and the Rockfish Program. NMFS has established this procedure to resolve several problems that may result if the QS use cap fluctuates over time. Most catch share participants have sought a clear and fixed definition of QS use caps to ensure that they can plan business operations that transfer QS. Additionally, establishing a use cap based on a proportion of a QS pool that decreases would result in a QS holder who is at or slightly below the QS use cap to exceed the limit once the use cap percentage is calculated against this new QS pool. This result could require a QS holder to divest of QS due to actions taken by NMFS to withdraw QS through the resolution of an appeal, or other operation of law. Under this scenario, a QS holder would be adversely affected by actions taken by NMFS outside of his or her control. Therefore, NMFS has established use caps based on the initial QS pool to ensure that all QS holders are subject to a cap that will not vary over time and create conditions that could result in forced divestiture of QS.

NMFS does not anticipate that appeals will result in a change to the QS pool. Under the Pilot Program, NMFS did not receive any appeal to adjust a QS holder's allocation. As the commenter notes, there are a limited number of potentially eligible LLP licenses under the Rockfish Program. NMFS has carefully reviewed landings data from those participants, particularly in the catcher/processor sector. NMFS does not believe that there are unique conditions within the Rockfish Program that require deviation from well-established use cap calculation procedures. However, should such a situation occur, it will not result in changes to the Initial Quota Share Pool used for use cap purposes but could change the calculation of annual CQ. This is because the additional QS would be included in the annual CQ calculation if the person holding that CQ joins a cooperative. Therefore, the amount of QS assigned to all cooperatives in each sector could be affected by the issuance of additional QS through the appeals process. In hypothetical situation 1 provided by the commenter, if the initial QS pool is 100 units, and the use cap is 40 percent of the initial QS pool (*i.e.,* 40 units), then the QS use cap would not vary if subsequent appeals resulted in the issuance of more QS. That is, the QS use cap would not increase if more QS is issued to a participant, but the amount of QS assigned to the sector for purposes of calculating the annual CQ would change.

In response to hypothetical situation 2, NMFS notes that although the QS use cap is fixed based on the initial QS pool, the total annual QS pool can vary as appeals or other operations of law occur. The annual QS pool for each sector is the total amount of QS assigned to rockfish cooperatives each year, based on rockfish cooperative applications. The annual QS pool may fluctuate if additional rockfish QS is issued as a result of an appeal, revoked by another action, or if an LLP license holder does not apply to be part of a rockfish cooperative. This may result in the QS of an individual cooperative member effectively generating more or less CQ as the annual QS pool fluctuates. If the annual QS pool were to increase due to the resolution of an appeal in favor of an appellant, NMFS would recalculate the annual QS pool in the year following the adjudication of the appeal. Each cooperative would then receive slightly less CQ per QS unit compared to the previous year. Conversely, if the annual QS pool decreased during a year, the following year, each cooperative would receive slightly more CQ per QS unit compared to the previous year. No changes in the regulations are required.

Comment 29: In the preamble to the proposed rule on page 52172, Table 8—Eligibility Criteria for a Grandfather Provision appears to inaccurately describe the grandfather provisions for the Rockfish Program. The 30 percent catcher vessel harvester cooperative cap and the 30 percent processor cap apply no matter what; that is, there are no grandfather provisions for the two caps in the new Rockfish Program. Cooperative formation is voluntary, so staying within the 30 percent catcher vessel harvester cooperative cap is achievable. Additionally, no Kodiak processor processed more than 30 percent of the catcher vessel rockfish harvest during the qualifying time period 2000 to 2006. As the preamble notes, the processing caps were imposed to prevent processor consolidation.

Response: NMFS agrees. The use cap exemptions, as specified in § 679.82(a)(6), apply only to rockfish eligible harvesters and catcher/processor vessels, and not to catcher vessel rockfish cooperatives or shoreside processors. Table 8 in the preamble to the proposed rule does not accurately reflect the grandfather provisions under the Rockfish Program because the table indicates that eligibility criteria for grandfather provisions apply to catcher vessel rockfish cooperatives and shoreside processors. The processor cap and the catcher vessel cooperative cap apply without grandfather provisions. The regulatory text is correct, and therefore, no change to this final rule is required.

Comment 30: Three commenters asked for clarification on a requirement explained in the preamble, on page 52176, under Management of the Sideboards, which states that all vessels subject to a sideboard limit must retain ''all rockfish caught during July 1 through July 31 in the Western GOA and the West Yakutat District. NMFS would require vessels to retain rockfish regardless of the specified target fishery.'' The commenters assert that this requirement would result in either a violation of the bycatch MRAs, or violation of this requirement to retain all rockfish. ''All rockfish'' includes minor species, which do not count against any allocation or sideboard and may not be marketable. The final rule should be corrected to clarify that full retention only applies to target rockfish species, as defined in the Rockfish Program, and that MRA regulations trump the retention requirement. In other words, retention requirements apply only to rockfish sideboarded species in the Western GOA and West Yakutat District, with 100 percent retention required if the sideboarded species is open to directed fishing and

retention up to the MRA if the species is on bycatch status.

Response: NMFS agrees that vessel operators will be required to retain rockfish primary species subject to a rockfish sideboard limit: (1) When that rockfish primary species in the Western GOA or West Yakutat District is open to directed fishing; or, (2) if it can be retained up to the MRA for that species if the species is on a bycatch status. Retention will not be required for species not subject to a rockfish sideboard limit, or if the species cannot be retained (*i.e.,* retention will cause the vessel operator to exceed the MRA for that species, or if the species is placed on PSC status and cannot be retained). This clarification to the description of the management of rockfish sideboard limits on page 52176 of the proposed rule does not require modification of the regulatory text.

Comment 31: As specified in § 679.82(e)(9)(iii), a rockfish cooperative may not exceed any deep-water or shallow-water halibut PSC sideboard limit assigned to that cooperative. NMFS has determined that deep-water halibut sideboards pertain to deep-water flatfish and the deep-water halibut PSC in the Pilot Program could be harvested in excess of the deep-water halibut PSC sideboard. The commenter raises three questions related to the application of the deep-water halibut complex halibut PSC sideboard. First, is the method for applying deep-water halibut PSC limits changing in the Rockfish Program? Second, are Western GOA rockfish sideboard harvesters going to be held to the deep-water halibut sideboard when harvesting in the rockfish sideboard fishery? And third, what is the rationale for not limiting halibut PSC use in the rockfish fishery.

Response: NMFS is clarifying § 679.7(n)(6)(iv) in response to this comment to note that a rockfish cooperative in the catcher/processor sector is prohibited from exceeding any rockfish sideboard limit. The reference to ''any sideboard limit'' has been removed to avoid potential confusion about the application of a halibut PSC sideboard limit. Section 679.82(e)(9)(iii), which addresses cooperative deep-water and shallow-water halibut PSC sideboard limits, has not been modified. Therefore, once a halibut PSC sideboard limit is reached by a rockfish cooperative, that cooperative is prohibited from directed fishing in the shallow-water flatfish complex if the shallow-water halibut PSC limit is reached, or is prohibited from directed fishing in the deep-water flatfish complex if the deep-water flatfish PSC limit is reached. If a cooperative uses halibut PSC fishing for rockfish in the Western GOA or the West Yakutat District, any halibut PSC used will be debited from the deep-water complex halibut PSC limit assigned to that cooperative. Once a cooperative reaches its deep-water halibut PSC sideboard limit, it will be able to continue to fish for rockfish in the Western GOA or West Yakutat District. This clarification to § 679.7(n)(6)(iv) ensures that catcher/processor cooperatives that have historically fished rockfish in the Western GOA or the West Yakutat District will not be foreclosed from fishing for rockfish by a halibut PSC sideboard limit. The Council intended to limit the ability of cooperatives to expand their harvests of deep-water flatfish beyond an amount that could be supported by the proportion of the halibut PSC historically used by a cooperative during 2000 through 2006.

Comment 32: The regulatory text at § 679.82(d) indicates that sideboards are applied to both the vessel and LLP license. Is that a correct interpretation?

Response: Yes. Sideboards are applied to both the vessel and the LLP license derived from that vessel.

Comment 33: Three commenters identified a mistake in the halibut PSC allocation in Table 1 of the preamble to the proposed rule and the same mistake again in the text on page 52169.

Response: NMFS agrees. Halibut PSC allocations between the catcher vessel and catcher/processor sectors were incorrectly switched in the preamble to the proposed rule, but correctly represented in the proposed regulations. NMFS corrected the halibut PSC allocations in Table 1 of the final rule to 117.3 mt with 16.8 mt not allocated (*i.e.,* ''left in the water'') for the catcher vessel sector, and 74.1 mt with 10.6 mt not allocated for the catcher/processor sector. No regulatory changes were made.

Comment 34: Three commenters assert that limiting 55 percent of the unused halibut PSC to be reassigned (*i.e.,* ''rolled over'') to the fifth seasonal trawl PSC apportionment does not provide incentive for participants in rockfish cooperatives to operate in ways that minimize halibut mortality. The commenters believe that in making the decision to reduce the halibut PSC limits, the Council mistakenly interpreted efforts by participants to reduce halibut PSC as a lack of need for halibut PSC during the fifth season by the trawl fleet operating during the fifth season.

Response: NMFS disagrees. The Council considered reducing the halibut PSC rollover from 100 percent of the unused halibut PSC allowances to as low as 25 percent. The Council understood that eliminating the halibut PSC rollover would result in the greatest savings of halibut PSC, but that reducing the amount of halibut PSC available for rollover dramatically would reduce the incentive for participants to minimize halibut mortality. Some Rockfish Program participants have more incentive than others to minimize halibut mortality because those participants are also active in a number of flatfish trawl fisheries that occur after November 1 of each year. As discussed in the preamble to the proposed rule, the Council assessed the amount of halibut PSC that is typically used after November 1 and concluded that even with the 55 percent rollover reduction of halibut PSC, the fleet would continue to have an incentive to conserve halibut PSC CQ and have additional harvest opportunities in flatfish fisheries.

Comment 35: The Secretary should disapprove the portion of the FMP that establishes halibut PSC reductions because the impact was not analyzed in the RIR/EA/IRFA and the public was not allowed to comment on the 12.5 percent halibut PSC reduction the Council recommended before halibut PSC CQ is allocated to cooperatives. It was unclear that the decision directly penalizes the catcher vessel trawl sector with virtually no penalty to the catcher/processor sector. Because halibut PSC allocations within the Pilot Program are not overly restrictive, cooperative members' relationships and cooperation are not compromised. Under the new Rockfish Program there is no way to understand this dynamic with the halibut PSC reduction.

Response: NMFS disagrees. As discussed in the preamble to the proposed rule, the Council considered a range of alternative approaches that would have reduced total halibut PSC CQ assigned to each sector. The Council accepts public comment on agenda items at every meeting and the allocation of halibut PSC was discussed at a number of meetings during Council deliberation on the Rockfish Program. The Council sought to balance the need to provide adequate halibut PSC for use by rockfish cooperatives, recognize patterns of reduced halibut PSC use once exclusive harvest privileges are established, and meet broader goals to reduce halibut mortality. In the Analysis, the Council addressed halibut PSC reductions, on page 100, in section 2.4.1, under the Analysis of the alternatives. The Council considered each sector's use of halibut PSC during the qualifying years. The Analysis recognizes that a reduction of the

halibut PSC rollover could cause cooperatives to place less emphasis on halibut PSC reductions in their cooperative agreements. It also noted that reductions might also affect trawlers that have benefitted from the halibut PSC rollover during the fifth season in the shallow-water flatfish, rex sole, arrowtooth flounder, flathead sole, and Pacific cod fisheries. Ultimately, halibut PSC reductions are meant to limit halibut mortality both by limiting the amount of halibut PSC that is initially allocated as halibut PSC CQ and by limiting the amount of halibut PSC that may be reassigned.

Comment 36: The Secretary should disapprove halibut PSC sections of the proposed rule because the Council will address halibut bycatch caps, both allocations and structures, in the GOA, holistically through a different amendment package.

Response: NMFS disagrees. The Council recommended specific halibut PSC provisions for the Rockfish Program. The Council will take the Rockfish Program halibut PSC reductions into account during deliberations on any future GOA halibut PSC amendment packages. Whether the Council should, or will, address halibut PSC through a different amendment package is outside the scope of this action.

Comment 37: The preamble to the proposed rule states on page 52170 under the section Reassignment of Halibut PSC to Non-Rockfish Program Fisheries that, ''NMFS would allow a portion of the halibut PSC CQ that was assigned to that rockfish cooperative to become available to trawl and non-trawl vessels during the last halibut PSC apportionment period of the year. * * *'' This statement is incorrect because reassignment of halibut PSC only goes to trawl vessels, and not non-trawl vessels.

Response: NMFS agrees. Reassignment of halibut PSC goes to trawl vessels in the fifth season trawl allocation, which begins on October 1 of each year. No change was made to the regulations.

Comment 38: Since the Pilot Program will no longer exist, and a new Rockfish Program will be in its place, the Amendment 80 sideboards will need to be adjusted according to the new catcher/processer halibut CQ. Under the Rockfish Program, the catcher/processor sector will be allocated 84.7 mt of halibut PSC, which is less than under the Pilot Program, based on the new suite of qualifying years. The Council did not discuss any revisions to Amendment 80 as a result of the Rockfish Program.

Response: NMFS disagrees. The Council did not recommend any modifications to the Amendment 80 sideboard limits. The Amendment 80 halibut PSC sideboard limits were established through regulations that implemented the Amendment 80 Program and not through the Pilot Program or the Rockfish Program. The halibut PSC sideboards established under Amendment 80 are outside of the scope of this action. The Council could choose to amend the Amendment 80 halibut PSC sideboard limits through a separate action.

Comment 39: Under the calculation of rockfish and halibut PSC sideboard limits, as specified at § 679.82(e)(3)(i), it is difficult to know whether the denominator is all catcher/processors, all Rockfish Program catcher/processors, or split between Rockfish Program catcher/processors for (i) and all catcher/processors for (ii) and (iii).

Response: The denominator is split between Rockfish Program catcher/processors and all GOA-endorsed LLP licenses in the catcher/processor sector. As specified in § 679.82(e)(3)(i), the denominator for each rockfish sideboard fishery is the total retained catch by vessels operating under the authority of all eligible LLP licenses in the catcher/processor sector. The denominator for the deep-water and shallow-water halibut PSC as specified in § 679.82(e)(3)(ii) and (iii), is the total halibut PSC used by vessels operating under the authority of all LLP licenses. No changes were made to the regulations.

Comment 40: The Council motion and intent was for the calculation of rockfish and deep-water/shallow-water halibut sideboards to remain the same as in the Pilot Program. The intended calculation is that each LLP license and cooperative receives its pro-rata share of Western GOA and West Yakutat District rockfish and deep-water/shallow-water halibut history of the sector. The description in the preamble on page 52175, and as specified under § 679.82(e)(3)(i) through (iii), reflects the rockfish halibut QS and secondary species QS calculation, which states the amount assigned is based on the amount of primary rockfish QS as a percent of the sector's primary rockfish aggregate QS. This is incorrect. The sideboard history is the LLP license and cooperative's historic usage.

Response: NMFS disagrees. Page 52175 of the preamble to the proposed rule and § 679.82(e)(3)(i) through (iii) establish a method to assign a portion of a rockfish sideboard limit or halibut PSC limit to a rockfish cooperative based on the proportion of the rockfish catch or halibut PSC used under the authority of an LLP license compared to the total rockfish catch or halibut PSC use by all eligible LLP licenses in the catcher/processor sector. This method is the same method that was used in the Pilot Program.

Comment 41: When NMFS publishes the 2011 Rockfish Pilot Program Catcher/Processor Sideboard Limits, please carry the catcher/processer sideboard out to the thousandths decimal, as that is how the information is presented on LLP licenses and CQ permits. Rounding up the numbers shows some allocations as higher than they really are.

Response: The sideboard percentages posted in the 2011 Rockfish Pilot Program Catcher/Processor Sideboard Limits currently display decimals to the tenths to make the spreadsheet easier to read, but the full number is available when a cell is selected. To avoid confusion in the future, NMFS will post the Rockfish Program Catcher/Processor Sideboard Limits with sideboard percentages carried out to the thousandths decimal to match percentages listed on the LLP licenses and CQ permits. NMFS can provide this additional information online at *http://www.alaskafisheries.noaa.gov,* without any change to the regulations.

Comment 42: The Pilot Program language stipulated that the waters adjacent to the Western GOA and West Yakutat District were those waters ''open by the State of Alaska.'' Should this be included in this program's language under § 679.82(d)(3) and (4), and (e)(2) for clarification?

Response: In the Rockfish Program regulations, NMFS replaced the language ''waters adjacent to the Western GOA and West Yakutat District were those waters open by the State of Alaska'' with ''in waters adjacent to the Western GOA and West Yakutat District when northern rockfish, Pacific ocean perch, and pelagic shelf rockfish by that vessel is deducted from the Federal TAC as specified under § 679.20.'' NMFS would like to avoid incorporating State of Alaska regulations by reference to avoid triggering a Federal requirement based on a State of Alaska action. Instead, under this final rule the regulation becomes effective when fish are caught and subsequently subtracted from the Federal TAC. That can only happen after the State of Alaska has made the choice to open the parallel fishery. Thus, the new language preserves the State of Alaska authority, but bases the trigger on a Federal action. No changes were made to the regulations.

Comment 43: Several commenters oppose the proposed Cost Recovery

regulations at § 679.85 that require the rockfish cooperative representative to collect and submit up to a 3 percent cost recovery fee for the members of the cooperative. The commenters also opposed the provisions that require NMFS to withhold all forthcoming CQ for all cooperative members, if the cooperative fails to pay the fee liability in full. Commenters assert that the individual QS holders should be responsible for the portion of fee liability associated with the amount of QS assigned to the cooperative by each QS holder. The commenters expressed the following reason for their position on this issue:

- The payment schedule creates logistical issues. There is a very real possibility that the paying (or even new) members of a cooperative could be subject to a financial burden if a member of a cooperative did not submit adequate payments according to the cooperative contract during the prior year. This may result in costly lawsuits.
- QS holders will be subject to the performance of another entity. For example, if a rockfish vessel with QS wants to move to a different cooperative associated with a different processor the following year, the original cooperative can withhold fee payment and prevent issuance of CQ to the new cooperative.
- It is burdensome and creates accounting, reporting, and tax liability not analyzed by the proposed rule. The five primary catcher vessel rockfish harvesting cooperatives are currently classified as non-profit entities under state and Federal law. This requirement will result in the generation of more than $5,000 in gross receipts for each cooperative, which will, in turn, require each to seek formal approval as a non-profit by filing an application for recognition with the Internal Revenue Service. Significant and unnecessary accounting and reporting obligations will be created as well. These consequences were neither contemplated nor analyzed, either as part of the Council action or in connection with this rulemaking process.
- By shifting responsibility for cost recovery to cooperatives, as opposed to individual harvesters, the proposed regulations simultaneously increase cooperative liability and limit the ability of cooperatives to recover those costs from their members. The proposed rule frees harvesters to change cooperative and processor affiliations on an annual basis, which hinders the ability for cooperatives to enforce their membership agreements on a multi-season basis. The withholding of CQ from all members is a disincentive to form cooperatives with other QS holders.

Response: MSA section 304(d)(2) requires NMFS to collect fees for the Rockfish Program equal to the actual costs directly related to the management, enforcement, and data collection. This fee may not exceed 3 percent of ex-vessel value of fish harvested under the Rockfish Program. The analysis noted in section 2.4.18 that a cost recovery fee would be collected by NMFS and that any participant granted a limited access privilege (a Federal permit) would be responsible for the payment of cost recovery fees. This means that NMFS collects the fee from the person who is authorized to fish under the authority of the permit. The person authorized to receive the Rockfish Program annual permit is the rockfish cooperative.

Assigning a fee to the members who hold QS in the rockfish cooperative poses considerable administrative challenges. QS holders do not receive a permit authorizing the harvest of a specific portion of the TAC, and therefore, NMFS does not have a method for determining the specific pounds or timing of landings that should be assigned to each individual QS holder within the rockfish cooperative. Additionally, NMFS may not develop a method for determining specific pounds or timing of landings based on the amount of fish each QS holder harvested on the cooperative report, because the Council intended for CQ permits to be assigned to the rockfish cooperative and not to specific QS holders. Even if NMFS had a method for determining the specific pounds or timing of landings, NMFS would not have a mechanism to effectively determine which specific landings should be assigned to each QS holder. This is because there is no requirement for QS holders to actually make the legal landings for their QS associated with the CQ permit. For example, a QS holder could be a member of a rockfish cooperative and another member of that rockfish cooperative could harvest the amount of CQ derived from that individual QS holder.

In order to facilitate the internal administration of fee collection within the rockfish cooperative, this rule requires that each rockfish cooperative describe how the rockfish cooperative will collect fees from its members in its contract submitted to NMFS each year. The Council was clear under the development of the Rockfish Program that the responsibility of monitoring catch by its members rests with the rockfish cooperative. In the preamble to the proposed rule, given the small size of the Rockfish Program relative to the administrative costs, NMFS noted it is likely the cost will exceed 3 percent. Each rockfish cooperative may want to ensure that 3 percent of all landings are set aside for future cost recovery fees.

Ultimately, the CQ permit holder (the cooperative) is responsible for paying the fee. Accounting, reporting, and tax liability for rockfish cooperatives were not specifically addressed in the analysis because the Council left the method by which cost recovery fees are collected to be established within the agreement for each individual rockfish cooperative. Cost recovery fees could be collected in a number of ways. For example, each vessel operator could be required to set aside 3 percent of the ex-vessel landings and then reassign that money to the rockfish cooperative at the end of the fishing year. This would not require each rockfish cooperative to have separate holdings, and other alternative methods are available for rockfish cooperatives to hold fees.

Almost all participants in the Rockfish Program have extensive experience establishing contractual arrangements to fish within a cooperative structure under the Pilot Program, AFA, or Amendment 80 Program. These programs have operated successfully in the North Pacific fisheries for over a decade. The Council specifically chose to develop the Rockfish Program based in part on the success of cooperative management in other catch share programs. Given their extensive experience establishing contractual relationships, rockfish cooperative members are well-suited to establish agreements to ensure the timely collection of fees from its members. Adherence to tax regulations as either for-profit or a non-profit corporation is established by the IRS. These matters are well outside the scope of this action and beyond the responsibility and authority of NMFS. No changes were made to the regulations in response to this comment.

Comment 44: In § 679.85(b)(2), establishing a complex and onerous system to create standardized values to use as a basis for determining cost recovery fees may unfairly and inaccurately impact crewmembers on all vessels. Cost recovery fees resulting from this program will be treated as a ''cost of doing business'' by most vessels and subtracted from gross revenues before crews are paid. NMFS should use fish tickets instead of standard ex-vessel values to clearly and simply establish the value of deliveries made by a vessel.

Response: NFMS disagrees. NMFS does not anticipate that cost recovery fees will unfairly or inaccurately impact

crewmembers on all vessels. The Rockfish Program retains the economic gains realized under the Pilot Program. Participants in the Rockfish Program, including crew members, receive the benefits of catch share management under the program. Participants benefit by avoiding a competitive and potentially wasteful race for fish, and tailoring fishing operations to specific catch limits to improve economic efficiency. The MSA requires that NMFS collect cost recovery fees for limited access programs but limits those fees so that it may not exceed 3 percent of the ex-vessel value of the fish harvested under the program.

NMFS uses standardized ex-vessel values instead of fish tickets because the State of Alaska does not require the reporting of prices on fish tickets. In cases where price is reported on fish tickets they do not necessarily reflect complete price information and are not intended to be used as an indication of the ex-vessel value of Alaska's fisheries. No change was made to the regulations.

Comment 45: Using the rockfish standard ex-vessel value by month for each rockfish primary and secondary species to determine cost recovery fee percentages, as described under § 679.85(b)(2), is overly complicated. The ex-vessel value for low-value, high-volume species has not fluctuated by month within the Pilot Program, and no price fluctuations are expected under the new Rockfish Program. Processors should report an annual price for each rockfish species instead of a rockfish standard ex-vessel value by month.

Response: NMFS disagrees in part. A review of past landings from fish ticket prices confirms that the ex-vessel value by month has remained reasonably stable within the Pilot Program. However, NMFS received comments asserting that the new terms of the catcher vessel cooperative processor association, which allows catcher vessels to deliver to any shoreside processor in the City of Kodiak, may change the relationship between the catcher vessel sector and shoreside processors in Kodiak. See comment 23. NMFS also does not anticipate a great degree of price fluctuation under the Rockfish Program, but acknowledges that catcher vessels may choose to deliver to a different processor, instead of the processor associated with the catcher vessel cooperative, if a higher price is offered. Therefore, NMFS will continue to collect the rockfish standard ex-vessel value by month from shoreside processors to account for any variation in prices. NMFS may revisit this matter in the future if prices remain stable under the Rockfish Program. No change was made to the regulations.

Comment 46: There should be a mechanism for an appeal of the ex-vessel price used to determine cost recovery fee percentages. It would be prudent to have the option to provide supporting documentation, such as product invoices, if there is a discrepancy between market values since the Rockfish Program cost recovery fees will be based on shorebased values. Catcher/processors might encounter different values.

Response: NMFS disagrees. As detailed in the preamble to the proposed rule, an appeal of the ex-vessel price is rarely used under existing cost recovery programs and has not proven to be an obstacle for industry to pay fees, particularly in the halibut and sablefish IFQ program, where IFQ holders may use either standard ex-vessel prices generated by NMFS or actual ex-vessel prices. The BSAI crab fee collection program does not provide for the use of actual ex-vessel price. The use of an actual ex-vessel price would require that the rockfish CQ holder document all landings and prices. NMFS has used the standard ex-vessel prices estimated from shorebased deliveries to assign an ex-vessel value to catcher/processor vessels in its other cost recovery programs and will continue to do the same under the Rockfish Program. The data used to determine the cost recovery fee are based on the data required to be provided to NMFS from each rockfish processor receiving rockfish CQ. No change was made to the regulations.

Comment 47: The Secretary should disapprove the 10-year duration of the Rockfish Program because the limited duration indicates that the program is inherently unstable. Additionally, it does not encourage long-term stewardship of the resource, but instead a view centered on short-term gains. Since participation in the rockfish fisheries is unlikely to change, the permits should automatically renew at the end of the 10-year duration unless revoked, limited, or modified by NMFS.

Response: Section 303A(f)(1) of the MSA limits permits under LAPPs established after the date of enactment of the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006 to 10 years. Permits are renewable unless revoked, limited, or modified. All Rockfish Program permits will expire after 10 years, and can be renewed only if the Council and Secretary take action to continue the Rockfish Program. By its terms, the Rockfish Program will expire after 10 years. The Council did consider options that would have extended the Rockfish Program beyond 10 years. However, the Council recommended limiting the duration of the Rockfish Program to provide additional opportunities for review and reconsideration. The Council considered the substantial improvements in redistributing harvest throughout the year and reducing conflicts with processors under the limited duration Pilot Program before recommending to limit the duration of the Rockfish Program.

Comment 48: A commenter provided opinions on QS allocations and the Federal Government's general management of fish populations and other marine resources.

Response: This comment is outside the scope of this action.

Comment 49: Two commenters expressed concern about the role of processors in the proposed Rockfish Program compared with that in the Pilot Program. The commenters stated that the Council did not engage in a full analysis of the Pilot Program as an alternative in the development of the Rockfish Program. The Pilot Program requires harvesters in the catcher vessel sector to deliver their catch to the same processor they historically delivered their catch to. Both commenters stated that the Council eliminated from further analysis the alternative to extend the existing Pilot Program after a NOAA General Counsel (GC) opinion was presented to the Council stating that the existing program could not be extended. They also suggested that the Council did not have enough time to fully explore the options due to pressure to make a recommendation to the Secretary in time to meet the December 31, 2011, sunset date of the Pilot Program.

One commenter stated that the Pilot Program was a reasonable alternative to be considered in the analysis, that the Pilot Program alternative was required by the National Environmental Policy Act (NEPA), and legal uncertainty or concerns about staff time are not excuses to discontinue consideration of an alternative. The commenter claims that after the Council eliminated the Pilot Program alternative from the analysis, the only option remaining to include processors in a LAPP for the rockfish fisheries was to allocate harvesting quota directly to processors, and that approach did not have the broad support among stakeholders that the processor linkage under the Pilot Program had. The commenter requested that the Secretary disapprove the Council's recommended proposed regulations to implement Amendment 88 to the GOA FMP because the Council violated NEPA by not considering the

management system under the Pilot Program as an alternative.

Response: NMFS disagrees. It was reasonable not to include as an alternative in the EA the Pilot Program and its processor linkage structure because (1) that option was not consistent with the Council's Problem Statement and its focus on protecting communities and sectors, not individual processors; and (2) the Magnuson Stevens Act does not authorize allocation of onshore processing privileges. An EA must include a reasonable range of alternatives, but it does not require consideration of alternatives that do not satisfy that need for the proposed action, or ones that require legislative action that is remote or speculative.

In developing a new program to take the place of the Pilot Program, the Council recognized the limited duration of the Pilot Program in the Problem Statement (purpose and need statement) developed for the action. The Council indicated in its Problem Statement that the ''intent of this action is to retain the conservation, management, safety, and economic gains created by the Rockfish Pilot Program to the extent practicable, while also considering the goals and limitations of the Magnuson-Stevens Fishery Conservation and Management Act LAPP provisions. The existing CGOA Rockfish Pilot Program (RPP) will sunset after 2011. Consequently, if the management, economic, safety and conservation gains enjoyed under the RPP are to be continued, the Council must act to create a long term CGOA rockfish LAPP.'' The Problem Statement also recognized that the ''the rockfish fishery dependent community in the CGOA and the shorebased processing sector have benefited from stabilization of the work force, more shoreside deliveries of rockfish, additional non-rockfish deliveries with the [Pilot Program] halibut savings, and increased rockfish quality and diversity of rockfish products. Moreover, the CGOA fishermen, and the shorebased processing sector have benefited from the removal of processing conflicts with GOA salmon production.''

After reviewing a range of options to address program requirements as well as concerns raised by Pilot Program participants, the Council included some modified aspects of the Pilot Program in the new Rockfish Program to ensure that Amendment 88 complies with section 303A of the MSA and meets the Council's goals and objectives. The Council considered the processor linkage structure under the Pilot Program, but did not advance that option for detailed analysis. Instead, the Council decided that other alternatives for the new program would better address the interests of harvesters, communities, and processors and be consistent with the Council's Problem Statement and goals and objectives for this action.

Two of the four alternatives that were advanced for analysis for the catcher vessel sector looked at the role of the processing sector relative to the Council's goals and objectives and meeting the action's purpose and need. For example, Alternative 3 considered a rockfish cooperative program where harvesting allocations would have been divided between historical harvesters and processing participants, and Alternative 4 considered a cooperative program where a harvester would be required to join in association with a processor where associations were severable. The Council selected Alternative 4 because the Council found, and NMFS agreed, that it best meets the purpose and need of the action and complies with statutory and national standard requirements, including consideration of employment in the harvesting and processing sectors and policies to promote the sustained participation of small owner-operated fishing vessels and fishing communities that depend on the fisheries.

It was also reasonable for the Council not to advance the Pilot Program for detailed analysis in the EA because the MSA does not authorize the continuation of the Pilot Program or the establishment of a processor linkage structure like that under the Program. By its terms, the special authority for the Pilot Program expires at the end of 2011, so the Council could not ''extend'' the Program, but would need to develop a new program under the authority of the Magnuson-Stevens Act. Section 303A of the Magnuson-Stevens Act sets out the requirements for limited access privilege programs to harvest fish. The Act defines a limited access privilege to mean a Federal permit to harvest a quantity of fish, including an individual fishing quota. Section 303A therefore authorizes the allocation of individual fishing quotas but does not authorize onshore processing privileges. Nor does the Act generally authorize the allocation of onshore processing privileges, based on the agency's long-standing interpretation of the definition of ''fishing'' and related provisions under the Act. Thus, absent a legislative change, the Council and agency therefore could not include in the Rockfish Program a provision similar to the Pilot Program's requirement that harvesters in the catcher vessel sector deliver their catch to the same processor to whom they historically delivered their catch. Given the exceedingly remote and speculative possibility that Congress would further extend the Pilot Program or otherwise amend the Act to authorize allocation of onshore processing privileges, this alternative was reasonably excluded from further analysis for this reason as well.

Comment 50: The Council should have chosen a preliminary preferred alternative (PPA), or several, before taking final action on issues such as processor association to allow the analysis to focus on the impacts, to fully understand cumulative impacts, and to allow the public to engage with the multiple policies and decisions that needed to be made.

Response: The Council is not required to identify a PPA before taking final action. The Council may do so to help facilitate the review and analysis of specific policy and technical issues. However, the lack of a PPA does not mean the Council neglected to consider the effects of its actions in its analysis or at the time of final action. Over several meetings and several versions of the analytical documents the Council considered numerous alternatives that include processors within the Rockfish Program. The alternatives considered but not advanced for detailed analysis are summarized in the Analysis for this action in section 2.2.3, on page 26. Two of the four alternatives that were advanced for analysis for the catcher vessel sector included a mechanism to include the processing sector and is discussed in Comment 49. The Analysis of Alternatives for this action is summarized in the analysis for this action in section 2.4.

Comment 51: A commenter requested that the Secretary disapprove Amendment 88 to the GOA FMP and the proposed rule because the commenter views specific regulatory language pertaining to one particular vessel as discriminatory. The commenter also asserts that the Council's analysis of the entry level trawl transition allocation methodology is incomplete. The commenter made the following three main points in the letter. (1) The Council discriminated against the commenter because he is the only Rockfish Program applicant who is not entitled to his entire catch history. The commenter holds the only LLP license to qualify for an initial allocation from rockfish legal landings made in both 2000 through 2006 and in the entry level trawl fishery, with participation in 2007, 2008, or 2009. A rockfish eligible harvester may apply for an initial allocation of QS based on landings made in 2000 through 2006, or the entry

level trawl fishery, but not both. Therefore the commenter is not eligible to receive an initial allocation based on the entire catch history of the LLP license. (2) The commenter believes he should not be subject to sideboards under the Rockfish Program that would prevent him from fishing in the West Yakutat District in July. He did not qualify for the Pilot Program and depended on the rockfish fisheries in the West Yakutat District as well as the Central GOA during the Rockfish Program qualifying years. (3) The allocation for the entry level trawl transition is based on years of participation instead of the amount of pounds landed during a period of time. The commenter views this structure as a new methodology of allocation that was not completely analyzed by the Council and does not meet National Standard 4 of the MSA under which one entity should not receive an excess allocation, in this case, 60 percent.

Response: NMFS disagrees with the three points made in the comment letter. In response to the commenter's first point, and after NMFS' review of the record, NMFS concludes that the Council did not discriminate against any of the LLP license holders in its decision to limit an applicant to an initial allocation of rockfish QS either from legal landings in 2000 through 2006 or the entry level trawl fishery, with participation in 2007, 2008, or 2009. In terms of qualifying years, the Council considered a range of alternatives for eligibility to receive initial QS allocations for participants in the Rockfish Program. Ultimately, the Council recommended specific eligibility provisions to limit a Rockfish Program applicant to QS derived from legal landings in 2000 through 2006, or the entry level trawl fishery under which a participant fished in 2007, 2008, or 2009, but not both. The Council believed it would not be fair and equitable to allow an LLP license holder eligibility for both QS allocations because this would amount to a disproportionate allocation. This determination is consistent with National Standard 4, which requires that allocations be fair and equitable. The initial QS allocation for legal landings in 2000 through 2006 is assigned to applicants based on rockfish legal landings made during the rockfish primary fisheries during 2000 through 2006. The initial QS allocation for the entry level trawl transition is based on a different methodology, which allocates 2.5 percent of the total rockfish QS to entry level trawl fishery applicants, who will proportionally divide the 2.5 percent. This allocation is consistent with the proportion of the TAC that was initially assigned to entry level trawl vessels during the Pilot Program.

In response to the commenter's second point, all rockfish eligible harvesters with QS in the Rockfish Program are subject to sideboards under the Rockfish Program. Sideboards are designed to prevent LLP license holders with exclusive QS privileges from further expanding their effort into fisheries that remain open access. However, based on public testimony, the Council recommended provisions to allow an LLP license holder to forgo rockfish QS and be exempt from sideboards in order to continue fishing in the West Yakutat District. These provisions allow a rockfish eligible harvester that does not want to be subject to sideboards to be permanently excluded from the Rockfish Program. An LLP license holder is eligible for the exclusion if it made rockfish legal landings in both 2000 through 2006 and the entry level trawl fishery in 2008, 2008, or 2009. The LLP license holder must submit a timely Application for Rockfish QS affirming his or her exclusion from the Rockfish Program.

In response to the commenter's third point, the allocation for the entry level trawl fishery is based on years of participation, rather than the amount landed during a period of time, so that each person will receive an equitable share of catch. The MSA does not require that QS be distributed based on catch history. The Council considered alternative methodologies for allocating catch in the entry level trawl transition fishery, which included allocations based on catch shares as well as years of participation. Due to a pending law enforcement investigation indicating that some catch in the Pilot Program entry level trawl fishery may have been illegally harvested, and so the landings history could be unreliable, the Council chose a method for QS allocation based on years of participation, instead of the amount of pounds landed during a period of time. In this decision, the Council also considered the relative allocations of QS assigned to the fishery overall, including within the entry level trawl transition fishery, but was limited in its ability to consider the allocation available to specific vessels due to MSA data confidentiality requirements. The Council allocated 2.5 percent of the TAC to the entry level trawl transition vessels, which is consistent with the proportion of TAC initially assigned to the entry level trawl fishery during the Pilot Program.

Comment 52: A commenter asserts that the Council does not support LAPPs as a market-based approach for fishery management. The Council wanted to capture the benefits of the Pilot Program but demonstrated lack of vision in their action to develop a long-term plan that creates stability for participants or that encourages investment and change within the Central GOA rockfish fisheries. This is demonstrated in many statements in the preamble that describe the Council's action. For example, (1) on page 52154, the Council did not use the term ''quota share'' in describing the Rockfish Program; (2) on page 52184, the Council decided on a 10-year limited duration; (3) on page 52170, the Council believed that consolidation through leasing is acceptable but consolidation through ownership is unacceptable; and (4) on page 52171, the Council recognized that lower ownership caps will restrict ownership changes.

Response: The Council developed the Rockfish Program under section 303A of the MSA, which lays out the requirements for LAPPs. The Rockfish Program is a LAPP, which is a market-based approach to fishery management that provides exclusive harvesting privileges to harvest fish. Previously, competition under the LLP created economic inefficiencies and incentives to increase harvesting and processing capacity. NMFS anticipates the Rockfish Program will retain the conservation, management, safety, and economic gains realized under the Pilot Program. The Council has the authority and discretion to develop LAPPs, such as the Rockfish Program, in a manner in which it deems necessary to manage the fisheries. The Council considered a range of alternatives, deliberated over the options, suboptions, and public testimony over of multiple meetings, and ultimately recommended the elements and option defining the Rockfish Program alternatives at final action.

The Council does not always use the same language as NMFS during the regulatory process to describe the multi-year exclusive harvest privileges, as indicated in the commenter's first point. The fact that the Council used the terms ''qualifying catch'' and ''catch history'' instead of ''quota share'' to describe the harvest privilege that is linked to historic harvests attributed to an LLP license does not mean that the Council discourages the use of quota share in LAPPs. While implementing this program, NMFS determined that the use of the term ''quota share'' does not alter the original intent of the Council.

The ten year limited duration of the Rockfish Program is not intended to discourage investments or stability for participants as indicated in the commenter's second point. The ten year limited duration and formal review is intended to ensure that the program is achieving the goals of the MSA and the problem statement as identified in the EA/RIR/IRFA (ADDRESS). The Council considered the various consequences that a sunset date could have on the Rockfish Program and recommended the 10 year duration to allow for the opportunity to reevaluate the program's effectiveness after an adequate amount of time has passed to gain and compare results. The Council's review allows for a full evaluation of the program's successes or challenges, and provides the Council with details on unanticipated consequences. The duration of the Rockfish Program is 5 years longer than the duration of the Pilot Program.

The commenter's third and fourth points regarding consolidation through ownership and ownership use caps were addressed in Comments 25 and 26.

Comment 53: If there is a non-catcher/processor sector component that the Secretary cannot approve or promulgate, then the Secretary should not let that prevent the implementation of the Rockfish Program for the catcher/processor sector as outlined in the Council motion.

Response: NMFS acknowledges the comment. Upon publication of the final rule, the Secretary has determined that the provisions in this rule that implement the Rockfish Program are consistent with the national standards of the MSA and other applicable laws for the catcher vessel and catcher/processor sectors. The Secretary approved the full Amendment on December 6, 2011.

Comment 54: The proposed Rockfish Program, which incorporates more recent qualifying years, results in an overall decrease in both target and secondary species and PSC allocations to the catcher/processor sector. We nonetheless believe that the Rockfish Program should be enacted to ensure the operational gains resulting from the program are retained.

Response: NMFS notes the comment, and agrees that the Rockfish Program extends many of the operational gains realized under the Pilot Program. No changes in the regulations are required.

Comment 55: The commenter supports changes from the Pilot Program that will benefit conservation and reduce regulatory discards such as (1) allowing for retention of incidental catches using all CQ species as basis species for determining MRAs and not just rockfish CQ; and (2) determining qualifications for opt-out catcher/processor participation in GOA flatfish fisheries during July based on past participation during the first two weeks of July by deep-water complex instead of each individual species. The commenter also supports other changes that improve efficiencies, reduce costs, and increase flexibility for the industry such as (1) simplifying sideboard rules for the catcher vessel sector by closing fisheries where minimal historical participation has occurred (West Yakutat District and Western GOA rockfish) and removing unnecessary monitoring and sideboards in other fisheries (GOA shallow-water flatfish, BSAI cod, and BSAI flatfish fisheries); (2) removing limits on the number of check-ins and check-outs for the fishery due to the efficiencies of the new electronic system; and (3) introducing a CMCP specialist instead of requiring 100 percent observer coverage for shoreside processors every 12-hours.

Response: NMFS agrees that the technical fixes mentioned above improve the functionality of the Rockfish Program relative to the Pilot Program. No changes in the regulations are required.

Summary of Regulation Changes in Response to Public Comments

This section summarizes the changes made to the final rule in response to public comments on the proposed rule. All of the specific changes, and the reasons for making these changes, are contained under Response to Comments above. The changes are described by regulatory section.

In § 679.2, NMFS clarified definitions under Rockfish sector for the catcher vessel sector and the catcher/processor sector, as indicated in Comment 1, to include the catcher/processor LLP licenses that have generated rockfish legal landings but have only operated as catcher vessels.

In § 679.4, NMFS clarified that rockfish cooperative CQ accounts will not be set to zero for rockfish primary and secondary species after a rockfish cooperative termination of fishing declaration is submitted to NMFS. The reason for this change is discussed in Comment 2. Rockfish primary and secondary species will be available for transfer after November 15, or upon approval of a rockfish cooperative termination of fishing declaration. NMFS also moved regulatory language from § 679.4 regarding the reapportionment of halibut PSC and the transfer of CQ to §§ 679.21 and 679.81 to better clarify regulations and reduce duplicative language.

In § 679.5, NMFS changed the check-in requirement for the catcher/processor sector to one hour prior to the time the catcher/processor begins a fishing trip to fish under a CQ permit.. The reason for this change is discussed in Comment 3. The 48-hour check-in requirement is still in place for the catcher vessel sector only. Additionally, the catcher/processor sector check-out designation effective date is effective upon the submission of the designation to NMFS, as indicated in Comment 4.

In § 679.7, NMFS clarified that catcher/processors may not exceed a ''rockfish'' sideboard limit assigned to a rockfish cooperative in the catcher/processor sector in response to Comment 31. This change is necessary to avoid potential confusion about the application of a halibut PSC sideboard limit.

In § 679.21, NMFS relocated provisions from § 679.4(n)(1)(iv)(D), specific to the reapportionment of halibut PSC to clarify and reduce duplication of provisions, as indicated in Comment 2.

In § 679.80, NMFS clarified that rockfish QS will be assigned if rockfish legal landings were made ''to an entry level processor'' under the authority of an LLP license in the entry level trawl fishery during 2007, 2008, or 2009. This clarification was made in paragraphs (e)(1) and (e)(3), in response to Comment 14.

In § 679.81, NMFS made several changes. NMFS removed the requirement to submit the Application to Opt-out of Rockfish Cooperative for catcher/processor vessels. As discussed earlier in Comment 22, NMFS determined this application is unnecessary. All references to the Application to Opt-out of Rockfish Cooperative have been removed in the regulatory text. In § 679.81(f)(3), NMFS changed the deadline for the Application for Rockfish Cooperative Fishing Quota from March 1 each year, to March 15, 2012, for the first year of the program, and to March 1 for all subsequent years to ensure rockfish cooperatives are allotted 30 days to apply for rockfish CQ, as discussed in Comment 18. NMFS also relocated provisions regarding the transfer of CQ from § 679.4(n)(1)(iv)(A) and (B), to § 679.81(i)(4)(ii)(H), because these provisions are specific to limitations on transfers of CQ and are more appropriately covered in § 679.81, as discussed earlier in Comment 2. Further, NMFS also clarified that a rockfish cooperative may transfer rockfish primary and secondary species

CQ after November 15, or after NMFS has approved a rockfish cooperative termination of fishing declaration for that rockfish cooperative in response to Comment 2.

In § 679.82(b), NMFS clarified that an opt-out vessel is any vessel named on an LLP license that is not named on a timely-submitted and approved Annual Application for Cooperative Fishing Quota. As discussed earlier in response to Comment 22, NMFS will determine that a catcher/processor is opting-out if NMFS does not receive an Application for Cooperative Fishing Quota from that holder. This change is necessary because NMFS removed the Application to Opt-out of Rockfish Cooperative.

In Table 28b to Part 679—Qualifying Season Dates for Central GOA Rockfish Primary Species, and as discussed earlier in comment 8, NMFS corrected the qualifying season dates for Pacific ocean perch and pelagic shelf rockfish.

Additional Changes From the Proposed Rule

NMFS made the following changes from the proposed rule to the final rule to clarify provisions and correct typographical errors, including numerous errors in capitalization and in grammar.

In § 679.4(a)(1), NMFS clarified that more information on CQ permits may be found in paragraph (n) of this section. The previous paragraph reference did not exist.

In § 679.4(b)(6)(iii), NMFS removed language about rockfish legal landings to clarify that NMFS will reissue a Federal fisheries permit to any person who holds a Federal fisheries permit issued for a vessel if that vessel is subject to sideboard provisions. This change simplifies the provision and does not change the intent of the proposed language.

In § 679.7, NMFS clarified the paragraph redesignation instructions. These changes are administrative in nature. All regulatory text remains the same, unless noted below.

In § 679.7(n)(1)(i) and (iii), NMFS removed the word ''other'' because its use was repetitive in these paragraphs.

In § 679.7(n)(2)(iii), NMFS changed a reference for opt-out vessels to § 679.81(e)(2) from 679.81(f)(5) as a result of changes made in response to Comment 22 to remove the Application to Opt-out of a Rockfish Cooperative.

In § 679.7(n)(8)(v), NMFS corrected a typographical error and removed the word ''he,'' which was erroneously placed in the paragraph.

In § 679.20(e)(3)(iv), NMFS corrected a typographical error to remove the number ''4'' from the word CQ in the paragraph.

NMFS clarified the revision instructions for Subpart G to ensure that all section titles in the instructions match the section titles in the proposed regulations. These changes are administrative in nature. All regulatory text remains the same, unless noted below.

In § 679.80(a)(3), NMFS notes that the fishing seasons are subject to other provisions of this part. The rockfish cooperative fishing season, as specified in paragraph (a)(3)(ii), ends on November 15 of each year, however; as specified in § 679.23(d)(3)(ii)(B), trawl vessels may not directed fish for Pacific cod after November 1 of each year. This means that vessels that have rockfish CQ onboard would be in violation of seasonal provisions if that vessel is directed fishing for Pacific cod after November 1 of each year. A review of available data indicates that this clarification would not impact the fishery. No changes in the regulations are required.

In § 679.80(d)(3), NMFS changed the Application for Rockfish QS deadline to January 17, 2012, from January 3, 2012. NMFS anticipates the final rule will publish on or about December 15, 2011. This change will allow potential participants at least 30 days to submit applications for initial allocations of rockfish QS.

In § 679.80(f)(2)(i), NMFS reworded a sentence to clarify that the use cap specified in § 679.82(a)(2), applies to the receiving LLP license in a transfer of rockfish QS. This change simplifies the provision and does not change the intent of the proposed language.

In § 679.80(f)(2)(ii), NMFS corrected the paragraph reference for transferring rockfish QS in excess of the use cap to paragraph (f)(2)(i) rather than paragraph (f)(1)(i), which does not exist.

In § 679.80(e)(4), and Table 29 to Part 679—Initial Rockfish QS Pools, NMFS changed the date to establish the Rockfish Program official record from January 31, 2012, to February 14, 2012. The Application for Rockfish QS deadline is January 17, 2012, and NMFS requires approximately 30 days to process applications and finalize the official record used to determine initial rockfish QS pools.

In § 679.81(a), NMFS clarified that sector and LLP license allocations of rockfish primary species will be assigned as described in paragraph (b) of this section.

In § 679.81(e)(2) and (f)(1), NMFS clarified that to receive a CQ permit, a cooperative representative must submit a complete and timely Application for Rockfish Cooperative Fishing Quota that is approved by NMFS. This clarification is necessary to determine whether a catcher/processor has opted-out of participating in a rockfish cooperative.

In § 679.81(g)(2), NMFS clarified that a designated representative must log in to the ''NMFS' online system'' rather than an ''online system.''

In § 679.82, NMFS corrected several typographical errors in paragraph references. In paragraph (e)(7), NMFS clarified that the provision is for holders of catcher/processor designated ''LLP licenses'' rather than ''LLP'' only.

In § 679.84, NMFS clarified in paragraph (g)(4) that all halibut PSC in the GOA used by a catcher/processor vessel, except halibut PSC used by a vessel fishing under a CQ permit in the Central GOA, will be debited against the sideboard limit established for the rockfish cooperative or catcher/processor opt-out vessel.

Classification

The Assistant Administrator for Fisheries, NOAA, has determined this rule is consistent with Amendment 88 to the Fishery Management Plan for Groundfish of the Gulf of Alaska, the MSA, and other applicable laws.

Executive Order 12866

This final rule has been determined to be not significant for the purposes of Executive Order 12866.

Pursuant to 5 U.S.C. 553(d)(3), NOAA finds good cause to waive the 30-day delay in effectiveness for this final rule. The 30-day delay in effectiveness is unnecessary and contrary to the public interest. Amendment 88 is necessary to replace the Central GOA Rockfish Pilot Program (Pilot Program), scheduled to expire December 31, 2011. If NMFS fails to implement Amendment 88 to take the place of Pilot Program regulations, the fishery will return to management under the LLP Program, thus undermining the purpose of this rule and of the MSA. Moreover, reverting to the LLP Program will remove the benefits to the fish stock that this rule would put in place.

NMFS requires approximately 170 days to prepare for the management of the rockfish fisheries under Amendment 88 before fishing begins on May 1, 2012. Delaying the effective date of Amendment 88 until after mid-December, 2011, will reduce the amount of time available for participants to review and submit applications to NMFS under the new program requirements. It will also reduce the time available for NMFS to prepare and mail permits to program participants. Immediate effectiveness will ensure the final rule is effective in time to initiate

the permit application processes for Amendment 88 as Pilot Program regulations expire, and thus ensure the highest level of participation in the Rockfish Program and therefore the greatest benefit to the public. Additional time is required for the two permit application periods prior to the start of fishing.

The first application period is for Rockfish QS, which must be submitted to NMFS by a rockfish eligible harvester by January 17, 2012. Typically, this application period opens 30 days prior to the application deadline. Immediate effectiveness will enable NMFS to open the application period on or about December 15, 2011, in order to allow applicants enough time to apply for initial QS allocations. After the first application deadline, NMFS requires one month to process applications and assign QS to LLP licenses so that participants may join rockfish cooperatives. NMFS is unable to calculate QS allocations until all timely applications are submitted. The Rockfish Program official record for initial rockfish QS pools is established February 14, 2012.

The second application period is for the annual CQ, which must be submitted by rockfish cooperatives by March 15 of the first year of the program. Immediate effectiveness of this rule will provide 30 days to rockfish eligible harvesters to join rockfish cooperatives and prepare for the fishing season after the revised LLP licenses are distributed by NMFS. The processing and harvesting sectors must have time after the issuance of rockfish QS to establish new associations under Amendment 88 before the rockfish cooperative is required to submit the annual CQ application to NMFS. Waiving the 30-day delay in effectiveness ensures that these processes can be completed in a timely manner. NMFS then requires 47 days to calculate, issue, and mail out rockfish CQ permits after the March 15 application deadline. NMFS anticipates extra time will be needed to verify that the CQ calculations generated by the database under the new program are correct. Immediate effectiveness of the Amendment 88 final rule will give the fishing industry the earliest possible opportunity to prepare and apply for participation under Amendment 88 before the fishing season begins, and thus will help maximize participation in the Rockfish Program. A 30-day delay in effectiveness would disrupt the initial and annual application processes, which may create confusion and frustration in the industry if NMFS is unable to allow sufficient time for applicants to apply for participation under new program requirements.

Because the only immediate regulatory effect is the enhancement and increased opportunity to prepare and submit applications, immediate effectiveness will not harm or prejudice any Amendment 88 participants or applicants. This rule improves an applicant's opportunity to participate under new program requirements and does not require any party to come into immediate compliance with any measures. Immediate effectiveness of Amendment 88 will allow NMFS and industry to better prepare for the upcoming fishing season, which does not begin until May 1, 2012. This timeframe allows participants ample time to organize and adjust to the new management criteria under Amendment 88 before the fishing season begins. Therefore, immediate effectiveness of this provision will not create a burden for the affected industry. Immediate effectiveness will benefit the industry and allow sufficient time for applicants to prepare for participation under new program requirements. For these reasons, NMFS finds good cause to waive the 30-day delay in effectiveness under 5 U.S.C. 553(d)(3).

Final Regulatory Flexibility Analysis

This final regulatory flexibility analysis (FRFA) incorporates the Initial Regulatory Flexibility Analysis (IRFA), a summary of the significant issues raised by the public comments, NMFS' responses to those comments, and a summary of the analyses completed to support the action. NMFS published the proposed rule on August 19, 2011 (76 FR 52148) with comments invited through September 19, 2011. An IRFA was prepared and summarized in the ''Classification'' section of the preamble to the proposed rule. The description of this action, its purpose, and its legal basis are described in the preamble to the proposed rule and are summarized below. The impacts on small entities, which are defined in the IRFA for this action, are not repeated here. Analytical requirements for the FRFA are described in the Regulatory Flexibility Act (RFA), 5 U.S.C. 604(a)(1) through (5), and summarized below.

The FRFA must contain:

1. A succinct statement of the need for, and objectives of, the rule;

2. A summary of the significant issues raised by the public comments in response to the IRFA, a summary of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments;

3. A description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available;

4. A description of the projected reporting, recordkeeping, and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record; and

5. A description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.

The ''universe'' of entities to be considered in a FRFA generally includes only those small entities that can reasonably be expected to be directly regulated by the proposed action. If the effects of the rule fall primarily on a distinct segment of the industry, or portion thereof (*e.g.,* user group, gear type, geographic area), that segment would be considered the universe for purposes of this analysis.

In preparing a FRFA, an agency may provide either a quantifiable or numerical description of the effects of a rule (and alternatives to the rule), or more general descriptive statements, if quantification is not practicable or reliable.

Need for and Objectives of This Final Action

The Rockfish Program is a long-term program designed to replace the short-term Pilot Program that is scheduled to expire December 31, 2011. Recognizing the management, economic, safety, and conservation gains created by the Pilot Program, the Council developed a problem statement defining the purpose for development of the Rockfish Program, as described in Section 2.1 of the Analysis. The Rockfish Program is intended to continue the success of the Pilot Program by continuing to improve economic efficiency, reduce incentives for bycatch, encourage PSC avoidance, reduce unnecessary physical risk when fishing conditions are hazardous, and address a range of social concerns.

The legal basis for this action is the MSA. One of the stated purposes of the MSA is to promote domestic commercial fishing under sound conservation and management

principles and to achieve and maintain the optimum yield from each fishery. The MSA also requires that conservation and management measures take into account the importance of fishery resources to fishing communities in order to (A) provide for the sustained participation of such communities; and (B) to the extent practicable, minimize adverse economic impacts on such communities.

Summary of Significant Issues Raised during Public Comment

The proposed rule was published in the **Federal Register** on August 19, 2011 (76 FR 52148). NMFS received one comment related to the IRFA. The commenter stated that halibut PSC reductions were not addressed in the Analysis, and NMFS did not make any changes to the rule as a result of the comment. See Comment 35 in the section above titled ''Comments and Responses.''

NMFS also received comments on the general economic impacts of the Rockfish Program on different sectors of the industry. These comments are included in the ''Comments and Responses'' section above.

Number and Description of Directly Regulated Small Entities

For purposes of a FRFA, the U.S. Small Business Administration has established that a business involved in fish harvesting is a small business if it is independently owned and operated, not dominant in its field of operation (including its affiliates), and has combined annual gross receipts not in excess of $4.0 million for all its affiliated operations worldwide. This final action directly affects catcher/processors and catcher vessels that participate in the Central GOA rockfish fisheries. None of the 12 catcher/processors eligible for the Rockfish Program and regulated by this action are estimated to be small entities, as defined by the RFA. Thirty-two catcher vessels eligible for the Rockfish Program were either members of cooperatives and, as such, are not considered small entities for the purpose of the RFA, or had annual gross revenues of at least $4 million. The remaining 14 eligible catcher vessels are all considered small entities. It is likely that some of the eligible 14 catcher vessels are affiliated through partnerships with other entities, and would be considered large entities for the purpose of this action, but in the absence of complete ownership information, these affiliations cannot be definitively determined.

In addition to the main program, this action also creates an ''entry level'' fishery for the longline sector. Since participation in that fishery is voluntary, the number of small entities participating cannot be predicted. It is likely that a substantial portion of the entry level longline fishery participants will be small entities. These impacts are analyzed in the RIR prepared for this action (see **ADDRESSES**).

Recordkeeping and Reporting

Implementation of the Rockfish Program continues the overall reporting structure and recordkeeping requirements of the Pilot Program for participants in the Central GOA rockfish fisheries. The regulations proposed are not expected to increase the recordkeeping and reporting requirements for small entities in the rockfish fisheries.

Description of Significant Alternatives to the Final Action

The Council considered an extensive and elaborate series of alternatives, options, and suboptions as it designed and evaluated the potential for the continued rationalization of the Central GOA rockfish fisheries, including the ''no action'' alternative. The RIR presents the complete set of alternatives, in various combinations with the complex suite of options. Three alternatives for the entry level fisheries were considered: Status Quo/No Action (Alternative 1); current entry level management under the Pilot Program (Alternative 2); and an entry level fishery for longline gear only (Alternative 3). The third alternative was selected. Three alternatives for catcher/processors also were considered: Status Quo/No Action (Alternative 1); a rockfish cooperative program where allocations are based on harvest history of sector members (Alternative 2); and the existing Pilot Program management (Alternative 3). Alternative 2 was selected. Four alternatives for the catcher vessel sector were considered: Status Quo/No Action (Alternative 1); a rockfish cooperative program where allocations are based on harvest history of sector members (Alternative 2); a rockfish cooperative program where allocations are divided between historical harvesters and processing participants (Alternative 3); and a cooperative program where a harvester must join in association with a processor where associations are severable (Alternative 4). Alternative 4 was selected.

These alternatives constitute the suite of ''significant alternatives'' under this action for purposes of the RFA. Based upon the best available scientific data, and consideration of the objectives of this action, it appears that there are no alternatives to this action that have the potential to accomplish the stated objectives of the MSA and any other applicable statutes and that have the potential to minimize any significant adverse economic impact of this action on small entities. After public process, the Council concluded that its preferred alternative for the Rockfish Program would best accomplish the stated objectives articulated in the problem statement and applicable statutes, and minimize to the extent practicable adverse economic impacts on the universe of directly regulated small entities.

The Council and NMFS have taken several steps to minimize the burden on directly regulated small entities. The Council developed the alternatives from a list of elements and options, beginning with the elements of the Pilot Program, and proposed changes of stakeholders, the public, and the Council's Advisory Panel. The Council used an iterative process for defining alternatives, deliberating the specific provisions, after receiving staff discussion papers and public testimony, over the course of several meetings.

This action establishes an entry level fishery for the longline sector only. Any longline vessel exempt from CGOA LLP requirements or any holder of a CGOA longline LLP license may enter a longline vessel in the entry level fishery. To improve entry into these fisheries, no application is necessary to participate. The Council determined that vessels should not be prevented from entering the fishery mid-season because of a missed application deadline.

The preferred alternative defined for the catcher/processor sector, which establishes a cooperative only structure for the rockfish fisheries, allows catcher/processors to join a cooperative or opt-out of the Rockfish Program for the year. One annual application is required to be submitted before the application deadline to participate in a cooperative. Whether some or all of these catcher/processor vessels would choose not to join a cooperative and opt-out of the Rockfish Program cannot be predicted, and depends on their opportunities in other fisheries. The preferred catcher/processor alternative appears to minimize negative economic impacts on small entities to a greater extent than alternative 3, which allows sector participants to annually choose whether to fish in a cooperative, opt-out of the fishery, or participate in the limited access fishery. The limited access fishery has the potential to lead participants into a ''race for fish'' if too many participants register.

The fourth alternative defined for the catcher vessel sector, which establishes a cooperative program with annual, severable processor associations, was selected as the preferred alternative. The preferred catcher vessel alternative appears to minimize negative economic impacts on small entities to a greater extent than alternatives 2 and 3. NMFS and the Council anticipates that catcher vessels under this alternative may realize substantial improvements in harvest sector efficiency due to the ability to coordinate harvest activity, and a relative improvement in bargaining strength as a result of no processor allocations.

The Council and Secretary considered a no-action alternative, but this was rejected because it would not accomplish the objective of this action to retain the conservation, management, safety, and economic gains created by the Pilot Program to the extent practicable, while also considering the goals and limitations of the MSA LAPP provisions. The Council also considered structures similar to the Pilot Program in its alternatives, some of which were advanced for analysis and others were not as the Council opted to consider other structures that better met program goals.

Collection-of-Information Requirements

This rule contains collection-of-information requirements subject to the Paperwork Reduction Act (PRA), and which have been approved by Office of Management and Budget (OMB). The collections are listed below by OMB control number.

OMB Control No. 0206

The Federal Fisheries Permit and Federal Processor Permit are mentioned in this rule; however, the public reporting burden for this collection-of-information is not directly affected by this rule.

OMB Control No. 0213

Public reporting burden per response is estimated to average 30 minutes for Catcher/processor Trawl Gear Daily Cumulative Production Logbook; 35 minutes for Catcher/processor trawl gear electronic logbook.

OMB Control No. 0330

Scale, catch weighing, and monitoring requirements are mentioned in this rule; however, the public reporting burden for this collection-of-information is not directly affected by this rule.

OMB Control No. 0334

LLP requirements are mentioned in this rule; however, the public reporting burden for this collection-of-information is not directly affected by this rule.

OMB Control No. 0445

The vessel monitoring system requirements are mentioned in this rule; however, the public reporting burden for this collection-of-information is not directly affected by this rule.

OMB Control No. 0515

eLandings is mentioned in this rule; however, the public reporting burden for this collection-of-information is not directly affected by this rule.

OMB Control No. 0545

Public reporting burden per response is estimated to average 2 hours for Application for Rockfish Cooperative Quota; 15 minutes for Cooperative Termination of Fishing Declaration; 2 hours for Application for Rockfish Limited Access Fishery (this application is removed with this action); 30 minutes for Rockfish Cooperative Vessel Check-in and Check-out Report; 2 hours for Rockfish Ex-vessel Volume and Value Report; 4 hours for appeal of a NMFS decision; 2 hours for Application for Rockfish Quota Share; 2 hours for Application to Transfer Rockfish Quota Share; 2 hours for Application for Inter-cooperative Transfer of Rockfish Cooperative Quota; 2 hours for Application for Rockfish Entry Level Longline Fishery; and 4 hours for the annual Rockfish Cooperative Report.

Public reporting burden includes the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding these burden estimates, or any other aspect of these data collections, including suggestions for reducing the burden, to NMFS (see **ADDRESSES**) and by email to *OIRA_Submission@omb.eop.gov,* or fax to (202) 395–7285.

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB control number.

Small Entity Compliance Guide

Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 states that, for each rule or group of related rules for which an agency is required to prepare a FRFA, the agency shall publish one or more guides to assist small entities in complying with the rule, and shall designate such publications as ''small entity compliance guides.'' The agency shall explain the actions a small entity is required to take to comply with a rule or group of rules. NMFS has posted a small entity compliance guide on its Web site at *http://alaskafisheries.noaa.gov/* to satisfy the Small Business Regulatory Enforcement Fairness Act of 1996 requirement for a plain language guide to assist small entities in complying with this rule.

List of Subjects in 50 CFR Part 679

Alaska, Fisheries, Reporting and recordkeeping requirements.

Dated: December 19, 2011.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 679 is amended as follows:

PART 679—FISHERIES OF THE EXCLUSIVE ECONOMIC ZONE OFF ALASKA

■ 1. The authority citation for part 679 continues to read as follows:

Authority: 16 U.S.C. 773 *et seq.,* 1801 *et seq.,* 3631 *et seq.;* and Pub. L. 108–447.

■ 2. In § 679.2,

■ a. Remove the definitions for ''Affiliation for the purpose of defining AFA entities'', ''Eligible rockfish harvester'', ''Eligible rockfish processor'', ''Halibut PSC sideboard limit'', ''Initial rockfish QS pool'', ''Legal rockfish landing for purposes of qualifying for the Rockfish Program'', ''Official Rockfish Program record'', ''Opt-out fishery'', ''Primary rockfish species'', ''Rockfish entry level fishery'', ''Rockfish entry level processor'', ''Rockfish limited access fishery'', ''Secondary species'', ''Sector for purposes of the Rockfish Program'', ''Sideboard limit for purposes of the Rockfish Program'', and ''Ten percent or greater direct or indirect ownership interest for purposes of the Amendment 80 Program and the Rockfish Program'';

■ b. Revise the definitions of ''Affiliates'', ''Basis species'', ''Cooperative quota (CQ)'', ''Rockfish cooperative'', ''Rockfish entry level harvester'', ''Rockfish Program'', ''Rockfish Program fisheries'', ''Rockfish Program species'', ''Rockfish quota share (QS)'', ''Rockfish QS pool'', ''Rockfish QS unit'', and ''Rockfish sideboard fisheries''; and

■ c. Add definitions for ''Affiliation for the purpose of defining AFA and the Rockfish Program'', ''Rockfish (Catch Monitoring Control Plan) CMCP

specialist'', ''Rockfish CQ'', ''Rockfish CQ equivalent pound(s)'', ''Rockfish eligible harvester'', ''Rockfish entry level longline fishery'', ''Rockfish entry level trawl fishery'', ''Rockfish fee liability'', ''Rockfish fee percentage'', ''Rockfish legal landings'', ''Rockfish processor'', ''Rockfish Program official record'', ''Rockfish sector'', ''Rockfish sideboard limit'', ''Rockfish sideboard ratio'', ''Rockfish standard ex-vessel value'', ''Rockfish standard price'', and ''Ten percent or greater direct or indirect ownership interest for purposes of the Amendment 80 Program'' in alphabetical order to read as follows:

§ 679.2. Definitions.

* * * * *

Affiliates, for purposes of subparts E and H to this part, means business concerns, organizations, or individuals are affiliates of each other if, directly or indirectly, either one controls or has the power to control the other, or a third party controls or has the power to control both. Indicators of control include, but are not limited to: Interlocking management or ownership; identity of interests among family members; shared facilities and equipment; common use of employees; or a business entity organized following the decertification, suspension, or proposed decertification of an observer provider that has the same or similar management, ownership, or principal employees as the observer provider that was decertified, suspended, or proposed for decertification.

Affiliation for the purpose of defining AFA and the Rockfish Program means a relationship between two or more individuals, corporations, or other business concerns in which one concern directly or indirectly owns a 10 percent or greater interest in another, exerts control over another, or has the power to exert control over another; or a third individual, corporation, or other business concern directly or indirectly owns a 10 percent or greater interest in both, exerts control over both, or has the power to exert control over both.

(1) *What is 10 percent or greater ownership*? For the purpose of determining affiliation, 10 percent or greater ownership is deemed to exist if an individual, corporation, or other business concern directly or indirectly owns 10 percent or greater interest in a second corporation or other business concern.

(2) *What is an indirect interest*? An indirect interest is one that passes through one or more intermediate entities. An entity's percentage of indirect interest in a second entity is equal to the entity's percentage of direct interest in an intermediate entity multiplied by the intermediate entity's direct or indirect interest in the second entity.

(3) *What is control*? For the purpose of determining affiliation, control is deemed to exist if an individual, corporation, or other business concern has any of the following relationships or forms of control over another individual, corporation, or other business concern:

(i) Controls 10 percent or more of the voting stock of another corporation or business concern;

(ii) Has the authority to direct the business of the entity that owns the fishing vessel or processor. The authority to direct the business of the entity does not include the right to simply participate in the direction of the business activities of an entity that owns a fishing vessel or processor;

(iii) Has the authority in the ordinary course of business to limit the actions of or to replace the chief executive officer, a majority of the board of directors, any general partner or any person serving in a management capacity of an entity that holds 10 percent or greater interest in a fishing vessel or processor. Standard rights of minority shareholders to restrict the actions of the entity are not included in this definition of control provided they are unrelated to day-to-day business activities. These rights include provisions to require the consent of the minority shareholder to sell all or substantially all the assets, to enter into a different business, to contract with the major investors or their affiliates, or to guarantee the obligations of majority investors or their affiliates;

(iv) Has the authority to direct the transfer, operation, or manning of a fishing vessel or processor. The authority to direct the transfer, operation, or manning of a vessel or processor does not include the right to simply participate in such activities;

(v) Has the authority to control the management of or to be a controlling factor in the entity that holds 10 percent or greater interest in a fishing vessel or processor;

(vi) Absorbs all the costs and normal business risks associated with ownership and operation of a fishing vessel or processor;

(vii) Has the responsibility to procure insurance on the fishing vessel or processor, or assumes any liability in excess of insurance coverage;

(viii) Has the authority to control a fishery cooperative through 10 percent or greater ownership or control over a majority of the vessels in the cooperative, has the authority to appoint, remove, or limit the actions of or replace the chief executive officer of the cooperative, or has the authority to appoint, remove, or limit the actions of a majority of the board of directors of the cooperative. In such instance, all members of the cooperative are considered affiliates of the individual, corporation, or other business concern that exerts control over the cooperative; or

(ix) Has the ability through any other means whatsoever to control the entity that holds 10 percent or greater interest in a fishing vessel or processor.

* * * * *

Basis species means any species or species group that is open to directed fishing that the vessel is authorized to harvest (see Tables 10, 11, and 30 to this part).

* * * * *

Cooperative quota (CQ):

(1) *For purposes of the Amendment 80 Program* means:

(i) The annual catch limit of an Amendment 80 species that may be caught by an Amendment 80 cooperative while fishing under a CQ permit;

(ii) The amount of annual halibut and crab PSC that may be used by an Amendment 80 cooperative while fishing under a CQ permit.

(2) *For purposes of the Rockfish Program* means:

(i) The annual catch limit of a rockfish primary species or rockfish secondary species that may be harvested by a rockfish cooperative while fishing under a CQ permit;

(ii) The amount of annual halibut PSC that may be used by a rockfish cooperative in the Central GOA while fishing under a CQ permit (see rockfish halibut PSC in this section).

* * * * *

Rockfish (Catch Monitoring Control Plan) CMCP specialist, for purposes of subpart H to this part, means a designee authorized by the Regional Administrator to monitor compliance with catch monitoring and control plans or for other purposes of conservation and management of marine resources as specified by the Regional Administrator.

Rockfish cooperative means a group of rockfish eligible harvesters who have chosen to form a rockfish cooperative under the requirements in § 679.81 in order to combine and harvest fish collectively under a CQ permit issued by NMFS.

Rockfish CQ (See CQ)

Rockfish CQ equivalent pound(s) means the weight recorded in pounds, for a rockfish CQ landing and calculated as round weight.

Rockfish eligible harvester means a person who is permitted by NMFS to hold rockfish QS.

Rockfish entry level harvester means a person who is harvesting fish in the rockfish entry level longline fishery.

Rockfish entry level longline fishery means the longline gear fisheries in the Central GOA conducted under the Rockfish Program by rockfish entry level harvesters.

Rockfish entry level trawl fishery means the trawl gear fisheries in the Central GOA conducted under the Rockfish Program by rockfish entry level harvesters during 2007 through 2011 only.

Rockfish fee liability means that amount of money for Rockfish Program cost recovery, in U.S. dollars, owed to NMFS by a CQ permit holder as determined by multiplying the appropriate standard ex-vessel value of his or her rockfish landing(s) by the appropriate rockfish fee percentage.

Rockfish fee percentage means that positive number no greater than 3 percent (0.03) determined by the Regional Administrator and established for use in calculating the rockfish fee liability for a CQ permit holder.

* * * * *

Rockfish legal landings means groundfish caught and retained in compliance with state and Federal regulations in effect at that time unless harvested and then processed as meal, and—

(1) *For catcher vessels:* The harvest of groundfish from the Central GOA regulatory area that is offloaded and recorded on a State of Alaska fish ticket during the directed fishing season for that rockfish primary species as established in Tables 28a and 28b to this part.

(2) *For catcher/processors:* The harvest of groundfish from the Central GOA regulatory area that is recorded on a weekly production report based on harvests during the directed fishing season for that rockfish primary species as established in Table 28a to this part.

Rockfish processor means a shoreside processor with a Federal processor permit that receives groundfish harvested under the authority of a CQ permit.

Rockfish Program means the program implemented under subpart G to this part to manage Rockfish Program fisheries.

Rockfish Program fisheries means one of following fisheries under the Rockfish Program:

(1) A rockfish cooperative in the catcher/processor sector;

(2) A rockfish cooperative in the catcher vessel sector; and

(3) The rockfish entry level longline fishery.

Rockfish Program official record means information used by NMFS necessary to determine eligibility to participate in the Rockfish Program and assign specific harvest privileges or limits to Rockfish Program participants.

Rockfish Program species means the following species that are managed under the authority of the Rockfish Program:

(1) *Rockfish primary species* means northern rockfish, Pacific ocean perch, and pelagic shelf rockfish in the Central GOA regulatory area.

(2) *Rockfish secondary species* means the following species in the Central GOA regulatory area:

(i) Sablefish not allocated to the IFQ Program;

(ii) Thornyhead rockfish;

(iii) Pacific cod for the catcher vessel sector;

(iv) Rougheye rockfish for the catcher/processor sector; and

(v) Shortraker rockfish for the catcher/processor sector.

(3) *Rockfish non-allocated species* means all groundfish species other than Rockfish Program species.

Rockfish quota share (QS) means a permit expressed in numerical units, the amount of which is based on rockfish legal landings for purposes of qualifying for the Rockfish Program and that are assigned to an LLP license.

Rockfish QS pool means the sum of rockfish QS units established for the Rockfish Program fishery based on the Rockfish Program official record.

Rockfish QS unit means a measure of QS based on rockfish legal landings.

Rockfish sector means:

(1) *Catcher/processor sector:* Those rockfish eligible harvesters who hold an LLP license with a catcher/processor designation and who are eligible to receive rockfish QS that may result in CQ that may be harvested and processed at sea.

(2) *Catcher vessel sector:* Those rockfish eligible harvesters who hold an LLP license who are eligible to receive rockfish QS that may result in CQ that may not be harvested and processed at sea.

Rockfish sideboard fisheries means fisheries that are assigned a rockfish sideboard limit that may be harvested by participants in the Rockfish Program.

Rockfish sideboard limit means:

(1) The maximum amount of northern rockfish, Pacific ocean perch, and pelagic shelf rockfish that may be harvested in the Rockfish Program as specified in the sideboard provisions under § 679.82(e), as applicable; and

(2) The maximum amount of halibut PSC that may be used in the Rockfish Program as specified in the sideboard provisions under § 679.82(e), as applicable.

Rockfish sideboard ratio means a portion of a rockfish sideboard limit for a groundfish fishery that is assigned as specified under § 679.82(e).

Rockfish standard ex-vessel value means the total U.S. dollar amount of rockfish CQ groundfish landings as calculated by multiplying the number of landed rockfish CQ equivalent pounds by the appropriate rockfish standard price determined by the Regional Administrator.

Rockfish standard price means a price, expressed in U.S. dollars per rockfish CQ equivalent pound, for landed rockfish CQ groundfish determined annually by the Regional Administrator.

* * * * *

Ten percent or greater direct or indirect ownership interest for purposes of the Amendment 80 Program means a relationship between two or more persons in which one directly or indirectly owns or controls a 10 percent or greater interest in, or otherwise controls, another person; or a third person which directly or indirectly owns or controls, or otherwise controls a 10 percent or greater interest in both. For the purpose of this definition, the following terms are further defined:

(1) *Person.* A person is a person as defined in this section.

(2) *Indirect interest.* An indirect interest is one that passes through one or more intermediate persons. A person's percentage of indirect interest in a second person is equal to the person's percentage of direct interest in an intermediate person multiplied by the intermediate person's direct or indirect interest in the second person.

(3) *Controls a 10 percent or greater interest.* A person controls a 10 percent or greater interest in a second person if the first person:

(i) Controls a 10 percent ownership share of the second person; or

(ii) Controls 10 percent or more of the voting or controlling stock of the second person.

(4) *Otherwise controls.* A person otherwise controls another person, if the first person has:

(i) The right to direct, or does direct, the business of the other person;

(ii) The right in the ordinary course of business to limit the actions of, or replace, or does limit or replace, the chief executive officer, a majority of the board of directors, any general partner, or any person serving in a management capacity of the other person;

(iii) The right to direct, or does direct, the Rockfish Program fishery processing activities of the other person;

(iv) The right to restrict, or does restrict, the day-to-day business activities and management policies of the other person through loan covenants;

(v) The right to derive, or does derive, either directly, or through a minority shareholder or partner, and in favor of the other person, a significantly disproportionate amount of the economic benefit from the processing of fish by that other person;

(vi) The right to control, or does control, the management of, or to be a controlling factor in, the other person;

(vii) The right to cause, or does cause, the purchase or sale of fish processed by the other person;

(viii) Absorbs all of the costs and normal business risks associated with ownership and operation of the other person; or

(ix) Has the ability through any other means whatsoever to control the other person.

* * * * *

■ 3. In § 679.4,

■ a. Remove paragraphs (a)(1)(xii)(C) and (D), (n)(2)(iii) through (v), and (n)(3); and

■ b. Revise paragraphs (a)(1)(xii)(A) and (B), (b)(6)(iii), (k)(12)(i), (n)(1)(i), (n)(1)(ii), and (n)(2)(i) and (ii) to read as follows:

§ 679.4 Permits.

(a) * * *

(1) * * *

If program permit or card type is:	Permit is in effect from issue date through the end of:	For more information, see . . .
*	*	*
(xii) * * *		
(A) Rockfish QS	Indefinite	§ 679.80(a).
(B) CQ	Until expiration date shown on permit	Paragraph (n) of this section.
*	*	*

* * * * *

(b) * * *

(6) * * *

(iii) NMFS will reissue a Federal fisheries permit to any person who holds a Federal fisheries permit issued for a vessel if that vessel is subject to sideboard provisions as described under § 679.82(d) through (f).

* * * * *

(k) * * *

(12) * * *

(i) *General.* In addition to other requirements of this part, a license holder must have rockfish QS assigned to his or her groundfish LLP license to conduct directed fishing for rockfish primary species and rockfish secondary species with trawl gear.

* * * * *

(n) * * *

(1) * * *

(i) A CQ permit is issued annually to a rockfish cooperative if the members of that rockfish cooperative have submitted a complete and timely application for CQ as described in § 679.81(f) that is approved by the Regional Administrator. A CQ permit authorizes a rockfish cooperative to participate in the Rockfish Program. The CQ permit will indicate the amount of rockfish primary species and rockfish secondary species that may be harvested by the rockfish cooperative, and the amount of rockfish halibut PSC that may be used by the rockfish cooperative. The CQ permit will list the members of the rockfish cooperative, the vessels that are authorized to fish under the CQ permit for that rockfish cooperative, and the rockfish processor with whom that rockfish cooperative is associated, if applicable.

(ii) A CQ permit is valid only until the end of the calendar year for which the CQ permit is issued;

* * * * *

(2) * * *

(i) A rockfish cooperative may choose to terminate its CQ permit through a declaration submitted to NMFS.

(ii) This declaration may only be submitted to NMFS electronically. The rockfish cooperative's designated representative must log into the online system and create a request for termination of fishing declaration as indicated on the computer screen. By using the rockfish cooperative's NMFS ID and password, and submitting the termination of fishing declaration request, the designated representative certifies that all information is true, correct, and complete.

* * * * *

■ 4. In § 679.5,

■ a. Remove paragraphs (r)(4), (r)(7), and (r)(10)(iv);

■ b. Redesignate paragraphs (r)(5) as (r)(4), (r)(6) as (r)(5), and (r)(8) through (r)(10) as (r)(6) through (r)(8), respectively;

■ c. Revise newly redesignated paragraphs (r)(4), (r)(5), (r)(6)(i), (r)(8)(i)(A) and (B), and (r)(8)(ii);

■ d. Revise paragraphs (r)(1) through (3); and

■ e. Add paragraphs (a)(1)(iii)(F), (r)(9), and (r)(10) to read as follows:

§ 679.5 Recordkeeping and reporting (R&R).

(a) * * *

(1) * * *

(iii) * * *

If harvest made under . . . program	Record the . . .	For more information, see . . .
*	*	*
(F) Rockfish Program	Cooperative number	subpart H to this part.

* * * * *

(r) * * *

(1) *General.* The owners and operators of catcher vessels, catcher/processors, and shoreside processors authorized as participants in the Rockfish Program must comply with the applicable recordkeeping and reporting requirements of this section and must assign all catch to a rockfish cooperative or rockfish sideboard fishery, as applicable at the time of catch or receipt

of groundfish. All owners of catcher vessels, catcher/processors, and shoreside processors authorized as participants in the Rockfish Program must ensure that their designated representatives or employees comply with all applicable recordkeeping and reporting requirements.

(2) *Logbook*—(i) *DFL.* Operators of catcher vessels equal to or greater than 60 ft (18.3 m) LOA participating in a Rockfish Program fishery and using trawl gear must maintain a daily fishing logbook for trawl gear as described in paragraphs (a) and (c) of this section.

(ii) *ELB.* Operators of catcher/processors permitted in the Rockfish Program must use a combination of NMFS-approved catcher/processor trawl gear ELB and eLandings to record and report groundfish and PSC information as described in paragraph (f) of this section to record Rockfish Program landings and production.

(3) *eLandings.* Managers of shoreside processors that receive rockfish primary species or rockfish secondary species in the Rockfish Program must use eLandings or NMFS-approved software as described in paragraphs (e) and (f) of this section, instead of a logbook and WPR, to record Rockfish Program landings and production.

(4) *Production reports.* Operators of catcher/processors that are authorized as processors in the Rockfish Program must submit a production report as described in paragraphs (e)(9) and (10) of this section.

(5) *Product transfer report (PTR), processors.* Operators of catcher/processors and managers of shoreside processors that are authorized as processors in the Rockfish Program must submit a PTR as described in paragraph (g) of this section.

(6) * * *

(i) *Applicability.* A rockfish cooperative permitted in the Rockfish Program (see § 679.4(n)(1)) annually must submit to the Regional Administrator an annual rockfish cooperative report detailing the use of the cooperative's CQ.

* * * * *

(8) * * *

(i) * * *

(A) *Vessel check-in.* The designated representative of a rockfish cooperative must designate any vessel that is authorized to fish under the rockfish cooperative's CQ permit before that vessel may fish under that CQ permit through a check-in procedure. The designated representative for a rockfish cooperative must submit to NMFS, in accordance with (8)(ii), a check-in designation for a vessel:

(*1*) At least 48 hours prior to the time the catcher vessel begins a fishing trip to fish under a CQ permit; or

(*2*) At least 1 hour prior to the time the catcher/processor begins a fishing trip to fish under a CQ permit; and

(*3*) A check-in designation is effective at the beginning of the first fishing trip after the designation has been submitted.

(B) *Vessel check-out.* The designated representative of a rockfish cooperative must designate any vessel that is no longer fishing under a CQ permit for that rockfish cooperative through a check-out procedure. A check-out report must be submitted to NMFS, in accordance with (8)(ii), within 6 hours after the effective date and time the rockfish cooperative ends the vessel's authority to fish under the CQ permit.

(*1*) If the vessel is fishing under a CQ permit for a catcher vessel cooperative, a check-out designation is effective at the end of a complete offload;

(*2*) If the vessel is fishing under a CQ permit for a catcher/processor cooperative, a check-out designation is effective upon submission to NMFS.

(ii) *Submittal.* The designated representative of the rockfish cooperative must submit a vessel check-in or check-out report electronically. The rockfish cooperative's designated representative must log into the online system and create a vessel check-in or vessel check-out request as indicated on the computer screen. By using the NMFS ID password and submitting the transfer request, the designated representative certifies that all information is true, correct, and complete.

* * * * *

(9) *Rockfish CQ cost recovery fee submission* (See § 679.85).

(10) *Rockfish Ex-vessel Volume and Value Report*—(i) *Applicability.* A rockfish processor that receives and purchases landings of rockfish CQ groundfish must submit annually to NMFS a complete Rockfish Ex-vessel Volume and Value Report, as described in this paragraph (r)(10), for each reporting period for which the rockfish processor receives rockfish CQ groundfish.

(ii) *Reporting period.* The reporting period of the Rockfish Ex-vessel Volume and Value Report shall extend from May 1 through November 15 of each year.

(iii) *Due date.* A complete Rockfish Ex-vessel Volume and Value Report must be received by the Regional Administrator not later than December 1 of the year in which the rockfish processor received the rockfish CQ groundfish.

(iv) *Information required.* (A) The rockfish processor must log in using the rockfish processor's password and NMFS person ID to submit a Rockfish Ex-vessel Volume and Value Report. The NMFS software autofills the rockfish processor's name. The User must review the autofilled cells to ensure that they are accurate. A completed application must contain the information specified on the Rockfish Ex-vessel Volume and Value Report with all applicable fields accurately filled-in.

(B) *Certification.* By using the rockfish processor NMFS ID and password and submitting the report, the rockfish processor certifies that all information is true, correct, and complete to the best of his or her knowledge and belief.

(v) *Submittal.* The rockfish processor must complete and submit online by electronic submission to NMFS the Rockfish Ex-vessel Volume and Value Report available at *https://alaskafisheries.noaa.gov.*

* * * * *

■ 5. In § 679.7,

■ a. Remove paragraphs (n)(1)(iv) through (viii), (n)(2)(iv), (n)(3)(ii) and (iv), and (n)(6);

■ b. Redesignate paragraphs (n)(3)(iii) as (n)(3)(ii), (n)(7) as (n)(6), and (n)(8) as (n)(7);

■ c. Redesignate newly redesignated paragraphs (n)(6)(i) through (vi) as (n)(6)(iii) through (viii);

■ d. Revise newly redesignated paragraphs (n)(3)(ii), and (n)(6)(iii) through (vii);

■ e. Revise paragraphs (n)(1)(i) through (iii), (n)(2)(i) through (iii), (n)(4), and (n)(5); and

■ f. Add paragraphs (n)(6)(i), (ii), (ix), and (x), and (n)(8) to read as follows:

§ 679.7 Prohibitions.

* * * * *

(n) * * *

(1) * * *

(i) Use an LLP license assigned to a rockfish cooperative in any rockfish cooperative other than the rockfish cooperative to which that LLP license was initially assigned for that fishing year.

(ii) Use an LLP license that was excluded from the Rockfish Program or that opted out of the Rockfish Program in any rockfish cooperative for that calendar year.

(iii) Operate a vessel assigned to a rockfish cooperative in any rockfish cooperative other than the rockfish cooperative to which that vessel was initially assigned for that fishing year.

(2) * * *

(i) Operate a vessel that is assigned to a rockfish cooperative and fishing under

a CQ permit and fail to follow the catch monitoring requirements detailed in § 679.84(c) through (e).

(ii) Operate a vessel that is subject to a sideboard limit detailed in § 679.82(e), as applicable, and fail to follow the catch monitoring requirements detailed in § 679.84(c) from July 1 until July 31, if that vessel is harvesting fish in the West Yakutat District, Central GOA, or Western GOA management areas.

(iii) Operate a catcher/processor opt-out vessel, under § 679.81(e)(2), that is subject to sideboard provisions detailed in § 679.82(e) and (f), as applicable, and fail to follow the catch monitoring requirements detailed in § 679.84(d) from July 1 until July 31, if that vessel is harvesting fish in the West Yakutat District, Central GOA, or Western GOA management areas.

(3) * * *

(ii) Operate a vessel that is subject to a sideboard limit detailed in § 679.82(e) and fail to use functioning VMS equipment as described in § 679.28(f) at all times when operating in a reporting area off Alaska from July 1 until July 31.

(4) *Catcher/processor vessels that opt-out.* Operate a vessel that has opted-out of participating in a rockfish cooperative to directed fish for northern rockfish, Pacific ocean perch, or pelagic shelf rockfish in the Central GOA.

(5) *Rockfish processors.* (i) Take deliveries of, or process, groundfish harvested by a catcher vessel fishing under the authority of a rockfish CQ permit unless operating as a shoreside processor.

(ii) Process any groundfish delivered by a catcher vessel fishing under the authority of a CQ permit not weighed on a scale approved by the State of Alaska. The scale must meet the requirements specified in § 679.28(c).

(iii) Take deliveries of, or process, groundfish caught by a vessel fishing under the authority of a rockfish CQ permit without following an approved CMCP as described in § 679.28(g). A copy of the CMCP must be maintained at the facility and made available to authorized officers or NMFS-authorized personnel upon request.

(iv) Take deliveries of, or process, groundfish harvested by a catcher vessel fishing under the authority of a rockfish CQ permit outside of the geographic boundaries of the City of Kodiak as those boundaries are established by the State of Alaska on December 27, 2011.

(v) Fail to submit a timely and complete Rockfish Ex-vessel Volume and Value Report as required under § 679.5(r)(10)

(6) * * *

(i) Fail to retain any rockfish primary species or rockfish secondary species caught by a vessel when that vessel is fishing under the authority of a CQ permit.

(ii) Harvest rockfish primary species, rockfish secondary species, or use halibut PSC assigned to a rockfish cooperative in the Central GOA without a valid CQ permit.

(iii) Begin a fishing trip for any Rockfish Program species with any vessel assigned to a rockfish cooperative if the total amount of unharvested CQ that is currently held by that rockfish cooperative is zero or less for any species for which CQ is assigned.

(iv) Exceed a rockfish sideboard limit assigned to a rockfish cooperative in the catcher/processor sector.

(v) Operate a vessel assigned to a rockfish cooperative to fish under a CQ permit unless the rockfish cooperative has notified NMFS that the vessel is fishing under a CQ permit as described under § 679.5(r)(8).

(vi) Operate a vessel fishing under the authority of a CQ permit in the catcher vessel sector and to have any Pacific ocean perch, pelagic shelf rockfish, northern rockfish, sablefish, Pacific cod, or thornyhead rockfish aboard the vessel unless those fish were harvested under the authority of a CQ permit.

(vii) Catch and process onboard a vessel any rockfish primary species or rockfish secondary species harvested under the authority of a CQ permit issued to the catcher vessel sector.

* * * * *

(ix) Deliver rockfish primary species and rockfish secondary species harvested under the authority of a CQ permit to any processor other than a shoreside processor located within the geographic boundaries of the City of Kodiak as those boundaries are established by the State of Alaska on December 27, 2011.

(x) Fail to submit a timely and complete rockfish CQ cost recovery fee submission form as required under § 679.5(r)(9).

* * * * *

(8) *Rockfish entry level longline fishery*—(i) Take deliveries of, or process, groundfish caught by a catcher vessel directed fishing in the rockfish entry level longline fishery unless operating as a shoreside processor.

(ii) Deliver groundfish caught by a catcher vessel directed fishing in the rockfish entry level longline fishery to any processor other than a shoreside processor.

(iii) Use any gear other than longline gear to directed fish for a rockfish primary species in the rockfish entry level longline fishery.

(iv) Catch and process onboard a vessel any rockfish primary species harvested while directed fishing in the rockfish entry level longline fishery.

(v) Deliver groundfish caught by a catcher vessel directed fishing in the rockfish entry level longline fishery fishing after NMFS has closed directed fishing to the rockfish entry level longline fishery or November 15 of each calendar year, whichever occurs first.

* * * * *

■ 6. In § 679.20, add paragraph (e)(3)(iv) to read as follows:

§ 679.20 General limitations.

* * * * *

(e) * * *

(3) * * *

(iv) The maximum retainable amount for groundfish harvested in the Central GOA by a catcher/processor vessel fishing under a rockfish CQ permit is calculated at the end of each weekly reporting period, and is based on the basis species defined in Table 30 harvested since the previous weekly reporting period, or for any portion of a weekly reporting period that vessel was designated under a vessel check-in as specified in § 679.5(r)(8).

* * * * *

■ 7. In § 679.21,

■ a. Revise paragraphs (d)(5)(iii)(B) introductory text and (d)(5)(iii)(B)(*2*); and

■ b. Add paragraph (d)(5)(iii)(C) to read as follows:

§ 679.21 Prohibited species bycatch management.

* * * * *

(d) * * *

(5) * * *

(iii) * * *

(B) An amount not greater than 55 percent of the halibut PSC that had been allocated as CQ and that has not been used by a rockfish cooperative will be added to the last seasonal apportionment for trawl gear during the current fishing year:

* * * * *

(*2*) After the effective date of a termination of fishing declaration according to the provisions set out in § 679.4(n)(2), whichever occurs first.

(C) The amount of unused halibut PSC not reapportioned under the provisions described in § 679.21(d)(5)(iii)(B) will not be available for use as halibut PSC by any person for the remainder of that calendar year.

* * * * *

■ 8. In § 679.28,

■ a. Revise paragraph (g)(2)(iii); and

■ b. Add paragraph (g)(7)(xi) to read as follows:

§ 679.28 Equipment and operational requirements.

* * * * *

(g) * * *

(2) * * *

(iii) Rockfish Program, unless those fish are harvested under the rockfish entry level longline fishery as described under § 679.83.

* * * * *

(7) * * *

(xi) *CMCP specialist notification.* For shoreside processors receiving deliveries of groundfish harvested under the authority of a rockfish CQ permit, describe how the CMCP specialist will be notified of deliveries of groundfish harvested under the authority of a rockfish CQ permit.

* * * * *

■ 9. In § 679.50,

■ a. Remove paragraphs (c)(7)(i)(B) and (d)(7);

■ b. Redesignate paragraphs (c)(7)(i)(C) through (F) as (c)(7)(i)(B) through (E), respectively;

■ c. Revise paragraphs (a)(4), (c)(7)(i) heading, (c)(7)(i)(A) introductory text, and (c)(7)(ii);

■ d. Revise newly redesignated paragraphs (c)(7)(i)(B) and (c)(7)(i)(E); and

■ e. Add paragraph (c)(7)(iii) to read as follows:

§ 679.50 Groundfish observer program.

(a) * * *

Program	Catcher/processor	Catcher vessels	Motherships	Shoreside and stationary floating processors
*	*	*	*	*
(4) Rockfish Program	(c)(7)(i)	(c)(7)(ii)	N/A	(d)(1) through (4).
*	*	*	*	*

* * * * *

(c) * * *

(7) * * *

(i) *Catcher/processor*—(A) *Rockfish cooperative.* A catcher/processor that is named on an LLP license that is assigned to a rockfish cooperative and is fishing under the authority of a CQ permit must have at least two NMFS-certified observers onboard for each day that the vessel is used to harvest or process in the Central GOA from May 1 through the earlier of:

* * * * *

(B) *Rockfish sideboard fishery for catcher/processors in a rockfish cooperative.* A catcher/processor that is subject to a sideboard limit as described under § 679.82(e) must have at least two NMFS-certified observers onboard for each day that the vessel is used to harvest or process fish in the West Yakutat District, Central GOA, or Western GOA management areas from July 1 through July 31.

* * * * *

(E) *Sideboard fishery for catcher/processors not in a rockfish cooperative.* A catcher/processor vessel that is subject to a sideboard limit as described under § 679.82(e) and (f), must have at least one NMFS-certified observer onboard for each day that the vessel is used to harvest or process in the West Yakutat District, Central GOA, or Western GOA management areas from July 1 through July 31.

(ii) *Catcher vessels—rockfish cooperative.* A catcher vessel that is named on an LLP license that is assigned to a rockfish cooperative and fishing under the authority of a CQ permit must have a NMFS-certified observer onboard at all times the vessel is used to harvest fish in the Central GOA from May 1 through the earlier of:

(A) November 15; or

(B) The effective date and time of an approved rockfish cooperative termination of fishing declaration.

(iii) *Observer coverage limitations.* Observer coverage requirements under paragraph (c)(7) of this section are in addition to observer coverage requirements in other fisheries. Observer coverage of groundfish harvested by vessels described under paragraph (c)(7) of this section are not counted for purposes of meeting minimum observer coverage requirements applicable to any groundfish fishery described under paragraphs (c)(2)(i) through (c)(2)(vi) of this section.

* * * * *

■ 10. Subpart G is revised to read as follows:

Subpart G—Rockfish Program

Sec.
679.80 Allocation and transfer of rockfish QS.
679.81 Rockfish Program annual harvester privileges.
679.82 Rockfish Program use caps and sideboard limits.
679.83 Rockfish Program entry level longline fishery.
679.84 Rockfish Program recordkeeping, permits, monitoring, and catch accounting.
679.85 Cost recovery.

Subpart G—Rockfish Program

§ 679.80 Allocation and transfer of rockfish QS.

Additional regulations that implement specific portions of the Rockfish Program are set out under: § 679.2 Definitions, § 679.4 Permits, § 679.5 Recordkeeping and reporting, § 679.7 Prohibitions, § 679.20 General limitations, § 679.21 Prohibited species bycatch management, § 679.28 Equipment and operational requirements, and § 679.50 Groundfish Observer Program.

(a) *Applicable areas and duration*—(1) *Applicable areas.* The Rockfish Program applies to Rockfish Program fisheries in the Central GOA Regulatory Area.

(2) *Duration.* The Rockfish Program authorized under this part 679 expires on December 31, 2021.

(3) *Seasons.* The following fishing seasons apply to fishing under this subpart subject to other provisions of this part:

(i) *Rockfish entry level longline fishery.* Fishing by vessels participating in the rockfish entry level longline fishery is authorized from 0001 hours, A.l.t., January 1 through 1200 hours, A.l.t., November 15.

(ii) *Rockfish cooperative.* Fishing by vessels participating in a rockfish cooperative is authorized from 1200 hours, A.l.t., May 1 through 1200 hours, A.l.t., November 15.

(b) *Rockfish legal landings*—(1) *Eligible LLP licenses.* NMFS will assign rockfish legal landings to an LLP license only if a vessel made those landings:

(i) Under the authority of a permanent fully transferable LLP license endorsed for Central GOA groundfish with a trawl gear designation during the season dates for a rockfish primary species as established in Table 28a to this part;

(ii) Under the authority of an interim LLP license endorsed for Central GOA groundfish with a trawl gear designation during the season dates for that rockfish

primary species as established in Table 28a to this part; provided that:

(A) NMFS has determined that an interim LLP license is ineligible to receive a designation as a permanent LLP license endorsed for Central GOA groundfish with a trawl gear designation; and

(B) A permanent fully transferable LLP license endorsed for Central GOA groundfish with a trawl gear designation was assigned to the vessel that made legal rockfish landings under the authority of an interim LLP license endorsed for Central GOA groundfish prior to December 31, 2003, and was continuously assigned to that vessel through June 14, 2010; or

(iii) Under the authority of a permanent fully transferable LLP license endorsed for Central GOA groundfish with a trawl gear designation during the season dates for the entry level trawl fishery in 2007, 2008, or 2009 for a rockfish primary species as established in Table 28b to this part.

(2) *Assigning rockfish legal landings to an LLP license.* (i) NMFS will assign rockfish legal landings to an LLP license only if the holder of the LLP license with those landings submits a timely application for Rockfish QS, in paragraph (d) of this section, that is approved by NMFS.

(ii) NMFS will assign rockfish legal landings made under the authority of an interim LLP license that meets the requirements in paragraph (b)(1)(ii) of this section, to the permanent fully transferable LLP license specified in paragraph (b)(1)(ii)(B) of this section. NMFS will not assign any legal rockfish landings made under the authority of the permanent fully transferable LLP license specified in paragraph (b)(1)(ii)(B) of this section prior to the date that permanent fully transferable LLP license was assigned to the vessel that made legal rockfish landings under the authority of an interim LLP license specified in paragraph (b)(1)(i) of this section.

(3) *Rockfish landings assigned to the catcher/processor sector.* A rockfish legal landing for a rockfish primary species is assigned to the catcher/processor sector if:

(i) The rockfish legal landings of that rockfish primary species were harvested and processed onboard a vessel during the season dates for that rockfish primary species as established in Table 28a to this part; and

(ii) The rockfish legal landings were made under the authority of an eligible LLP license that is endorsed for Central GOA groundfish fisheries with trawl gear with a catcher/processor designation.

(4) *Rockfish legal landings assigned to the catcher vessel sector.* A rockfish legal landing for a rockfish primary species is assigned to the catcher vessel sector if:

(i) The rockfish legal landings of that rockfish primary species were harvested and not processed onboard a vessel during the season dates for that rockfish primary species as established under Table 28a or 28b to this part; and

(ii) The rockfish legal landings were made under the authority of an eligible LLP license that is endorsed for Central GOA groundfish fisheries with trawl gear.

(c) *Rockfish Program official record*—(1) *Use of the Rockfish Program official record.* The Rockfish Program official record will contain information used by the Regional Administrator to determine:

(i) The amount of rockfish legal landings assigned to an LLP license;

(ii) The amount of rockfish QS resulting from rockfish legal landings assigned to an LLP license held by a rockfish eligible harvester;

(iii) Rockfish sideboard ratios assigned to an LLP license;

(iv) Eligibility to participate in the Rockfish Program and assign specific harvest privileges to Rockfish Program participants.

(2) *Presumption of correctness.* The Rockfish Program official record is presumed to be correct. An applicant to participate in the Rockfish Program has the burden to prove otherwise. For the purposes of creating the Rockfish Program official record, the Regional Administrator will presume the following:

(i) An LLP license has been used onboard the same vessel from which that LLP license was derived during the calendar years 2000 and 2001, unless clear and unambiguous written documentation is provided that establishes otherwise.

(ii) If more than one person is claiming the same rockfish legal landing, then each LLP license for which the rockfish legal landing is being claimed will receive an equal division of credit for the landing unless the applicants can provide written documentation that establishes an alternative means for distributing the catch history to the LLP licenses.

(3) *Documentation.* Only rockfish legal landings, as defined in § 679.2, shall be used to establish an allocation of rockfish QS.

(4) *Non-severability of rockfish legal landings.* Rockfish legal landings are non-severable from the LLP license to which those rockfish legal landings are assigned according to the Rockfish Program official record.

(d) *Application for rockfish QS*—(1) *Submission of application for rockfish QS.* A person who wishes to receive rockfish QS to participate in the Rockfish Program as a rockfish eligible harvester must submit a timely and complete Application for Rockfish Quota Share. This application may only be submitted to NMFS using the methods described on the application.

(2) *Forms.* Forms are available through the Internet on the NMFS Alaska Region Web site at *http://alaskafisheries.noaa.gov,* or by contacting NMFS at (800) 304–4846, Option 2.

(3) *Deadline.* (i) A completed Application for Rockfish Quota Share must be received by NMFS no later than 1700 hours, A.l.t., on January 17, 2012, or if sent by U.S. mail, postmarked by that time. For applications delivered by hand delivery or carrier only, the receiving date of signature by NMFS staff is the date the application was received. If the application is submitted by facsimile, the receiving date of the application is the date stamped received by NMFS.

(ii) Objective written evidence of timely application will be considered proof of a timely application.

(4) *Contents of application.* A completed application must contain the information specified on the Application for Rockfish Quota Share identifying the applicant and LLP license numbers, with all applicable fields accurately filled-in and all required documentation attached.

(i) *Additional documentation.* (A) Vessel names, ADF&G vessel registration numbers, and USCG documentation numbers of all vessels that fished under the authority of each LLP license, including dates when landings were made under the authority of an LLP license for 2000 and 2001;

(B) Indicate (YES or NO) if the applicant is applying to participate in the Rockfish Program based on rockfish legal landings made during the rockfish entry level trawl fishery in 2007, 2008, or 2009; and,

(C) For an applicant who holds an LLP license that made rockfish legal landings during the fishery seasons established in Table 28a to this part and during the entry level trawl fishery during 2007, 2008, or 2009 established in Table 28b to this part, indicate whether you wish to receive rockfish QS based on rockfish legal landings during the fishery seasons established in Table 28a or Table 28b to this part.

(ii) *Exclusion from Rockfish Program for LLP licenses with rockfish legal*

landings. A person who holds an LLP license that made rockfish legal landings during the fishery seasons established in Table 28a to this part and during the entry level trawl fishery during 2007, 2008, or 2009 established in Table 28b to this part may choose to be excluded from the Rockfish Program and not receive rockfish QS. A person must submit an Application for Rockfish QS affirming exclusion from the Rockfish Program and forgo all rockfish QS.

(iii) *Applicant signature and certification.* The applicant must sign and date the application certifying that all information is true, correct, and complete to the best of his or her knowledge and belief. If the application is completed by a designated representative, then explicit authorization signed by the applicant must accompany the application.

(5) *Application evaluation.* The Regional Administrator will evaluate applications received as specified in paragraph (d)(4) of this section and compare all claims in an application with the information in the Rockfish Program official record. Application claims that are consistent with information in the Rockfish Program official record will be approved by the Regional Administrator. Application claims that are inconsistent with the Rockfish Program official record, unless verified by sufficient documentation, will not be approved. An applicant who submits inconsistent claims, or an applicant who fails to submit the information specified in paragraph (d)(4) of this section, will be provided a single 30-day evidentiary period to submit the specified information, submit evidence to verify his or her inconsistent claims, or submit a revised application with claims consistent with information in the Rockfish Program official record. An applicant who submits claims that are inconsistent with information in the Rockfish Program official record has the burden of proving that the submitted claims are correct. Any claims that remain inconsistent or that are not accepted after the 30-day evidentiary period will be denied, and the applicant will be notified by an initial administrative determination (IAD) of his or her appeal rights under § 679.43.

(6) *Appeals.* If an applicant is notified by an IAD that claims made by the applicant have been denied, that applicant may appeal that IAD under the provisions in § 679.43.

(e) *Assigning rockfish QS*—(1) *General.* The Regional Administrator will assign rockfish QS only to a person who submits a timely application for rockfish QS that is approved by NMFS based on:

(i) The amount of rockfish legal landings assigned to an LLP license as established in paragraph (e)(2) of this section; or

(ii) The number of years during which a person made a rockfish legal landing under the authority of an LLP license in the entry level trawl fishery during 2007, 2008, or 2009 as established in paragraph (e)(3) of this section.

(2) *Calculation of rockfish QS allocation for LLP licenses.* Based on the Rockfish Program official record, the Regional Administrator shall determine the initial allocation of rockfish QS for each rockfish primary species assigned to each LLP license indicated on a timely and complete Application for Rockfish QS that is approved by NMFS, and that qualifies for an allocation of QS based on rockfish legal landings from 2000 to 2006 (and that is not assigned rockfish QS under the entry level trawl fishery transition allocation under the provisions in paragraph (e)(3) of this section), according to the following procedure:

(i) Sum the rockfish legal landings for each rockfish primary species ''s'' for each eligible LLP license ''l'' for each year during the fishery seasons established in Table 28a to this part. For purposes of this calculation, the Regional Administrator will not assign any amount of rockfish legal landings to an LLP license that is assigned rockfish QS under the provisions in paragraph (e)(3) of this section. This yields the Rockfish Total Catch for each rockfish primary species for each year.

(ii) For each rockfish primary species, sum the highest 5 years of Rockfish Total Catch for each eligible LLP license described under paragraph (e)(2)(i) of this section. This yields the Highest 5 Years_{ls}. This amount is equal to the number of rockfish QS units for that LLP license for that rockfish primary species.

(iii) Sum the Highest 5 Years_{ls} in paragraph (e)(2)(ii) of this section of all eligible LLP licenses for each rockfish primary species. The result is the ΣHighest 5 Years_{ls} (or All Highest 5 Years_{s}).

(3) *Calculation of rockfish QS allocation for LLP licenses that receive rockfish QS under the entry level trawl fishery transition allocation.* Based on the Rockfish Program official record, the Regional Administrator shall determine the initial allocation of rockfish QS for each rockfish primary species assigned to each LLP license indicated on a timely and complete Application for Rockfish QS that is approved by NMFS, that qualifies for an allocation of QS based on rockfish legal landings from 2007, 2008, or 2009 under the entry level trawl fishery transition allocation (and that is not assigned rockfish QS under the provisions in paragraph (e)(2) of this section), according to the following procedure:

(i) Assign one Rockfish Landing Unit to an LLP license for each year a rockfish legal landing of any rockfish primary species was made under the authority of an LLP license during the season dates for the entry level trawl fishery in 2007, 2008, or 2009 as established in Table 28b to this part. This yields the Rockfish Landing Units_{l}. For purposes of this calculation, the Regional Administrator will not assign any Rockfish Landing Units to an LLP license that is assigned rockfish QS under the provisions in paragraph (e)(2) of this section.

(ii) Sum the Rockfish Landing Units of all eligible LLP licenses.

(iii) Divide the Rockfish Landing Units_{l} in paragraph (e)(3)(i) of this section for an LLP license by the sum of all Rockfish Landing Units_{l} of all eligible LLP licenses in paragraph (e)(3)(ii) of this section. The result is the Percentage of the Total Entry Level Trawl Fishery Transition Rockfish QS Pool_{l} as presented in the following equation:

Rockfish Landing Units_{l}/Σ Rockfish Landing Units_{l} = Percentage of the Total Entry Level Trawl Fishery Transition Rockfish QS pool_{l}.

(iv) Determine the Total Entry Level Trawl Fishery Transition Rockfish QS pool for each rockfish primary species ''s'' as presented in the following equation:

(Σ All Highest 5 Years_{s}/0.975) $-\Sigma$ All Highest 5 Years_{s} (as calculated in paragraph (e)(2)(iii) of this section) = Total Entry Level Trawl Fishery Transition Rockfish QS pool_{s}.

(v) Multiply the Percentage of the Total Entry Level Trawl Fishery Transition Rockfish QS pool for each LLP license, as calculated in paragraph (e)(3)(iii) of this section, by the Total Entry Level Trawl Fishery Transition Rockfish QS pool for each rockfish primary species, as calculated in paragraph (e)(3)(iv) of this section. This yields the number of rockfish QS units for that LLP license for that rockfish primary species.

(vi) All rockfish QS units calculated in paragraph (e)(3)(v) of this section are assigned to the catcher vessel sector.

(4) *Rockfish initial QS pool.* The rockfish initial QS pool for each rockfish primary species, and for each sector, is equal to the sum of all QS units assigned to LLP licenses, and in

each sector, as calculated under paragraphs (e)(2) and (e)(3) of this section as of February 14, 2012.

(5) *Non-severability of rockfish QS from an LLP license.* Rockfish QS assigned to an LLP license is non-severable from that LLP license, except as provided for under § 679.80(f)(2).

(f) *Transfer of rockfish QS*—(1) *Transfer of rockfish QS.* A person may transfer an LLP license, and any rockfish QS assigned to that LLP license under the provisions in § 679.4(k)(7), provided that the LLP license is not assigned rockfish QS in excess of the use cap specified in § 679.82(a)(2) at the time of transfer.

(2) *Transfer of rockfish QS assigned to LLP licenses that exceeds rockfish QS use caps.* (i) If an LLP license is assigned an initial allocation of aggregate rockfish QS that exceeds a use cap specified in § 679.82(a)(2), the LLP license holder may transfer rockfish QS in excess of the use cap specified in § 679.82(a)(2) separate from that LLP license and assign it to one or more LLP licenses. However, a transfer may not be approved by NMFS if that transfer would cause the receiving LLP license to exceed a use cap specified in § 679.82(a)(2).

(ii) Prior to the transfer of an LLP license that is assigned an initial allocation of aggregate rockfish QS that exceeds a use cap specified in § 679.82(a)(2), the LLP license holder must transfer the rockfish QS that is in excess of the use cap specified in § 679.82(a)(2), separate from that LLP license, and assign it to one or more LLP licenses under paragraph (f)(2)(i) of this section. On completion of the transfer of QS, the LLP license that was initially allocated an amount of aggregate rockfish QS in excess of the use cap may not exceed the use cap specified in § 679.82(a)(2).

(iii) Any rockfish QS associated with the LLP license that is in excess of the use cap may be transferred only if Block C of the Application for Transfer License Limitation Program Groundfish/Crab License is filled out entirely.

(iv) Rockfish QS may only be transferred to an LLP license that has been assigned rockfish QS with the same sector designation as the rockfish QS to be transferred.

(v) Rockfish QS that is transferred from an LLP license that was initially allocated an amount of aggregate rockfish QS in excess of the use cap specified in § 679.82(a)(2) and assigned to another LLP license may not be severed from the receiving LLP license.

§ 679.81 Rockfish Program annual harvester privileges.

(a) *Sector and LLP license allocations of rockfish primary species*—(1) *General.* Each calendar year, the Regional Administrator will determine the tonnage of rockfish primary species that will be assigned to participants in a rockfish cooperative. This amount will be assigned to rockfish cooperatives as described in paragraph (b) of this section.

(2) *Calculation.* (i) The amount of rockfish primary species ''s'' allocated to the Rockfish Program is calculated by deducting the incidental catch allowance the Regional Administrator determines is required on an annual basis in other non-target fisheries from the TAC. The remaining TAC for that rockfish primary species (TAC_s) is assigned for use by the rockfish entry level longline fishery and rockfish cooperatives.

(ii) The allocation of TAC_s for each rockfish primary species to the rockfish entry level longline fishery is established in Table 28e to this part.

(iii) The allocation of TAC_s to rockfish cooperatives is equal to the amount remaining after allocation to the rockfish entry level longline fishery (cooperative TAC_s).

(b) *Allocations of rockfish primary species CQ to rockfish cooperatives*—(1) *Rockfish primary species TAC_s assigned to the catcher/processor and catcher vessel sector.* Cooperative TAC_s assigned for a rockfish primary species will be divided between the catcher/processor sector and the catcher vessel sector. Each sector will receive a percentage of cooperative TAC_s for each rockfish primary species equal to the sum of the rockfish QS units assigned to all LLP licenses that receive rockfish QS in that sector divided by the rockfish QS pool for that rockfish primary species. Expressed algebraically for each rockfish primary species ''s'' in paragraphs (b)(1)(i) and (ii) of this section:

(i) Catcher/Processor Sector TAC_s = [(Cooperative TAC_s) × (Rockfish QS Units in the Catcher/Processor $Sector_s$/Rockfish QS $Pool_s$)].

(ii) Catcher Vessel Sector TAC_s = [(Cooperative TAC_s) × (Rockfish QS Units in the Catcher Vessel $Sector_s$/Rockfish QS $Pool_s$)].

(2) *Allocations of rockfish primary species to rockfish cooperatives.* TAC is assigned to each rockfish cooperative based on the rockfish QS assigned to that fishery in each sector according to the following procedures:

(i) *Catcher vessel sector rockfish cooperatives.* The amount of TAC_s for each rockfish primary species assigned to a catcher vessel rockfish cooperative is equal to the amount of rockfish QS units assigned to that rockfish cooperative divided by the total rockfish QS assigned to rockfish cooperatives in the catcher vessel sector multiplied by the catcher vessel TAC_s. Once TAC_s for a rockfish primary species is assigned to a catcher vessel rockfish cooperative, it is issued as CQ specific to that rockfish cooperative. The amount of CQ for each rockfish primary species that is assigned to a rockfish cooperative is expressed algebraically as follows:

CQ_s = [(Catcher Vessel Sector TAC_s) × (Rockfish QS assigned to that rockfish $cooperative_s$/Rockfish QS Units assigned to all rockfish cooperatives in the Catcher Vessel $Sector_s$)].

(ii) *Catcher/processor sector rockfish cooperatives.* The amount of TAC_s for each rockfish primary species assigned to a catcher/processor rockfish cooperative is equal to the amount of rockfish QS units assigned to that rockfish cooperative divided by the sum of the rockfish QS units assigned to rockfish cooperatives in the catcher/processor sector multiplied by the catcher/processor TAC_s. Once TAC for a rockfish primary species is assigned to a catcher/processor rockfish cooperative, it is issued as CQ specific to that rockfish cooperative.

The amount of CQ for each rockfish primary species that is assigned to a rockfish cooperative is expressed algebraically as follows:

CQ = [(Catcher/Processor Sector TAC_s) × (Rockfish QS Units assigned to that rockfish cooperative/Rockfish QS Units assigned to all rockfish cooperatives in the Catcher/Processor Sector)].

(c) *Allocations of rockfish secondary species CQ to rockfish cooperatives*—(1) *General.* Each calendar year, the Regional Administrator will determine the tonnage of rockfish secondary species that may be assigned to the rockfish cooperatives as rockfish CQ. This amount will be assigned to the rockfish cooperatives in the catcher/processor sector and the catcher vessel sector.

(2) *Amount of rockfish secondary species tonnage assigned.* The amount of rockfish secondary species tonnage that may be assigned to the catcher/processor sector and the catcher vessel sector is specified in Table 28c to this part.

(3) *Assignment of rockfish secondary species.* Rockfish secondary species will be assigned only to rockfish cooperatives.

(4) *Determining the amount of rockfish secondary species CQ assigned to a rockfish cooperative.* The amount of CQ for each rockfish secondary species that is assigned to each rockfish cooperative is determined according to the following procedures:

(i) *CQ assigned to rockfish cooperatives in the catcher/processor sector.* The CQ for a rockfish secondary species that is assigned to a catcher/processor rockfish cooperative is equal to the amount of that rockfish secondary species allocated to the catcher/processor sector in the Rockfish Program as specified in Table 28c to this part, multiplied by the sum of the rockfish QS units for all rockfish primary species assigned to that catcher/processor rockfish cooperative divided by the sum of the rockfish QS units assigned to rockfish cooperatives for all rockfish primary species in the catcher/processor sector. Expressed algebraically in the following equation:

CQ for that Secondary Species = Amount of that rockfish secondary species allocated to the catcher/processor sector in the Rockfish Program × (Σ Rockfish QS units for all rockfish primary species assigned to that rockfish cooperative/Σ Rockfish QS units for all rockfish primary species assigned to all rockfish cooperatives in the catcher/processor sector).

(ii) *CQ assigned to rockfish cooperatives in the catcher vessel sector.* The CQ for a rockfish secondary species that is assigned to a catcher vessel rockfish cooperative is equal to the amount of that rockfish secondary species allocated to the catcher vessel sector in the Rockfish Program as specified in Table 28c to this part, multiplied by the sum of the rockfish QS units for all rockfish primary species assigned to that catcher vessel rockfish cooperative divided by the sum of the rockfish QS units assigned to rockfish cooperatives for all rockfish primary species in the catcher vessel sector. Expressed algebraically in the following equation:

CQ for that Secondary Species = Amount of that rockfish secondary species allocated to the catcher vessel sector in the Rockfish Program × (Σ Rockfish QS units for all rockfish primary species assigned to that rockfish cooperative/Σ Rockfish QS units assigned to all rockfish cooperatives for all rockfish primary species in the catcher vessel sector).

(d) *Allocations of rockfish halibut PSC CQ to rockfish cooperatives*—(1) *General.* Each calendar year, the Regional Administrator will determine the tonnage of rockfish halibut PSC that will be assigned to the Rockfish Program. This amount will be allocated appropriately to the catcher/processor sector and the catcher vessel sector. The tonnage of rockfish halibut PSC assigned to a sector will be further assigned as CQ only to rockfish cooperative(s) within that sector.

(2) *Amount of halibut PSC that may be assigned.* (i) The amount of halibut PSC that may be assigned to the catcher vessel and catcher/processor sectors is specified in Table 28d to this part.

(ii) The amount of halibut PSC that is not assigned to the catcher vessel and catcher/processor sectors as specified in Table 28d to this part will not be assigned for use as halibut PSC or as halibut IFQ.

(3) *Use of rockfish halibut PSC by a rockfish eligible harvester.* (i) Rockfish halibut PSC assigned to a sector will be assigned only to rockfish cooperatives within that sector.

(ii) Rockfish halibut PSC specified in Table 28d is not assigned to rockfish opt-out vessels.

(iii) Rockfish halibut PSC specified in Table 28d is not assigned to the rockfish entry level longline fishery.

(4) *Determining the amount of rockfish halibut PSC CQ assigned to a rockfish cooperative.* The amount of rockfish halibut PSC CQ that is assigned to each rockfish cooperative is determined according to the following procedures:

(i) *CQ assigned to rockfish cooperatives in the catcher/processor sector.* The CQ for halibut PSC that is assigned to a catcher/processor rockfish cooperative is equal to the amount of halibut PSC allocated to the catcher/processor sector in the Rockfish Program as specified in Table 28d to this part, multiplied by the sum of the rockfish QS units for all rockfish primary species assigned to that catcher/processor rockfish cooperative divided by the sum of the rockfish QS units assigned to rockfish cooperatives for all rockfish primary species in the catcher/processor sector. This is expressed algebraically in the following equation:

CQ for rockfish halibut PSC = Amount halibut PSC allocated to the catcher/processor sector in the Rockfish Program × (Σ Rockfish QS units assigned to that rockfish cooperative/Σ Rockfish QS units assigned to all rockfish cooperatives in the catcher/processor sector).

(ii) *CQ assigned to rockfish cooperatives in the catcher vessel sector.* The CQ for halibut PSC that is assigned to a catcher vessel rockfish cooperative is equal to the amount of halibut PSC allocated to the catcher vessel sector in the Rockfish Program as specified in Table 28d to this part, multiplied by the sum of the rockfish QS units for all rockfish primary species assigned to that catcher vessel rockfish cooperative divided by the sum of the rockfish QS units assigned to rockfish cooperatives for all rockfish primary species in the catcher vessel sector. This is expressed algebraically in the following equation:

CQ for rockfish halibut PSC = Amount halibut PSC allocated to the catcher vessel sector in the Rockfish Program × (Σ Rockfish QS units assigned to that rockfish cooperative/Σ Rockfish QS units assigned to all rockfish cooperatives in the catcher vessel sector).

(e) *Assigning rockfish QS to a rockfish cooperative*—(1) *General.* Each calendar year, a person that is participating in the Rockfish Program may assign an LLP license and the rockfish QS assigned to that LLP license to a Rockfish cooperative. A rockfish eligible harvester assigns rockfish QS to a rockfish cooperative on a complete application for CQ that is approved by NMFS and that meets the requirements of paragraph (f) of this section.

(i) An LLP license and rockfish QS may be assigned to a catcher vessel cooperative if that rockfish QS is derived from legal rockfish landings assigned to the catcher vessel sector.

(ii) An LLP license and rockfish QS may be assigned to a catcher/processor cooperative if that rockfish QS is derived from rockfish legal landings assigned to the catcher/processor sector.

(2) *Catcher/Processor opt-out.* Each calendar year, a person holding an LLP license assigned rockfish QS in the catcher/processor sector may opt-out of participating in a rockfish cooperative. NMFS will presume a person has opted-out of participating in a rockfish cooperative if that person and LLP license with rockfish QS is not named on a timely submitted Annual Application for Cooperative Fishing Quota. A person may not assign an LLP license assigned rockfish QS in the catcher/processor sector to both a rockfish cooperative and opt-out of participating in a rockfish cooperative.

(f) *Annual Application for the Rockfish Program*—(1) *Application for Rockfish Cooperative Fishing Quota (CQ).* If a designated rockfish cooperative representative submits a complete and timely application that is approved by NMFS, the cooperative will receive a CQ permit. The CQ permit will list the amount of CQ, by rockfish primary species, rockfish secondary species, and halibut PSC held by the rockfish cooperative, the members of the rockfish cooperative, LLP licenses assigned to that rockfish cooperative, and the vessels that are authorized to harvest fish under that CQ permit. This application may only be submitted to

NMFS using the methods described on the application.

(2) *Application forms.* Application forms are available on the NMFS Alaska Region Web site at *http://alaskafisheries.noaa.gov,* or by contacting NMFS at (800) 304–4846, Option 2.

(3) *Deadline.* (i) A completed application must be received by NMFS no later than 1700 hours, A.l.t., on March 15, 2012, for the first year of the program and March 1 for all subsequent years, or if sent by U.S. mail, the application must be postmarked by that time. For applications delivered by hand delivery or carrier only, the receiving date of signature by NMFS staff is the date the application was received. If the application is submitted by facsimile, the receiving date of the application is the date stamped received by NMFS.

(ii) Objective written evidence of timely application will be considered as proof of a timely application.

(4) *Contents of the Application.* A completed application must contain the information specified on the Application for Rockfish Cooperative Fishing Quota identifying the rockfish cooperative, members of the cooperative, and processor associate of a catcher vessel rockfish cooperative, with all applicable fields accurately filled-in and all required documentation attached.

(i) *Additional documentation.* For the cooperative application to be considered complete, the following documents must be attached to the application:

(A) A copy of the business license issued by the state in which the rockfish cooperative is registered as a business entity;

(B) A copy of the articles of incorporation or partnership agreement of the rockfish cooperative;

(C) Provide the names of all persons, to the individual level, holding an ownership interest in the LLP license and the percentage ownership each person and individual holds in the LLP license;

(D) A copy of the rockfish cooperative agreement signed by the members of the rockfish cooperative (if different from the articles of incorporation or partnership agreement of the rockfish cooperative) that includes terms that specify that:

(*1*) Rockfish QS holders affiliated with rockfish processors cannot participate in price setting negotiations except as permitted by general antitrust law;

(*2*) The rockfish cooperative must establish a monitoring program sufficient to ensure compliance with the Rockfish Program;

(*3*) The proposed fishing plan to be used by members of the cooperative, including any proposed cooperative specific monitoring procedures and any voluntary codes of conduct that apply to the members of the cooperative, if applicable; and

(*4*) Terms and conditions to specify the obligations of rockfish QS holders who are members of the rockfish cooperative to ensure the full payment of rockfish cost recovery fees that may be due.

(ii) *Applicant signature and certification.* The applicant, including the processor associate of the rockfish cooperative, must sign and date the application certifying that all information is true, correct, and complete to the best of his or her knowledge and belief. If the application is completed by a designated representative, then explicit authorization signed by the applicant must accompany the application.

(5) *Issuance of CQ.* NMFS will not issue a CQ permit if an application is not complete and approved by NMFS. Issuance by NMFS of a CQ permit is not a determination that the rockfish cooperative is formed or is operating in compliance with antitrust law.

(6) *LLP licenses and rockfish QS not designated on a timely and complete application for rockfish CQ.* NMFS will prohibit any LLP licenses with rockfish QS assigned to that LLP license from fishing in the directed rockfish primary fisheries in the Central GOA for a calendar year if that LLP license is not designated on a timely and complete application for CQ for that calendar year that is approved by NMFS. Rockfish sideboard provisions described in § 679.82 shall apply to that LLP license, as applicable.

(g) *Application for inter-cooperative transfer of cooperative quota (CQ)*—(1) *Completed application.* NMFS will process an application for inter-cooperative transfer of CQ provided that an electronic online transfer application is completed by the transferor and transferee, with all applicable fields accurately filled-in.

(2) *Certification of transferor.* (i) The transferor's designated representative must log into NMFS' online system and create a transfer request as indicated on the computer screen. By using the transferor's NMFS ID, password, and Transfer Key and submitting the transfer request, the designated representative certifies that all information is true, correct, and complete.

(ii) The transferee's designated representative must log into the online system and accept the transfer request. By using the transferee's NMFS ID, password, and Transfer Key, the designated representative certifies that all information is true, correct, and complete.

(h) *Maximum retainable amount (MRA) limits*—(1) *Rockfish cooperative.* A vessel assigned to a rockfish cooperative and fishing under a CQ permit may harvest groundfish species not allocated as CQ up to the amounts of the MRAs for those species as established in Table 30 to this part.

(2) *Opt-out vessels.* A rockfish eligible harvester who opted-out of participating in a rockfish cooperative is subject to MRAs for rockfish primary species and rockfish secondary species as established in Table 10 to this part.

(3) *Rockfish entry level longline fishery.* A person directed fishing in the rockfish entry level longline fishery may harvest groundfish species other than rockfish primary species up to amounts of the MRAs for those species as established in Table 10 to this part.

(4) *Maximum retainable amount (MRA) calculation and limits—catcher vessels.* (i) The MRA for an incidental catch species for vessels fishing under the authority of a CQ permit is calculated as a proportion of the total allocated rockfish primary species and rockfish secondary species on board the vessel in round weight equivalents using the retainable percentage in Table 30 to this part; except that—

(ii) Once the amount of shortraker rockfish harvested in the catcher vessel sector is equal to 9.72 percent of the shortraker rockfish TAC in the Central GOA regulatory area, then shortraker rockfish may not be retained by any participant in the catcher vessel sector while fishing under the authority of a CQ permit.

(5) *Maximum retainable amount (MRA) calculation and limits—catcher/processor vessels.* The MRA for an incidental catch species for vessels fishing under the authority of a CQ permit is calculated as a proportion of the total allocated rockfish primary species and rockfish secondary species on board the vessel in round weight equivalents using the retainable percentage in Table 30 to this part as determined under § 679.20(e)(3)(iv).

(i) *Rockfish cooperative*—(1) *General.* This section governs the formation and operation of rockfish cooperatives. The regulations in this section apply only to rockfish cooperatives that have formed for the purpose of fishing with CQ issued annually by NMFS.

(i) Members of rockfish cooperatives should consult legal counsel before commencing any activity if the members are uncertain about the legality under

the antitrust laws of the rockfish cooperative's proposed conduct.

(ii) Membership in a rockfish cooperative is voluntary. No person may be required to join a rockfish cooperative.

(iii) Members may leave a rockfish cooperative, but any CQ contributed by the rockfish QS held by that member remains assigned to that rockfish cooperative for the remainder of the calendar year.

(iv) An LLP license or vessel that has been assigned to a rockfish cooperative and that leaves the rockfish cooperative continues to be subject to the sideboard provisions established for that rockfish cooperative under § 679.82(d) and (e), as applicable, for that calendar year.

(v) If a person becomes the holder of an LLP license that had been previously assigned to a rockfish cooperative, then that person may join that rockfish cooperative upon receipt of that LLP license, but may not assign that LLP license to another rockfish cooperative during that calendar year.

(2) *Legal and organizational requirements.* A rockfish cooperative must meet the following legal and organizational requirements before it is eligible to receive CQ:

(i) Each rockfish cooperative must be formed as a partnership, corporation, or other legal business entity that is registered under the laws of one of the 50 states or the District of Columbia;

(ii) Each rockfish cooperative must appoint an individual as designated representative to act on the rockfish cooperative's behalf and serve as contact point for NMFS for questions regarding the operation of the rockfish cooperative. The designated representative must be an individual, and may be a member of the rockfish cooperative, or some other individual designated by the rockfish cooperative;

(iii) Each rockfish cooperative must submit a complete and timely application for CQ.

(3) *General requirements.* The following table describes the requirements to form a rockfish cooperative in the catcher vessel or catcher/processor sector.

Requirement	Catcher vessel sector	Catcher/processor sector
(i) Who may join a rockfish cooperative?	Only persons who hold rockfish QS may join a rockfish cooperative.	
(ii) What is the minimum number of LLP licenses that must be assigned to form a rockfish cooperative?	No minimum requirement.	
(iii) Is an association with a rockfish processor required?	Yes, a rockfish QS holder may only be a member of a rockfish cooperative formed in association with a rockfish processor. The rockfish cooperative may not receive rockfish CQ unless a shoreside processor eligible to receive rockfish CQ has indicated that it may be willing to receive rockfish CQ from that cooperative in the application for CQ, as described under § 679.81, that is submitted by that cooperative.	No.
(iv) Is a rockfish cooperative member required to deliver catch to the rockfish processor with whom the rockfish cooperative is associated?	No	N/A.
(v) Is there a minimum amount of rockfish QS that must be assigned to a rockfish cooperative for it to be allowed to form?	No	No.
(vi) What is allocated to the rockfish cooperative?	CQ for rockfish primary species, rockfish secondary species, and rockfish halibut PSC, based on the rockfish QS assigned to all of the LLP licenses that are assigned to the cooperative.	
(vii) Is this CQ an exclusive harvest privilege?	Yes, the members of the rockfish cooperative have an exclusive harvest privilege to collectively catch this CQ, or a cooperative may transfer all or a portion of this CQ to another rockfish cooperative.	
(viii) Is there a season during which designated vessels may catch CQ?	Yes, any vessel designated to catch CQ for a rockfish cooperative is limited to catching CQ during the season beginning on 1200 hours, A.l.t., on May 1 through 1200 hours, A.l.t., on November 15.	
(ix) Can any vessel catch a rockfish cooperative's CQ?	No, only vessels that are named on the application for CQ for that rockfish cooperative may catch the CQ assigned to that rockfish cooperative.A vessel may be assigned to only one rockfish cooperative in a calendar year.	
Can a member of a rockfish cooperative transfer CQ individually to another rockfish cooperative without the approval of the other members of the rockfish cooperative?	No, only the rockfish cooperative's designated representative, and not individual members, may transfer its CQ to another rockfish cooperative. Any such transfer must be approved by NMFS as established under paragraph (i)(4)(ii) of this section	
(xi) Can a rockfish cooperative in the catcher/processor sector transfer its sideboard limit?	N/A	No, a sideboard limit assigned to a rockfish cooperative in the catcher/processor sector is a limit applicable to a specific rockfish cooperative, and may not be transferred between rockfish cooperatives.

Requirement	Catcher vessel sector	Catcher/processor sector
(xii) Is there a hired master requirement?	No, there is no hired master requirement.	
(xiii) Can an LLP license be assigned to more than one rockfish cooperative in a calendar year?	No, an LLP license may only be assigned to one rockfish cooperative in a calendar year. A person holding multiple LLP licenses with associated rockfish QS may assign different LLP licenses to different rockfish cooperatives subject to any other restrictions that may apply.	
(xiv) Can a rockfish processor be associated with more than one rockfish cooperative?	Yes	N/A
(xv) Can an LLP license be assigned to a rockfish cooperative and opt-out of participating in a rockfish cooperative?	N/A	No, each calendar year an LLP license must either be assigned to a rockfish cooperative or opt-out.
(xvi) Which members may harvest the rockfish cooperative's CQ?	That is determined by the rockfish cooperative contract signed by its members. Any violations of this contract by one cooperative member may be subject to civil claims by other members of the rockfish cooperative.	
(xvii) Does a rockfish cooperative need a contract?	Yes, a rockfish cooperative must have a membership agreement or contract that specifies how the rockfish cooperative intends to harvest its CQ. A copy of this agreement or contract must be submitted to NMFS with the cooperative's application for CQ.	
(xviii) What happens if the rockfish cooperative exceeds its CQ amount?	A rockfish cooperative is not authorized to catch fish in excess of its CQ and must not exceed its CQ amount at the end of the calendar year. Exceeding a CQ is a violation of the Rockfish Program regulations. Each member of the rockfish cooperative is jointly and severally liable for any violations of the Rockfish Program regulations while fishing under authority of a CQ permit. This liability extends to any persons who are hired to catch or receive CQ assigned to a rockfish cooperative. Each member of a rockfish cooperative is responsible for ensuring that all members of the rockfish cooperative comply with all regulations applicable to fishing under the Rockfish Program.	
(xix) Is there a limit on how much CQ a rockfish cooperative may hold or use?	Yes, see § 679.82(a) for the provisions that apply.	
(xx) Is there a limit on how much CQ a vessel may harvest?	Yes, see § 679.82(a) for the provisions that apply.	
(xxi) Is there a requirement that a rockfish cooperative pay rockfish cost recovery fees?	Yes, see § 679.85 for the provisions that apply.	
(xxii) When does catch count against my CQ permit?	Any vessel fishing checked-in (and therefore fishing under the authority of a CQ permit must count any catch of rockfish primary species, rockfish secondary species, or rockfish halibut PSC against that rockfish cooperative's CQ from May 1 until November 15, or until the effective date of a rockfish cooperative termination of fishing declaration that has been approved by NMFS).	
(xxiii) If my vessel is checked-out and fishing in a directed flatfish fishery in the Central GOA and I catch groundfish and halibut PSC, does that count against the rockfish cooperative's CQ?	No. If you are fishing in a directed flatfish fishery and checked-out of the Rockfish Program fisheries, you are not fishing under the authority of a CQ permit. Groundfish harvests would not be debited against the rockfish cooperative's CQ permit. In this case, any catch of halibut would be attributed to the halibut PSC limit for that directed target fishery and gear type and any applicable sideboard limit.	
(xxiv) Can my rockfish cooperative negotiate prices for me?	The rockfish cooperatives formed under the Rockfish Program are intended to conduct and coordinate harvest activities for their members. Rockfish cooperatives formed under the Rockfish Program are subject to existing antitrust laws. Collective price negotiation by a rockfish cooperative must be conducted in accordance with existing antitrust laws.	
(xxv) Are there any special reporting requirements?	Yes, each year a rockfish cooperative must submit an annual rockfish cooperative report to NMFS by December 15 of that year. See § 679.5(r)(6) for the reporting requirements.	
(xxvi) What is required in the annual rockfish cooperative report?	The annual rockfish cooperative report must include at a minimum: (A) The rockfish cooperative's CQ, sideboard limit (if applicable), and any rockfish sideboard fishery harvests made by the vessels in the rockfish cooperative on a vessel-by-vessel basis; (B) The rockfish cooperative's actual retained and discarded catch of CQ, and sideboard limit on an area-by-area and vessel-by-vessel basis; (C) A description of the method used by the rockfish cooperative to monitor fisheries in which rockfish cooperative vessels participated; and (D) A description of any civil actions taken by the rockfish cooperative in response to any members that exceeded their allowed catch.	

(4) *Additional requirements*—(i) *Restrictions on fishing CQ assigned to a rockfish cooperative.* A person fishing CQ assigned to a rockfish cooperative must maintain a copy of the CQ permit onboard any vessel that is being used to harvest any rockfish primary species, or rockfish secondary species, or that uses any rockfish halibut PSC CQ.

(ii) *Transfer of CQ between rockfish cooperatives.* Rockfish cooperatives may transfer CQ during a calendar year with the following restrictions:

(A) A rockfish cooperative may only transfer CQ to another rockfish cooperative;

(B) A rockfish cooperative may only receive CQ from another rockfish cooperative;

(C) A rockfish cooperative may transfer or receive rockfish CQ only if that cooperative has been assigned at least two LLP licenses with rockfish QS assigned to those LLP licenses;

(D) A rockfish cooperative in the catcher vessel sector may not transfer any CQ to a rockfish cooperative in the catcher/processor sector;

(E) A rockfish cooperative in the catcher/processor sector may not transfer any rougheye rockfish CQ or shortraker rockfish CQ to a rockfish cooperative in the catcher vessel sector.

(F) A rockfish cooperative receiving rockfish primary species CQ by transfer must assign that rockfish primary species CQ to a member(s) of the rockfish cooperative for the purposes of applying the use caps established under § 679.82(a). NMFS will not approve a transfer if that member would exceed the use cap as a result of the transfer. Rockfish secondary species or halibut PSC CQ is not assigned to a specific member of a rockfish cooperative;

(G) A rockfish cooperative in the catcher/processor sector may not transfer any sideboard limit assigned to it; and

(H) After November 15 of the year for which the CQ permit is issued, or upon approval of a rockfish cooperative termination of fishing declaration described in § 679.4(n)(2):

(*1*) A cooperative may only use rockfish primary species and rockfish secondary species CQ for transfer;

(*2*) A cooperative may not transfer halibut PSC CQ;

(5) *Use of CQ.* (i) A rockfish cooperative in the catcher vessel sector may not use a rockfish primary species CQ in excess of the amounts specified in § 679.82(a).

(ii) For purposes of CQ use cap calculation, the total amount of CQ held or used by a person is equal to all tons of CQ derived from the rockfish QS held by that person and assigned to the rockfish cooperative and all tons of CQ assigned to that person by the rockfish cooperative from approved transfers.

(iii) The amount of rockfish QS held by a person, and CQ derived from that rockfish QS is calculated using the individual and collective use cap rule established in § 679.82(a).

(6) *Successors-in-interest.* If a member of a rockfish cooperative dies (in the case of an individual) or dissolves (in the case of a business entity), the LLP license(s) and associated rockfish QS held by that person will be transferred to the legal successor-in-interest under the procedures described in § 679.4(k)(6)(iv)(A). However, the CQ derived from that rockfish QS and assigned to the rockfish cooperative for that year from that person remains under the control of the rockfish cooperative for the duration of that calendar year. Each rockfish cooperative is free to establish its own internal procedures for admitting a successor-in-interest during the fishing season to reflect the transfer of an LLP license and associated rockfish QS.

§ 679.82 Rockfish Program use caps and sideboard limits.

(a) Use caps —(1) *General.* (i) Use caps limit the amount of rockfish QS that may be held or used by a rockfish eligible harvester and the amount of CQ that may be held or used by a rockfish cooperative, harvested by a vessel, or received or processed by a rockfish processor.

(ii) Use caps do not apply to halibut PSC CQ.

(iii) Use caps may not be exceeded unless the entity subject to the use cap is specifically allowed to exceed a cap according to the criteria established under this paragraph (a), or by an operation of law.

(iv) All rockfish QS use caps are based on the aggregate rockfish primary species initial rockfish QS pool established by NMFS in Table 29 to this part.

(v) Sablefish and Pacific cod CQ processing use caps are based on the amount of CQ assigned to the catcher vessel sector during a calendar year.

(2) *Rockfish QS use cap.* A person may not individually or collectively hold or use more than:

(i) Four (4.0) percent of the aggregate rockfish primary species QS initially assigned to the catcher vessel sector and resulting CQ unless that rockfish eligible harvester qualifies for an exemption to this use cap under paragraph (a)(6) of this section;

(ii) Forty (40.0) percent of the aggregate rockfish primary species QS initially assigned to the catcher/processor sector and resulting CQ unless that rockfish eligible harvester qualifies for an exemption to this use cap under paragraph (a)(6) of this section.

(3) *Catcher vessel cooperative rockfish CQ use cap.* A catcher vessel rockfish cooperative may not hold or use an amount of rockfish primary species CQ during a calendar year that is greater than an amount resulting from 30.0 percent of the aggregate rockfish primary species QS initially assigned to the catcher vessel sector.

(4) *Vessel use cap.* (i) A catcher vessel may not harvest an amount of rockfish primary species CQ greater than 8.0 percent of the aggregate rockfish primary species CQ issued to the catcher vessel sector during a calendar year.

(ii) A catcher/processor vessel may not harvest an amount of rockfish primary species CQ greater than 60.0 percent of the aggregate rockfish primary species CQ issued to the catcher/processor sector during a calendar year.

(5) *Use cap for rockfish processors.* (i) A rockfish processor may not receive or process an amount of rockfish primary species harvested with CQ assigned to the catcher vessel sector greater than 30.0 percent of the aggregate rockfish primary species CQ assigned to the catcher vessel sector during a calendar year.

(ii) A rockfish processor may not receive or process an amount of Pacific cod harvested with CQ assigned to the catcher vessel sector greater than 30.0 percent of Pacific cod CQ issued to the catcher vessel sector during a calendar year.

(iii) A rockfish processor may not receive or process an amount of sablefish harvested with CQ assigned to the catcher vessel sector greater than 30.0 percent of sablefish CQ issued to the catcher vessel sector during a calendar year.

(iv) The amount of aggregate rockfish primary species, Pacific cod, or sablefish CQ assigned to the catcher vessel sector that is received by a rockfish processor is calculated based on the sum of all landings made with CQ received or processed by that rockfish processor and the CQ received or processed by any person affiliated with that rockfish processor as that term is defined in § 679.2.

(6) *Use cap exemptions*—(i) *Rockfish QS.* A rockfish QS holder may receive an initial allocation of aggregate rockfish QS in excess of the use cap in that sector only if that rockfish QS is assigned to LLP license(s) held by that rockfish eligible harvester prior to June 14, 2010,

and continuously through the time of application for rockfish QS.

(ii) *Transfer limitations.* A rockfish eligible harvester that receives an initial allocation of aggregate rockfish QS that exceeds the use cap listed in paragraph (a)(2) of this section shall not receive any rockfish QS by transfer (except by operation of law) unless and until that harvester's holdings of aggregate rockfish QS in that sector are reduced to an amount below the use cap specified in paragraph (a)(2) of this section.

(b) *Opt-out.* Any vessel named on an LLP license that is not named on an approved Annual Application for Cooperative Fishing Quota, may not fish with any vessel named on the opted-out LLP license during that fishing year in any directed fishery for any rockfish primary species in the Central GOA and waters adjacent to the Central GOA when the rockfish primary species caught by that vessel is deducted from the Federal TAC specified under § 679.20.

(c) *Sideboard limitations—General.* The regulations in this section restrict the vessels and holders of LLP licenses with rockfish legal landings that could generate rockfish QS from using the increased flexibility provided by the Rockfish Program to expand their level of participation in other GOA groundfish fisheries. These limitations are commonly known as ''sideboards.''

(1) *Classes of sideboard restrictions.* Three types of sideboard restrictions apply under the Rockfish Program:

(i) Catcher vessel sideboard restrictions as described under paragraph (d) of this section;

(ii) Catcher/processor rockfish sideboard restrictions as described under paragraph (e) of this section; and,

(iii) Opt-out sideboard restrictions as described under paragraphs (e) and (f) of this section.

(2) *Notification of affected vessel owners and LLP license holders.* After NMFS determines which vessels and LLP licenses may be subject to sideboard limitations as described in paragraphs (d) through (f) of this section, NMFS will inform each vessel owner and LLP license holder in writing of the type of rockfish sideboard limitation and issue a revised Federal Fisheries Permit and/or LLP license that displays the sideboard limitation(s) that may apply to that FFP or LLP on its face.

(3) *Appeals.* A vessel owner or LLP license holder who believes that NMFS has incorrectly identified his or her vessel or LLP license as meeting the criteria for a sideboard limitation, or who disagrees with the specific sideboard ratio assigned to that LLP license, may make a contrary claim and provide evidence to NMFS. All claims must be submitted in writing with any documentation or evidence supporting the request within 30 days of being notified by NMFS of the sideboard limitation. NMFS will provide instructions for submitting such claims with the sideboard notification. An applicant must submit any documentation or evidence supporting a claim within 30 days of being notified by NMFS of the sideboard limitation. If NMFS finds the claim is unsupported, the claim will be denied in an Initial Administrative Determination (IAD). The affected persons may appeal this IAD using the procedures described in § 679.43.

(4) *Duration of sideboard limits.* Unless otherwise specified, all sideboard limitations established under paragraph (e) of this section only apply from July 1 through July 31 of each year.

(d) *Sideboard provisions for catcher vessels*—(1) *Vessels subject to catcher vessel sideboard limits.* Any vessel not specified in paragraph (d)(2) of this section that NMFS has determined meets any of the following criteria is subject to the provisions under this paragraph (d):

(i) Any vessel whose rockfish legal landings could be used to generate rockfish QS for the catcher vessel sector; and,

(ii) Any vessel named on an LLP license under whose authority rockfish legal landings were made that could be used to generate rockfish QS for the catcher vessel sector.

(2) *Applicability of sideboard provisions for specific catcher vessels.* The following vessels are exempt from the sideboard limits in paragraph (d) of this section:

(i) Any AFA catcher vessel that is not exempt from GOA groundfish sideboards under the AFA as specified under § 679.64(b)(2)(ii);

(ii) Any vessel that made rockfish legal landings during the fishery seasons established in Table 28a to this part and during the entry level trawl fishery during 2007, 2008, or 2009 established in Table 28b to this part and that is designated on an approved application for rockfish QS as being excluded from the Rockfish Program as specified under § 679.80(d)(4)(ii); and

(iii) Any vessel named on an LLP license under whose authority rockfish legal landings were made during the fishery seasons established in Table 28a to this part and during the entry level trawl fishery during 2007, 2008, or 2009 established in Table 28b to this part if that LLP license is designated on an approved application for rockfish QS as being excluded from the Rockfish Program as specified under § 679.80(d)(4)(ii).

(3) *Prohibition for directed fishing in the Western GOA and West Yakutat District rockfish fishery during July.* Vessels subject to the provisions in this paragraph (d) may not participate in directed fishing in the Western GOA and West Yakutat District for northern rockfish, Pacific ocean perch, and pelagic shelf rockfish (or in waters adjacent to the Western GOA and West Yakutat District when northern rockfish, Pacific ocean perch, and pelagic shelf rockfish by that vessel is deducted from the Federal TAC as specified under § 679.20) from July 1 through July 31.

(4) *Prohibition for directed fishing in the specific GOA flatfish fisheries during July.* Vessels subject to the provisions in this paragraph (d) may not participate in directed fishing for arrowtooth flounder, deep-water flatfish, and rex sole in the GOA (or in waters adjacent to the GOA when arrowtooth flounder, deep-water flatfish, and rex sole caught by that vessel is deducted from the Federal TAC as specified under § 679.20) from July 1 through July 31.

(e) *Rockfish and halibut PSC sideboard provisions for catcher/processor vessels*—(1) *Vessels subject to catcher/processor sideboard limits.* Any vessel that NMFS has determined meets any of the following criteria is subject to the provisions under this paragraph (e):

(i) Any vessel whose rockfish legal landings could be used to generate rockfish QS for the catcher/processor sector in the Rockfish Program; or

(ii) Any vessel named on an LLP license under whose authority rockfish legal landings were made that could be used to generate rockfish QS for the catcher/processor sector in the Rockfish Program.

(2) *Prohibition for directed rockfish fishing in the Western GOA and West Yakutat District by non-Amendment 80 vessels assigned to the catcher/processor sector.* Any vessel that meets the criteria established in paragraph (e)(1) of this section and that is not an Amendment 80 vessel is prohibited from directed fishing for northern rockfish, Pacific ocean perch, and pelagic shelf rockfish in the Western GOA and West Yakutat District (or in waters adjacent to the Western GOA and West Yakutat District when northern rockfish, Pacific ocean perch, and pelagic shelf rockfish by that vessel is deducted from the Federal TAC as specified under § 679.20) from July 1 through July 31.

(3) *Calculation of rockfish and halibut PSC sideboard limits assigned to each*

LLP license in the catcher/processor sector. NMFS will determine specific rockfish sideboard ratios for each LLP license assigned to the catcher/processor sector that could generate rockfish QS. These rockfish sideboard ratios will be noted on the face of an LLP license and will be calculated as follows:

(i) For each rockfish sideboard fishery, divide the retained catch of that rockfish sideboard fishery from July 1 through July 31 in each year from 2000 through 2006 made under the authority of that LLP license, by the total retained catch of that rockfish sideboard fishery from July 1 through July 31 in each year from 2000 through 2006 by vessels operating under the authority of all eligible LLP licenses in the catcher/processor sector.

(ii) For the deep-water halibut PSC sideboard limit, divide the halibut PSC used in the deep-water complex, except in the Central GOA rockfish fisheries, from July 1 through July 31 in each year from 2000 through 2006 under the authority of that LLP license, by the total deep-water halibut PSC used from July 1 through July 31 in each year from 2000 through 2006 by vessels operating under the authority of all LLP licenses in the catcher/processor sector.

(iii) For the shallow-water halibut PSC sideboard limit, divide the halibut PSC used in the shallow-water complex from July 1 through July 31 in each year from 2000 through 2006 under the authority of that LLP license, by the total shallow-water halibut PSC used from July 1 through July 31 in each year from 2000 through 2006 by vessels operating under the authority of all LLP licenses in the catcher/processor sector.

(4) *Western GOA and West Yakutat District rockfish sideboard ratios.* The rockfish sideboard ratio for each rockfish fishery in the Western GOA and West Yakutat District is established in the following table:

For the management area of the . . .	In the directed fishery for . . .	The sideboard limit for the catcher/processor sector is . . .
West Yakutat District	Pelagic shelf rockfish	** percent of the TAC.
	Pacific ocean perch	** percent of the TAC.
Western GOA	Pelagic shelf rockfish	72.3 percent of the TAC.
	Pacific ocean perch	50.6 percent of the TAC.
	Northern rockfish	74.3 percent of the TAC.

(5) *GOA halibut PSC sideboard ratios.* (i) The annual deep-water complex halibut PSC sideboard limit in the GOA is 2.5 percent of the annual halibut mortality limit.

(ii) The annual shallow-water complex halibut PSC sideboard limit in the GOA is 0.1 percent of the annual halibut mortality limit.

(6) *Assigning a rockfish sideboard limit to a rockfish cooperative.* Each rockfish cooperative in the catcher/processor sector will be assigned a portion of the rockfish sideboard limit for each rockfish species established in paragraph (e)(4) of this section according to the following formula.

(i) For each rockfish sideboard fishery specified in paragraph (e)(4) of this section, sum the rockfish sideboard ratios of all LLP licenses as calculated under paragraph (e)(3) of this section assigned to that rockfish cooperative and multiply this result by the amount of TAC (in metric tons) assigned to that rockfish sideboard fishery.

(ii) Once assigned, a catcher/processor rockfish cooperative may not exceed any rockfish sideboard limit assigned to that cooperative from July 1 through July 31.

(7) *Assigning a rockfish sideboard limit to catcher/processors that opt-out of participating in rockfish cooperatives.* Holders of catcher/processor designated LLP licenses that opt-out of participating in a rockfish cooperative will receive the portion of each rockfish sideboard limit established in paragraph (e)(3) of this section not assigned to rockfish cooperatives.

(8) *Management of a rockfish opt-out sideboard limit.* (i) If the Regional Administrator determines that an annual rockfish sideboard limit for opt-out vessels is sufficient to support directed fishing for that rockfish sideboard fishery, the Regional Administrator may establish a directed fishing allowance applicable to holders of catcher/processor designated LLPs that have opted-out of participating in a rockfish cooperative.

(ii) If the Regional Administrator determines that a sideboard limit is insufficient to support a directed fishing allowance for that rockfish sideboard fishery, then the Regional Administrator may not allow directed fishing and set the allowance to zero for catcher/processor opt-out vessels from July 1 through July 31.

(iii) Upon determining that a halibut PSC sideboard limit is or will be reached, the Regional Administrator will publish notification in the **Federal Register** prohibiting directed fishing for the rockfish sideboard fishery in the regulatory area or district for catcher/processor opt-out vessels that will be effective from July 1 through July 31.

(9) *Assigning deep-water and shallow-water halibut PSC sideboard limits to a rockfish cooperative.* Each rockfish cooperative in the catcher/processor sector will be assigned a percentage of the deep-water and shallow-water halibut PSC sideboard limits based on the following calculation:

(i) Sum the deep-water ratios of all LLP licenses assigned to that rockfish cooperative and multiply this result by the amount set out in paragraph (e)(5)(i) of this section; and

(ii) Sum the shallow-water ratios of all LLP licenses assigned to that rockfish cooperative and multiply this result by the amount set out in paragraph (e)(5)(ii) of this section; and

(iii) A rockfish cooperative may not exceed any deep-water or shallow-water halibut PSC sideboard limit assigned to that cooperative.

(10) *Assigning a halibut PSC limit to catcher/processor opt-out vessels.* Catcher/processor opt-out vessels will receive the portion of the deep-water and shallow-water halibut PSC sideboard limit not assigned to catcher/processor rockfish cooperatives.

(11) *Management of halibut PSC limits assigned to catcher/processor opt-out vessels.* (i) If the Regional Administrator determines that a halibut PSC sideboard limit for opt-out vessels is sufficient to support a directed fishing allowance for groundfish in the deep-water or shallow-water halibut PSC complex, then the Regional Administrator may establish a directed fishing allowance for that species or species group applicable to catcher/processor opt-out vessels.

(ii) If the Regional Administrator determines that a sideboard limit is insufficient to support a directed fishing allowance for groundfish in the deep-water or shallow-water halibut PSC complex, then the Regional

Administrator may not allow directed fishing and set the allowance to zero for the deep-water or shallow-water halibut PSC complex for catcher/processor opt-out vessels from July 1 through July 31.

(iii) Upon determining that a halibut PSC sideboard limit is or will be reached, the Regional Administrator will publish notification in the **Federal Register** prohibiting directed fishing for the species or species in that complex for catcher/processors opt-out vessels that will be effective from July 1 through July 31. The following specific directed fishing closures will be implemented if a halibut PSC sideboard limit is reached:

(A) If the shallow-water halibut PSC sideboard limit for catcher/processor opt-out vessels is or will be reached, then NMFS will close directed fishing in the GOA for:

(*1*) Flathead sole; and

(*2*) Shallow-water flatfish.

(B) If the deep-water halibut PSC sideboard limit is or will be reached for catcher/processor opt-out vessels, then NMFS will close directed fishing in the GOA for:

(*1*) Rex sole;

(*2*) Deep-water flatfish; and

(*3*) Arrowtooth flounder.

(iv) *Halibut PSC accounting.* Any halibut mortality occurring under a CQ permit from July 1 through July 31 will not apply against the halibut PSC sideboard limits established in paragraph (e)(5) of this section.

(f) *Sideboard provisions—catcher/processor opt-out provisions*—(1) *Vessels subject to opt-out sideboard provisions.* In addition to the sideboards for opt-out vessels in paragraphs (e)(7) and (e)(10) of this section, any catcher/processor opt-out vessel that NMFS has determined meets any of the following criteria is subject to the provisions under this paragraph (f):

(i) Any vessel whose legal rockfish landings could be used to generate rockfish QS for the catcher/processor sector that is not assigned to a rockfish cooperative; or,

(ii) Any vessel named on an LLP license under whose authority legal rockfish landings were made that could be used to generate rockfish QS for the catcher/processor sector and that is not assigned to a rockfish cooperative.

(2) *Prohibitions on directed fishing in GOA groundfish fisheries without previous participation.* (i) Any vessel that is subject to the opt-out sideboard restriction under paragraph (f) of this section is prohibited from directed fishing in any groundfish fishery in the GOA and waters adjacent to the GOA when groundfish caught by that vessel is deducted from the Federal TAC specified under § 679.20 (except sablefish harvested under the IFQ Program) from July 1 through July 14 of each year if that vessel has not participated in that directed groundfish fishery in any 2 years from 2000 through 2006 during the following time periods:

(A) July 9, 2000, through July 15, 2000;

(B) July 1, 2001, through July 7, 2001;

(C) June 30, 2002, through July 6, 2002;

(D) June 29, 2003, through July 5, 2003;

(E) July 4, 2004, through July 10, 2004;

(F) July 3, 2005, through July 9, 2005; and

(G) July 2, 2006, through July 8, 2006.

(ii) For purposes of determining participation in a directed groundfish fishery for paragraph (f)(2)(i) of this section, a vessel may participate:

(A) In the flathead sole and shallow-water flatfish fisheries if that vessel participated in a directed groundfish fishery for either of these two fisheries during any 2 years during the 2000 through 2006 qualifying period defined in paragraph (f)(2)(i) of this section; and

(B) In the arrowtooth flounder, deep-water flatfish, and rex sole fisheries if that vessel participated in a directed groundfish fishery for any of these three fisheries during any 2 years during the 2000 through 2006 qualifying period defined in paragraph (f)(2)(i) of this section.

§ 679.83 Rockfish Program entry level longline fishery.

(a) *Rockfish entry level longline fishery*—(1) *Rockfish primary species allocations.* Vessels participating in the rockfish entry level longline fishery may collectively harvest an amount not greater than the total allocation to the rockfish entry level longline fishery as described in Table 28e to this part.

(2) *Participation.* Catcher vessels fishing under a CQ permit must first be checked-out of the Rockfish Program by the catcher vessel cooperative's designated representative to participate in the entry level longline fishery (see § 679.5(r)(8)(i)(B) for check-out procedures).

(3) *Rockfish secondary species allocations.* Rockfish secondary species shall not be allocated to the rockfish entry level longline fishery. Rockfish secondary species shall be managed based on an MRA for the target species as described in Table 10 to this part.

(4) *Opening of the rockfish entry level longline fishery.* The Regional Administrator maintains the authority to not open the rockfish entry level longline fishery if he or she deems it appropriate for conservation or other management measures. Factors such as the total allocation, anticipated harvest rates, and number of participants will be considered in making any such decision.

(b) [Reserved]

§ 679.84 Rockfish Program recordkeeping, permits, monitoring, and catch accounting.

(a) *Recordkeeping and reporting. See § 679.5(r).*

(b) *Permits. See § 679.4(n).*

(c) *Catch monitoring requirements for catcher/processors assigned to a rockfish cooperative.* The requirements under paragraphs (c)(1) through (10) of this section apply to any catcher/processor vessel assigned to a rockfish cooperative at all times when that vessel has groundfish onboard that were harvested under a CQ permit, or that were harvested by a vessel subject to a rockfish sideboard limit as described under § 679.82(c) through (f), as applicable. The vessel owner or operator must ensure that:

(1) *Catch weighing.* All catch is weighed on a NMFS-approved scale in compliance with the scale requirements at § 679.28(b). Each haul must be weighed separately and all catch must be made available for sampling by a NMFS-certified observer.

(2) *Observer sampling station.* An observer sampling station meeting the requirements at § 679.28(d) is available at all times.

(3) *Observer coverage requirements.* The vessel is in compliance with the observer coverage requirements described at § 679.50(c)(7)(i).

(4) *Operational line.* The vessel has no more than one operational line or other conveyance for the mechanized movement of catch between the scale used to weigh total catch and the location where the observer collects species composition samples.

(5) *Fish on deck.* No fish are allowed to remain on deck unless an observer is present, except for fish inside the codend and fish spilled from the codend during hauling and dumping. Fish spilled from the codend must be moved to the fish bin.

(6) *Sample storage.* The vessel owner or operator provides sufficient space to accommodate a minimum of 10 observer sampling baskets. This space must be within or adjacent to the observer sample station.

(7) *Pre-cruise meeting.* The Observer Program Office is notified by phone at 1–(907) 271–1702 at least 24 hours prior to departure when the vessel will be carrying an observer who had not previously been deployed on that vessel within the last 12 months. Subsequent

to the vessel's departure notification, but prior to departure, NMFS may contact the vessel to arrange for a pre-cruise meeting. The pre-cruise meeting must minimally include the vessel operator or manager and any observers assigned to the vessel.

(8) *Belt and flow operations.* The vessel operator stops the flow of fish and clears all belts between the bin doors and the area where the observer collects samples of unsorted catch when requested to do so by the observer.

(9) *Vessel crew in tanks or bins.* The vessel owner or operator must comply with the bin monitoring standards specified in § 679.28(i).

(10) *Mixing of hauls.* Catch from an individual haul is not mixed with catch from another haul prior to sampling by a NMFS-certified observer;

(d) *Catch monitoring requirements for catcher/processors opt-out vessels.* The requirements under paragraphs (c)(1) through (9) of this section apply to any catcher/processor opt-out vessels at all times when that vessel has groundfish onboard that were harvested by a vessel subject to a sideboard limit as described under § 679.82(f), as applicable. The vessel owner or operator must ensure that:

(1) Catch from an individual haul is not mixed with catch from another haul prior to sampling by a NMFS-certified observer;

(2) All catch be made available for sampling by a NMFS-certified observer; and

(3) The requirements in paragraphs (c)(3), (c)(4), (c)(5), (c)(8), and (c)(9) of this section are met.

(e) *Catch monitoring requirements for catcher vessels.* The owner or operator of a catcher vessel must ensure the vessel complies with the observer coverage requirements described in § 679.50(c)(7)(ii) at all times the vessel is participating in a rockfish cooperative.

(f) *Catch monitoring requirements for shoreside processors*—(1) *Catch monitoring and control plan (CMCP).* The owner or operator of a shoreside processor receiving deliveries from a catcher vessel described in § 679.50(c)(7)(ii) must ensure the shoreside processor complies with the CMCP requirements described in § 679.28(g).

(2) *Catch weighing.* All groundfish landed by catcher vessels described in § 679.50(c)(7)(ii) must be sorted, weighed on a scale approved by the State of Alaska as described in § 679.28(c), and be made available for sampling by an observer, NMFS staff, or any individual authorized by NMFS. Any of these persons must be allowed to test any scale used to weigh groundfish to determine its accuracy.

(g) *Catch accounting*—(1) *Rockfish primary species and rockfish secondary species.* All rockfish primary species and rockfish secondary species harvests (including harvests of those species in waters adjacent to the Central GOA that are deducted from the Federal TAC as specified under § 679.20) of a vessel, that is named on an LLP license that is assigned to a rockfish cooperative and fishing under a CQ permit, will be debited against the CQ for that rockfish cooperative from May 1:

(i) Until November 15; or

(ii) Until that rockfish cooperative has submitted a rockfish cooperative termination of fishing declaration that has been approved by NMFS.

(2) *Rockfish halibut PSC.* All halibut PSC in the Central GOA (including halibut PSC in the waters adjacent to the Central GOA when rockfish primary species and rockfish secondary species caught by that vessel are deducted from the Federal TAC specified under § 679.20) used by a vessel, that is named on an LLP license that is assigned to a rockfish cooperative and fishing under a CQ permit, will be debited against the CQ for that rockfish cooperative from May 1,

(i) Until November 15; or

(ii) Until the designated representative of that rockfish cooperative has submitted a rockfish cooperative termination of fishing declaration that has been approved by NMFS.

(3) *Groundfish sideboard limits.* All groundfish harvests (including harvests of those species in waters adjacent to the Central GOA that are deducted from the Federal TAC as specified under § 679.20) of a catcher/processor vessel that is subject to a sideboard limit for that groundfish species as described under § 679.82(e), except groundfish harvested by a vessel fishing under a CQ permit in the Central GOA, will be debited against the sideboard limit established for that sector or rockfish cooperative, as applicable.

(4) *Halibut sideboard limits.* All halibut PSC in the GOA (including halibut PSC in the waters adjacent to the GOA when rockfish primary species and rockfish secondary species caught by that vessel are deducted from the Federal TAC specified under § 679.20) used by a catcher/processor vessel, except halibut PSC used by a vessel fishing under a CQ permit in the Central GOA, will be debited against the sideboard limit established for the rockfish cooperative or catcher/processor opt-out vessel, as applicable from July 1 until July 31.

§ 679.85 Cost recovery.

(a) *Cost recovery fees*—(1) *Responsibility.* The person documented on the rockfish CQ permit as the permit holder at the time of a rockfish CQ landing must comply with the requirements of this section.

(i) Subsequent transfer of rockfish CQ or rockfish QS held by rockfish cooperative members does not affect the rockfish CQ permit holder's liability for noncompliance with this section.

(ii) Non-renewal of a rockfish CQ permit does not affect the CQ permit holder's liability for noncompliance with this section.

(iii) Changes in the membership in a rockfish cooperative, such as members joining or departing during the relevant year, or changes in the amount of rockfish QS holdings of those members does not affect the rockfish CQ permit holder's liability for noncompliance with this section.

(2) *Fee collection.* All rockfish CQ holders who receive rockfish CQ are responsible for submitting the cost recovery payment for all rockfish CQ landings made under the authority of their rockfish CQ permit.

(3) *Payment*—(i) *Payment due date.* A rockfish CQ permit holder must submit any rockfish cost recovery fee liability payment(s) to NMFS at the address provided in paragraph (a)(3)(iii) of this section no later than February 15 of the year following the calendar year in which the rockfish CQ landings were made.

(ii) *Payment recipient.* Make electronic payment payable to NMFS.

(iii) *Payment address.* Submit payment and related documents as instructed on the fee submission form. Payments must be made electronically through the NMFS Alaska Region Web site at *http://alaskafisheries.noaa.gov.* Instructions for electronic payment will be made available on both the payment Web site and a fee liability summary letter mailed to the CQ permit holder.

(iv) *Payment method.* Payment must be made electronically in U.S. dollars by automated clearing house, credit card, or electronic check drawn on a U.S. bank account.

(b) *Rockfish standard ex-vessel value determination and use*—(1) *General.* A CQ permit holder must use the rockfish standard ex-vessel value determined by NMFS under paragraph (b)(2) of this section.

(2) *Rockfish standard ex-vessel value*—(i) *General.* Each year the Regional Administrator will publish rockfish standard ex-vessel values in the **Federal Register** during the first quarter of each calendar year. The standard prices will be described in U.S. dollars

per equivalent pound, for rockfish primary species and rockfish secondary species landings made by rockfish CQ holders during the previous calendar year.

(ii) *Effective duration.* The rockfish standard ex-vessel value published by NMFS shall apply to all rockfish primary species and rockfish secondary species landings made by a rockfish CQ holder during the previous calendar year.

(iii) *Determination.* NMFS will calculate the rockfish standard ex-vessel value to reflect, as closely as possible by month, the variations in the actual ex-vessel values of landings based on information provided in the Rockfish Ex-vessel Volume and Value Report as described in § 679.5(r)(10). The Regional Administrator will base rockfish standard ex-vessel values on the following types of information:

(A) Landed pounds by rockfish primary species and rockfish secondary species landings and month;

(B) Total ex-vessel value by rockfish primary species and rockfish secondary species landings and month; and

(C) Price adjustments, including retroactive payments.

(c) *Rockfish fee percentage*—(1) *Established percentage.* The rockfish fee percentage is the amount as determined by the factors and methodology described in paragraph (c)(2) of this section. This amount will be announced by publication in the **Federal Register** in accordance with paragraph (c)(3) of this section. This amount must not exceed 3.0 percent pursuant to 16 U.S.C. 1854(d)(2)(B).

(2) *Calculating fee percentage value.* Each year NMFS shall calculate and publish the fee percentage according to the following factors and methodology:

(i) *Factors.* NMFS must use the following factors to determine the fee percentage:

(A) The catch to which the rockfish cost recovery fee will apply;

(B) The ex-vessel value of that catch; and

(C) The costs directly related to the management, data collection, and enforcement of the Rockfish Program.

(ii) *Methodology.* NMFS must use the following equations to determine the fee percentage:

$$100 \times DPC/V$$

where:

DPC = the direct program costs for the Rockfish Program for the previous calendar year with any adjustments to the account from payments received in the previous year.

V = total of the standard ex-vessel value of the catch subject to the rockfish cost recovery fee liability for the current year.

(3) *Publication*—(i) *General.* During the first quarter of the year following the calendar year in which the rockfish CQ landings were made, NMFS shall calculate the rockfish fee percentage based on the calculations described in paragraph (c)(2) of this section.

(ii) *Effective period.* The calculated rockfish fee percentage is applied to rockfish CQ landings made in the previous calendar year.

(4) *Applicable percentage.* The CQ permit holder must use the rockfish fee percentage applicable at the time a rockfish primary species and rockfish secondary species landing is debited from a rockfish CQ allocation to calculate the rockfish cost recovery fee liability for any retroactive payments for that rockfish primary species and rockfish secondary species.

(5) *Fee liability determination for a rockfish CQ holder.* (i) All rockfish CQ holders will be subject to a fee liability for any rockfish primary species and rockfish secondary species CQ debited from a rockfish CQ allocation during a calendar year.

(ii) The rockfish fee liability assessed to a rockfish CQ holder will be based on the proportion of the standard ex-vessel value of rockfish primary species and rockfish secondary species debited from a rockfish CQ holder relative to all rockfish CQ holders during a calendar year as determined by NMFS.

(iii) NMFS will provide a fee liability summary letter to all CQ permit holders during the first quarter of the year following the calendar year in which the rockfish CQ landings were made. The summary will explain the fee liability determination including the current fee percentage, details of rockfish primary species and rockfish secondary species CQ pounds debited from rockfish CQ allocations by permit, species, date, and prices.

(d) *Underpayment of fee liability.* (1) Pursuant to § 679.81(f), no rockfish CQ holder will receive any rockfish CQ until the rockfish CQ holder submits a complete application. A complete application shall include full payment of an applicant's complete rockfish cost recovery fee liability.

(2) If a rockfish CQ holder fails to submit full payment for rockfish cost recovery fee liability by the date described in paragraph (a)(3) of this section, the Regional Administrator may:

(i) At any time thereafter send an IAD to the CQ permit holder stating that the CQ permit holder's estimated fee liability, as indicated by his or her own submitted information, is the rockfish cost recovery fee liability due from the CQ permit holder.

(ii) Disapprove any application to transfer rockfish CQ to or from the CQ permit holder in accordance with § 679.81(g).

(3) If a rockfish CQ holder fails to submit full payment by the rockfish cost recovery fee liability payment deadline described at paragraph (a)(3) of this section:

(i) No CQ permit will be issued to that rockfish CQ holder for that calendar year; and

(ii) No rockfish CQ will be issued based on the rockfish QS held by the members of that rockfish cooperative to any other CQ permit for that calendar year.

(4) Upon final agency action determining that a CQ permit holder has not paid his or her rockfish cost recovery fee liability, the Regional Administrator may continue to prohibit issuance of a CQ permit for any subsequent calendar years until NMFS receives the unpaid fees. If payment is not received by the 30th day after the final agency action, the agency may pursue collection of the unpaid fees.

(e) *Over payment.* Upon issuance of final agency action, payment submitted to NMFS in excess of the rockfish cost recovery fee liability determined to be due by the final agency action will be returned to the CQ permit holder unless the permit holder requests the agency to credit the excess amount against the permit holder's future rockfish cost recovery fee liability. Payment processing fees may be deducted from any fees returned to the CQ permit holder.

(f) *Appeals.* A CQ permit holder who receives an IAD for incomplete payment of a rockfish fee liability may appeal the IAD pursuant to 50 CFR 679.43.

■ 11. Remove Table 28 to part 679 and add Tables 28a through 28e to part 679 to read as follows:

TABLE 28a TO PART 679—QUALIFYING SEASON DATES FOR CENTRAL GOA ROCKFISH PRIMARY SPECIES

A Legal Rockfish Landing includes	Year						
	2000	2001	2002	2003	2004	2005	2006
Northern rockfish that were harvested in the Central GOA between. . .	July 4–July 26.	July 1–July 23. and Oct. 1–Oct. 21.	June 30–July 21.	June 29–July 29.	July 4–July 25.	July 5–July 24.	July 1–July 21.
and landed by	Aug. 2	July 30 and Oct. 28, respectively.	July 28	Aug. 5	Aug. 1	July 31	July 28.
Pelagic shelf rockfish that were harvested in the Central GOA between. . .	July 4–July 26.	July 1–July 23 and Oct. 1–Oct. 21.	June 30–July 21.	June 29–July 31.	July 4–July 25.	July 5–July 24, Sept. 1–Sept 4, and Sept. 8–Sept. 10.	July 1–July 21 and Oct. 2–Oct. 8.
and landed by	Aug. 2	July 30 and Oct. 28, respectively.	July 28	Aug. 7	Aug. 1	July 31, Sept. 11, and Sept. 17, respectively.	July 28 and Oct. 15, respectively.
Pacific ocean perch that were harvested in the Central GOA between. . .	July 4–July 15.	July 1–July 12.	June 30–July 8.	June 29–July 8.	July 4–July 12.	July 5–July 14.	July 1–July 6.
and landed by	July 22	July 19	July 15	July 15	July 19	July 21	July 13.

TABLE 28b TO PART 679—QUALIFYING SEASON DATES FOR CENTRAL GOA ROCKFISH PRIMARY SPECIES

A Rockfish Legal Landing includes . . .	2007	2008	2009
Northern rockfish that were harvested by vessels authorized to fish in the rockfish entry level trawl fishery between. . .	Sept. 1–Nov. 8	Sept. 1–Nov. 15	Sept. 1–Nov. 15.
and landed by	Nov. 15	Nov. 22	Nov. 22.
Pelagic shelf rockfish that were harvested by vessels authorized to fish in the rockfish entry level trawl fishery between. . .	Sept. 1–Nov. 15	Sept. 1–Nov. 15	Sept. 1–Nov. 15.
and landed by	Nov. 22	Nov. 22	Nov. 22.
Pacific ocean perch that were harvested by vessels authorized to fish in the rockfish entry level trawl fishery between. . .	May 1–May 17; July 1–Aug. 1.	July 1–July 27	July 1–Nov. 15.
and landed by	Aug. 8	Aug. 3	Nov. 22.

TABLE 28c TO PART 679—ALLOCATION OF ROCKFISH SECONDARY SPECIES

For the following rockfish secondary species . . .	The following percentage of the Central GOA TAC is allocated to rockfish cooperatives as CQ . . .	
	For the catcher vessel sector . . .	For the catcher/processor sector . . .
Pacific cod	3.81%	N/A
Sablefish	6.78%	3.51%
Rougheye rockfish	N/A	58.87%
Shortraker rockfish	N/A	40.00%
Thornyhead rockfish	7.84%	26.50%

TABLE 28d TO PART 679—ALLOCATION OF HALIBUT PSC UNDER THE CENTRAL GOA ROCKFISH PROGRAM

For the following rockfish sectors . . .	The following amount of halibut . . .	Is multiplied by . . .	To yield the following amount of halibut PSC assigned as rockfish CQ . . .	The following amount of halibut is not assigned as rockfish CQ, halibut PSC, or halibut IFQ for use by any person . . .
Catcher vessel sector	134.1 mt	0.875	117.3 mt	27.4 mt (16.8 mt from the catcher vessel sector and 10.6 mt from the catcher/processor sector).
Catcher/processor sector	84.7 mt		74.1 mt.	

TABLE 28e TO PART 679—ROCKFISH ENTRY LEVEL LONGLINE FISHERY ALLOCATIONS

The allocation to the rockfish entry level longline fishery for the following rockfish primary species . . .	For 2012 will be . . .	If the catch of a rockfish primary species during a calendar year exceeds 90 percent of the allocation for that rockfish primary species then the allocation of that rockfish primary species in the following calendar year will increase by . . .	Except that the maximum amount of the TAC assigned to the Rockfish Program (after deducting the incidental catch allowance) that may be allocated to the rockfish entry level non-trawl fishery for each rockfish primary species is . . .
Northern rockfish	5 mt	5 mt	2 percent.
Pacific ocean perch	5 mt	5 mt	1 percent.
Pelagic shelf rockfish	30 mt	20 mt	5 percent.

■ 17. Revise Tables 29 and 30 to part 679 to read as follows:

TABLE 29 TO PART 679—INITIAL ROCKFISH QS POOLS

Initial Rockfish QS Pool	Northern Rockfish	Pelagic Shelf Rockfish	Pacific Ocean Perch	Aggregate Primary Species Initial Rockfish QS Pool
Initial Rockfish QS Pool	Based on the Rockfish Program official record on February 14, 2012.			
Initial Rockfish QS Pool for the Catcher/Processor Sector.				
Initial Rockfish QS Pool for the Catcher Vessel Sector.				

TABLE 30 TO PART 679—ROCKFISH PROGRAM RETAINABLE PERCENTAGES (IN ROUND WT. EQUIVALENT)

Fishery	Incidental Catch Species	Sector	MRA as a percentage of total retained rockfish primary species and rockfish secondary species
Rockfish Cooperative Vessels fishing under a Rockfish CQ permit.	Pacific cod	Catcher/Processor	4.0 percent.
	Shortraker/Rougheye aggregate catch.	Catcher Vessel	2.0 percent.
	See rockfish non-allocated species for "other species"		
Rockfish non-allocated species for Rockfish Cooperative vessels fishing under a Rockfish CQ permit.	Pollock	Catcher/Processor and Catcher Vessel.	20.0 percent.
	Deep-water flatfish	Catcher/Processor and Catcher Vessel.	20.0 percent.
	Rex sole	Catcher/Processor and Catcher Vessel.	20.0 percent.
	Flathead sole	Catcher/Processor and Catcher Vessel.	20.0 percent.
	Shallow-water flatfish	Catcher/Processor and Catcher Vessel.	20.0 percent.
	Arrowtooth flounder	Catcher/Processor and Catcher Vessel.	35.0 percent.
	Other rockfish	Catcher/Processor and Catcher Vessel.	15.0 percent.
	Atka mackerel	Catcher/Processor and Catcher Vessel.	20.0 percent.
	Aggregated forage fish	Catcher/Processor and Catcher Vessel.	2.0 percent.
	Skates	Catcher/Processor and Catcher Vessel.	20.0 percent.
	Other species	Catcher/Processor and Catcher Vessel.	20.0 percent.
Longline gear Rockfish Entry Level Fishery.	See Table 10 to this part.		
Opt-out vessels	See Table 10 to this part.		

TABLE 30 TO PART 679—ROCKFISH PROGRAM RETAINABLE PERCENTAGES (IN ROUND WT. EQUIVALENT)—Continued

Fishery	Incidental Catch Species	Sector	MRA as a percentage of total retained rockfish primary species and rockfish secondary species
Rockfish Cooperative Vessels not fishing under a CQ permit.	See Table 10 to this part.		

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Part VII

Office of Management and Budget

Office of Federal Procurement Policy

48 CFR Part 9904

Cost Accounting Standards: Cost Accounting Standards 412 and 413—Cost Accounting Standards Pension Harmonization Rule; Final Rule

OFFICE OF MANAGEMENT AND BUDGET

Office of Federal Procurement Policy

48 CFR Part 9904

Cost Accounting Standards: Cost Accounting Standards 412 and 413—Cost Accounting Standards Pension Harmonization Rule

AGENCY: Cost Accounting Standards Board, Office of Federal Procurement Policy, Office of Management and Budget.

ACTION: Final rule.

SUMMARY: The Office of Federal Procurement Policy (OFPP), Cost Accounting Standards Board (Board), is publishing this final rule to revise Cost Accounting Standard (CAS) 412, ''Composition and Measurement of Pension Cost,'' and CAS 413, ''Adjustment and Allocation of Pension Cost.'' This revision will harmonize the measurement and period assignment of the pension cost allocable to Government contracts, and the minimum required contribution under the Employee Retirement Income Security Act of 1974 (ERISA), as amended, as required by the Pension Protection Act (PPA) of 2006. The PPA amended the minimum funding requirements for qualified defined benefit pension plans. The Board issues this final rule to revise CAS 412 and CAS 413 to include the recognition of a ''minimum actuarial liability'' and ''minimum normal cost,'' which are measured on a basis consistent with the liability measurement used to determine the PPA minimum required contribution, and accelerate the recognition of actuarial gains and losses. These and other revisions will better align both the measurement and period assignment of pension cost allocable to a contractor's Government contracts and other final cost objectives in accordance with CAS, and the measurement and period assignment requirements for determining the contractor's minimum pension contribution under the PPA.

DATES: *Effective Date:* February 27, 2012.

FOR FURTHER INFORMATION CONTACT: Eric Shipley, Project Director, Cost Accounting Standards Board (telephone: (410) 786–6381).

SUPPLEMENTARY INFORMATION:

A. Regulatory Process

The Rules, Regulations and Standards issued by the Board are codified at 48 CFR chapter 99. The Office of Federal Procurement Policy Act, 41 U.S.C. 1502(c) [formerly, 41 U.S.C. 422(g)], requires that the Board, prior to the establishment of any new or revised Cost Accounting Standard, complete a prescribed rulemaking process. The process consists of the following four steps:

1. Consult with interested persons concerning the advantages, disadvantages and improvements anticipated in the pricing and administration of Government contracts as a result of the adoption of a proposed Standard, and prepare and publish a report on the issues reviewed, which is normally accomplished by publication of a staff discussion paper (SDP).
2. Promulgate an advance notice of proposed rulemaking (ANPRM).
3. Promulgate a notice of proposed rulemaking (NPRM).
4. Promulgate a final rule.

This final rule completes the four-step process.

B. Background and Summary

The Board is releasing a final rule on the revisions to 48 CFR 9904.412 and 9904.413 (respectively, CAS 412 and 413, or 9904.412 and 9904.413) to implement paragraph (d) of section 106 of the Pension Protection Act (PPA) of 2006 (Pub. L. 109–280, 120 Stat. 780).

The PPA amended the minimum funding requirements for, and the tax-deductibility of contributions to, qualified defined benefit pension plans under ERISA. Paragraph (d) of section 106 of the PPA requires the Board to revise CAS 412 and 413 to harmonize the ERISA minimum required contribution and the reimbursable pension cost.

In addition to the revisions to implement harmonization, the Board is making technical corrections to cross references and minor inconsistencies in the current rule. These technical corrections are not intended to change the meaning or provisions of CAS 412 and 413. The technical corrections for CAS 412 are being made to paragraphs 9904.412–30(a)(1), (8) and (9); paragraph 9904.412–50(a)(6); paragraphs 9904.412–50(c)(1), (2) and (5); and paragraph 9904.412–60(c)(13). In CAS 413, the technical corrections are being made to paragraph 9904.413–30(a)(1), subsection 9904.413–40(c), paragraph 9904.413–50(c)(1)(i), and paragraphs 9904.413–60(c)(12) and (18).

Different Roles and Responsibilities

The Board recognizes that heightened interest in pension-related matters may attract attention to this regulatory action by members of the public who are not familiar with CAS and the Board. The Board has a limited role, albeit an indirect one, with respect to pension funding, through its rulemaking regarding reimbursement of Government contractor pension costs. Under ERISA, the authority to implement the statute and promulgate rules and regulations regarding the minimum funding requirements for pension plans, tax deductibility of contributions, and protection of participant's rights has been granted to the Department of Treasury, Department of Labor (DOL) and the Pension Benefit Guaranty Corporation (PBGC). By contrast, the OFPP Act gave the CAS Board the exclusive authority to ''make, promulgate, amend, and rescind cost accounting standards and interpretations thereof designed to achieve uniformity and consistency in the cost accounting standards governing measurement, assignment, and allocation of costs to contracts with the United States.''

In this preamble, references to ERISA serve to identify and distinguish the federal system of funding requirements and restrictions for qualified pension plans from financial disclosure and reporting guidance, which is also known as generally accepted accounting principles (GAAP), and the CAS. References to ERISA may include: ERISA as amended to date; relevant sections of the Internal Revenue Code (IRC) at Title 26 of the U.S.C.; regulations and other pertinent guidance issued by Treasury, DOL and PBGC; and pertinent case law. The Board acknowledges that the tax deductibility of pension contributions is governed by the IRC at Title 26 of the U.S.C. and refers to the IRC when addressing issues related to tax deductibility. The Board acknowledges the pension funding responsibilities of ERISA as being distinct from the Board's responsibilities under the OFPP Act, which are to establish contract cost accounting standards governing the reimbursement of contract costs, including pension costs. Government contractors must continue to comply with ERISA and its implementing regulations that govern the funding of pension plans. This includes the new minimum funding requirements imposed by the PPA as implemented by Treasury. The Board's rules do not change the minimum funding requirements imposed by ERISA or Treasury's implementing regulations. To the contrary, the Board has changed its regulations to harmonize with the PPA and Treasury's implementing regulations by revising the CAS measurement basis for determining the amount of pension cost allocable to

Government contracts, which is reimbursable through contract pricing.

Prior Promulgations

On July 3, 2007, the Board published a SDP (72 FR 36508) to solicit public views with respect to section 106 of the PPA that required the Board to review and revise CAS 412 and 413. Differences between CAS 412 and 413, and the PPA, as well as potential issues associated with addressing those differences, were identified in the SDP.

The ANPRM (73 FR 51261, September 2, 2008) proposed changes to CAS 412 and 413. These proposed changes included the recognition of a ''minimum actuarial liability,'' a ''minimum normal cost,'' special recognition of ''mandatory prepayment credits,'' accelerated gain and loss amortization, and revision of the assignable cost limitation. Other proposed changes addressed the PPA's mandatory cessation of benefit accruals for severely underfunded plans, projection of flat dollar benefits, recognition of accrued contribution values on a discounted basis, interest on prepayment credits, and prior period unfunded pension costs. The Board also proposed a transition period to phase in certain provisions to promote fairness and equity to the contracting parties, as has been done by the Board in other rulemaking. The public was invited to offer comments on these proposed changes and any other related matters. In response to many respondents who asked for additional time for the submission of additional or supplemental public comments, on November 26, 2008, the Board published a notice (73 FR 72086) extending the comment period for the ANPRM.

After considering the comments received on the ANPRM, as well as the results of further analysis and deliberations conducted by the Board, the Board published a NPRM (75 FR 25982) on May 10, 2010, to solicit public views with respect to the proposed revisions to CAS 412 and 413. The NPRM reflected public comments in response to the SDP and ANPRM, as well as research accomplished by the staff for consideration by the Board.

The NPRM proposed changes to CAS 412 and 413 that were considered necessary to harmonize the minimum required contributions under ERISA for Government contractor pension plans and the Government's reimbursable pension plan costs. The primary proposed changes were the recognition of a ''minimum actuarial liability,'' ''minimum normal cost,'' and an accelerated amortization of actuarial gains and losses. The minimum actuarial liability and minimum normal cost are measured on a settlement basis using the expected payout of currently accrued benefits that have been discounted using yield rates on investment grade corporate bonds with matching durations to forecasted pension benefit payments, and that are in the top three quality levels available, *e.g.,* Moody's grade A and above. Other proposed changes addressed the PPA's mandatory cessation of benefit accruals for severely underfunded plans, the projection of flat dollar benefits, recognition of accrued contribution values on a discounted basis, interest on prepayments credits, and prior period unfunded pension costs. The Board continued to propose a transition period to phase in certain provisions to promote fairness and equity to the contracting parties, as has been done by the Board in other rulemaking. The public was invited to offer comments on these proposed changes and any other related matters.

A major feature of the NPRM was the proposal that the minimum actuarial liability and minimum normal cost would only be recognized if three threshold criteria were met. Otherwise, the actuarial accrued liability and normal cost are measured on a going concern basis using the expected payout of projected benefits that have been discounted using an interest assumption equal to the expected future rate of return on investments which reflect long-term trends so as to avoid distortions caused by short-term market fluctuations. (Note that the SDP, ANPRM and NPRM referred to this as the ''long-term'' interest assumption.) These threshold criteria, which have been referred to as ''triggers,'' required that:

(i) The ERISA minimum required contribution exceeds the contract pension costs measured on a going concern basis, referred to as ''trigger 1;''

(ii) The sum of the minimum actuarial liability and minimum normal cost exceeds the sum of the going concern actuarial accrued liability and normal cost, referred to as ''trigger 2;'' and

(iii) The contract pension cost measured using the sum of the minimum actuarial liability and minimum normal cost exceeds the contract pension cost measured using the sum of the actuarial accrued liability and normal cost, referred to as ''trigger 3.''

The Board provided illustrations of these proposed revisions in a new section 9904.412–60.1, Illustrations—CAS Pension Harmonization Rule. The illustrations showed the measurement, assignment and allocation of pension cost under the proposed rule for a contractor that separately accounted for pension costs for one segment and an aggregation of the remaining segments.

The NPRM also added language to clarify that any difference between the expected and actual unfunded actuarial liability caused by a change between recognition of the going concern actuarial accrued liability and the minimum actuarial liability would be treated as part of the actuarial gain or loss for the period. The actuarial gain and loss recognition arising from the change in the liability basis (between using the actuarial accrued liability and the minimum actuarial liability) for computing pension costs was illustrated in the NPRM at 9904.412–60.1(h). The proposed structural format differed from the format for 9904.412–60.

The final rule considered the comments and other concerns expressed by the public in response to the NPRM. The Board's responses to the public comments are discussed in Section C—Public Comments to the NPRM.

Basis for Conclusions

Paragraph (d) of section 106 of the PPA instructs the Board to revise CAS 412 and 413, as follows:

> COST ACCOUNTING STANDARDS PENSION HARMONIZATION RULE—The Cost Accounting Standards Board shall review and revise sections 412 and 413 of the Cost Accounting Standards (48 CFR 9904.412 and 9904.413) to harmonize the minimum required contribution under the Employee Retirement Income Security Act of 1974 of eligible government contractor plans and government reimbursable pension plan costs not later than January 1, 2010. Any final rule adopted by the Cost Accounting Standards Board shall be deemed the Cost Accounting Standards Pension Harmonization Rule.

In deliberating and deciding upon a final rule, the Board adopted the following criteria for harmonizing the minimum required contribution under ERISA:

- Accounting rules must satisfy the Board's Statement of Objectives, Policies and Concepts (57 FR 31036 published July 13, 1992);
- Accounting rules must promote fairness and equity to both contracting parties;
- Measurement of pension costs must be objectively verifiable;
- Accounting rules must keep volatility to a minimum in the pricing of Government contracts; and
- Accounting rules must be understandable, particularly given the complexity of CAS 412.

Throughout the comment process afforded by the SDP, ANPRM, and NPRM, many respondents commented

that ''harmonize'' under PPA section 106(d) meant that it was Congress's intent that the Board adopt ERISA's minimum required contribution for measuring, assigning, and allocating pension costs to CAS-covered contracts. Further, these commenters stated that the plain meaning of ''harmonize,'' as defined in various dictionaries, would lead to an identical conclusion. The Board's review of the PPA, as well as its legislative history, did not reveal evidence of any such Congressional intent.

The Board has historically recognized that financial accounting policies and procedure, *i.e.,* GAAP, and tax accounting rules have inherently different goals from Government contract cost accounting that preclude their use for the appropriate measurement, assignment and allocation of pension costs for CAS. In the Board's view, PPA section 106 did not seek to change that historical recognition. Based on the Board's analysis, entirely adopting either financial accounting or tax accounting rules for CAS 412 and 413 would have resulted in inequities and unfairness to both contracting parties. The Board noted that the public commenters most directly affected by the CAS Pension Harmonization Rule tended to agree with the NPRM provisions, except for a few matters which are discussed later in this preamble.

The Board continues to believe that CAS 412 and 413 should reflect the continuing nature of the pension plan sponsored by a going concern, as well as the multi-year nature of the contractual relationship between the Government and contractors in the acquisition process. The CAS are intended to provide consistent and accurate cost data to determine the incurred cost for the current period and for the forward pricing of Government contracts over future years for multi-year contracts. With regard to pension accounting, both financial accounting and ERISA have taken a market-based approach toward pension liabilities, which are often referred to as ''mark-to-market'' liabilities. This approach is less predictable for purposes of projecting future costs than the going concern basis of CAS and, therefore, is less useful than CAS for forward pricing purposes for multi-year contracts.

The Board recognizes that contract cost accounting must address the risks to both the contractor and the Government associated with inadequate funding of a plan's current period settlement liability measured on a ''mark-to-market'' basis. This final rule addresses this risk by recognizing a minimum actuarial liability and minimum normal cost that is based on currently accrued benefits valued using the top three quality levels of investment grade corporate bond rates consistent with the PPA criteria as cited in the IRC at 26 U.S.C. 430(h)(2)(D)(i).

ERISA's ''funding target'' and ''target normal cost'' were introduced by the PPA and are mark-to-market values consistent with the measurement basis for the minimum actuarial liability and minimum normal cost. The CAS recognition of the minimum actuarial liability and minimum normal cost ensures that the annual pension cost as measured and assigned under CAS is at least sufficient to liquidate ERISA's target normal cost currently and the unfunded target liability on an amortized basis. Therefore, recognizing the minimum actuarial liability and minimum normal cost will reduce differences between the CAS assigned cost and the ERISA minimum required contribution, although the CAS assigned cost may sometimes exceed the ERISA minimum required contribution. Maintaining the going concern basis for Government contract costing will allow contractors to set multi-year funding goals that avoid undue volatility in cash flow requirements.

The Board was persuaded by public comments that the proposed threshold criteria (''triggers'') for recognition of the minimum actuarial liability and minimum normal cost were overly complex and might create inequities. The final rule only retains the criterion that assesses whether the sum of the minimum actuarial liability and minimum normal cost exceeds the sum of the actuarial accrued liability and normal cost. If the contractor computes pension costs on a composite basis for the plan as a whole, then the criterion should be examined at the plan level. However, if 9904.413–50(c)(2) or (3) require the contractor to separately compute pension costs for a segment, or if the contractor so elects, the criterion should be separately examined at the segment level. This may mean that some segments might use an actuarial accrued liability and normal cost to compute pension costs, and other segments might use the minimum actuarial liability and minimum normal cost. This ensures that variance in demographics or funding levels between different segments is recognized.

ERISA imposes minimum funding requirements on qualified defined benefit plans based on a conservative measurement of the plan's liability and normal cost. It should be noted that the measurement mandated for ERISA minimum funding approximates the value of a bond portfolio required to liquidate the stream of expected payments for accrued benefits if purchased in the current market. While the purchase of such a bond portfolio would not transfer all asset and demographic risks to a third party, this measurement emulates the costs of self-insuring the pension fund against the liability for accrued benefits and represents the mark-to-market (settlement) value without the premium charge for transfer of risk. The final rule requires that contract cost accounting for pension costs must recognize a mark-to-market (settlement) based liability and normal cost as minimum values for CAS. By doing so, the Board believes that any ERISA minimum required contribution in excess of the allocable contract pension cost amount will be reconciled and reflected in contract pricing in the near term because, by definition, the CAS liability and normal cost would be equal to or greater than the minimum values determined under the settlement liability. Furthermore, by recognizing the settlement liability and normal cost as minimum values, this final rule will benefit the procuring agencies, as well as taxpayers, by minimizing the Government's exposure to the financial risk of unfunded actuarial liabilities as funding progresses.

In order to promote equity and fairness in achieving an orderly change in the contract cost accounting for pension costs, this final rule retains the transition period consisting of five cost accounting periods, the Pension Harmonization Rule Transition Period, that will phase in recognition of any adjustment of the actuarial accrued liability and normal cost. This transition method will apply to all contractors with contracts subject to CAS 412 and 413.

Because modern actuarial software programs can value the same data set multiple times using different assumptions, the final rule is designed to allow companies to use the same actuarial methods and valuation software for ERISA, financial statements, and Government contract costing purposes. Except for the interest rate, the same general set of actuarial assumptions can be used for all three purposes. This will allow Government agencies and auditors to place reliance on externally verified data from ERISA and financial statement valuations while allowing contractors to avoid unnecessary additional actuarial effort and expense.

Summary of Final Rule

The primary harmonization provisions are consolidated within the ''CAS Pension Harmonization Rule'' at 9904.412–50(b)(7). This consolidation eliminates the need to revise many long-standing provisions of CAS 412 and clearly identifies the special accounting practices required for harmonization. Some revisions to other provisions of CAS 412 and 413 are also necessary to achieve the full result. These basic changes to CAS 412 and 413 are as follows:

(1) *Recognition of a ''minimum actuarial liability'' and ''minimum normal cost.''* CAS 412 and 413 continue to measure the actuarial accrued liability and normal cost based on a going concern basis using ''best-estimate'' actuarial assumptions, projected benefits, and the contractor's established immediate gain actuarial cost method. However, in order to ensure that the measured costs recognize the mark-to-market liability as a minimum value, the final rule requires that the measured pension cost must be determined using the minimum actuarial liability and minimum normal cost if a specific threshold criterion is met. That is, if the sum of the minimum actuarial liability and the minimum normal cost (as measured using current yield rates on the top three quality levels of investment-grade corporate bonds) exceeds the sum of actuarial accrued liability and normal cost (as measured using the expected rate of return on investments), the contractor must measure the pension cost for the period using the minimum actuarial liability and minimum normal cost. Furthermore, if the criterion is met, the minimum actuarial liability and minimum normal costs are used for all purposes of measurement, period assignment, and allocation under CAS 412. However, the minimum actuarial liability is not recognized for the purposes of 9904.413–50(c)(8), (9) and (12).

The minimum actuarial liability and minimum normal cost are measured under the accrued benefit cost method based on the current yield rate on the top three quality levels of investment-grade corporate bonds. Measuring the minimum actuarial liability and minimum normal cost on a current mark-to-market basis better aligns the CAS measurement with current accounting and economic theory. In addition, the minimum actuarial liability definition is consistent with the ERISA's funding target and the GAAP's ''accumulated benefit obligation.'' The minimum normal cost is similarly defined to be consistent with the ERISA's ''target normal cost'' and the GAAP's ''service cost'' (without salary projection).

(2) *Accelerated Gain and Loss Amortization.* The final rule accelerates the assignment of actuarial gains and losses to accounting periods by decreasing the amortization period from a fifteen-year to ten-year period. This accelerated assignment will reduce the period of deferral in cost recognition and is consistent with the shortest amortization period permitted for other portions of the unfunded actuarial liability (or actuarial surplus). Paragraph 9904.412–64–1(b)(5) of the transition provisions clarify that the ten-year amortization of gains and losses begins with the first cost accounting period this final rule is applicable to the contractor.

(3) *Mandatory Cessation of Benefit Accruals.* This final rule exempts any curtailment of benefit accrual required by ERISA from immediate adjustment under 9904.413–50(c)(12). Voluntary benefit curtailments will remain subject to immediate adjustment under 9904.413–50(c)(12).

(4) *Projection of Flat Dollar Benefits.* The final rule allows the projection of increases in specific dollar benefits granted under collective bargaining agreements. The recognition of such increases is limited to the average increase in such benefits over the preceding six years, limited to benefits governed by collective bargaining agreements. As with salary projections, the final rule will discontinue projection of these specific dollar benefit increases upon a segment closing, which uses the accrued benefit cost method to measure the actuarial accrued liability.

(5) *Present Value of Contributions Receivable.* For both qualified and nonqualified defined benefit plans, the final rule discounts contributions attributable to the prior accounting period but made after the asset valuation date, *i.e.,* the contribution receivable, at the expected rate of return on investments assumption that reflects long-term trends (assumed interest rate) from the date actually paid back to the valuation date. In considering the public comments on interest crediting on application of prepayment credits and the FAR 31.205–6(j)(2)(iii) quarterly funding requirement, the Board also reviewed the provisions on interest adjustments on pension costs, contributions receivable, prepayment credits, and unfunded pension costs. The assumed interest rate is used to adjust amounts not yet funded, such as receivable contributions, quarterly pension costs, and unfunded pension costs. This is consistent with the general provision of 9904.412–40(b)(2) that the assumed interest rate must be based on expected rates of return on investments, except for the interest rate used to measure the minimum actuarial liability and minimum normal cost. However, interest adjustments on invested monies, such as the prepayment credits, are adjusted at the actual rate of return on the assets.

(6) *Interest on Prepayments Credits.* Generally, the funding of pension plans is a financial management decision made by the contractor, and must satisfy the minimum funding requirements of ERISA. Thus, funding more than the pension cost measured and assigned under CAS is entirely possible. Funding in excess of the CAS assigned costs results in a prepayment for the purposes of CAS. Since all monies deposited into the funding agency are fungible and share equally in the fund's investment results, the prepayment is allocated a share of the investment earnings and administrative expenses on the same basis as all other invested monies. This recognition ensures that any investment gain or loss attributable to the assets accumulated by prepayments does not inequitably affect the gains and losses of the plan or any segments. A decision to fund in excess of the CAS assigned cost should have a neutral impact on Government contract costing, although it might have a transitory negative impact on the contractor's cash flow.

(7) *Transition Period to Phase In Minimum Actuarial Liability and Minimum Normal Cost Mitigates Initial Impact of the Potential Increase.* The changes to CAS 412 and 413 are phased in over a transition period consisting of five cost accounting periods, the Pension Harmonization Rule Transition Period. The phase in allows the cost impact of this final rule to be gradually recognized in the pricing and costing of CAS-covered and FAR-covered contracts alike. It also moderates the difference in the pension cost allocable to FAR-covered fixed price contracts entered into prior to the effective date of the CAS Pension Harmonization Rule that are not subject to equitable adjustment. The final rule was revised so that the transition period in the proposed rule is now a fixed schedule for the first five cost accounting periods, the Pension Harmonization Rule Transition Period, following the ''Implementation Date'' so that the transition does not extend unduly beyond the time needed for the contract pricing and budgetary systems to migrate from the existing rule to the CAS Pension Harmonization Rule. Also, the Board has modified the transition

schedule slightly to lessen the impact on contract prices and agency budgets in the near-term. To accomplish this, the difference between the minimum actuarial liability and the going concern actuarial accrued liability, and the difference between the minimum normal cost and the going concern normal cost, are recognized on a scheduled basis during the Pension Harmonization Rule Transition Period, the first five cost accounting periods that this rule is applicable. Under the revised schedule, 0% of the difference will be recognized in the First Cost Accounting Period, 25% in the Second Cost Accounting Period, 50% in the Third Cost Accounting Period, 75% in the Fourth Cost Accounting Period, and finally, 100% in the Fifth Cost Accounting Period. After the completion of the Pension Harmonization Rule Transition Period, 100% of the minimum actuarial liability and minimum normal cost are recognized, if applicable. While 0% of the difference is recognized in the First Cost Accounting Period, there will be other incremental differences, *e.g.,* the change to ten-year amortization of gains and losses.

(8) *Extended Illustrations.* Many illustrations in 9904.412–60 have been updated to reflect the proposed changes to CAS 412 and 413. To assist users with understanding how this final rule will function, examples have been added in a new section, ''9904.412–60.1 Illustrations—CAS Pension Harmonization Rule.'' This section presents illustrations showing the measurement and assignment of pension cost for a contractor's pension plan that meets the criterion of the 9904.412–50(b)(7) CAS Pension Harmonization Rule. The actuarial gain and loss recognition arising from the change in the liability basis (between using the actuarial accrued liability and the minimum actuarial liability) for computing pension cost is illustrated in 9904.412–60.1(d). This structural format differs from the format of 9904.412–60, Illustrations.

C. Public Comments to the Notice of Proposed Rulemaking

The Board received 20 public comments to the NPRM. These comments came from Federal agencies, contractors, professional and trade associations, actuaries, and individuals. As with the ANPRM and SDP, the Board found the public comments to be focused, well developed, and informative. The Board appreciates the efforts of all parties who submitted comments. The public comments to the NPRM may be viewed at: *http://www.whitehouse.gov/omb/casb_index_public_comments/*, or *http://www.regulations.gov.*

Summary of Public Comments

Many of the public commenters believed that, while the NPRM represented progress towards harmonizing the minimum required contribution under ERISA and reimbursable pension plan costs, the proposed three threshold criteria (''triggers'') for recognition of the minimum actuarial liability were an obstacle to adequate recognition of the contribution requirements of ERISA.

Some of the commenters continued to recommend that the Board accept the PPA's mark-to-market based accounting as the only basis for contract cost accounting. Several commenters believed that full harmonization could only be achieved by the direct recognition of mandatory prepayment credits. The public comments also included many detailed recommendations regarding how the proposed rule might be corrected or clarified.

Most of the public comments reiterated concerns that the differences between CAS and the PPA have the potential to cause cash flow problems for some Government contractors. Although there were diverse views on how to best achieve that goal, timely recognition of the ERISA minimum required contribution in contract costing was often recommended. Some commenters believed that section 106 of the PPA requires CAS 412 and 413 to be identical to PPA's minimum required contribution.

Many commenters believed that the Board should remove the proposed first threshold criterion, which some commenters referred to as ''trigger 1,'' that compared the pension cost measured on a going concern basis to the ERISA minimum required contribution. They noted that this criterion not only added complexity to the proposed rule, but also unnecessarily delayed the recovery of previously accumulated prepayment credits. Some of these comments also suggested that the Board remove the second threshold criterion (''trigger 2''), which compared the total liability for the period measured on a going concern basis (*i.e.,* the actuarial accrued liability and normal cost) to the total liability for the period measured on a mark-to-market basis (*i.e.,* the minimum actuarial liability and minimum normal cost). These commenters believe that the only necessary limitation on use of the minimum actuarial liability would occur when the pension cost measured on a going concern basis already exceeded the pension cost on a mark-to-market basis.

Many public comments objected to the segment closing and benefit curtailment provisions that excluded the recognition of the minimum actuarial liability. These commenters expressed their belief that such an exception could reverse the cost recovery and be non-compliant with the mandate of section 106 of the PPA.

Some public comments expressed a concern that the proposed transition rules would delay full recovery and believed that the Board should address contract cost accounting and not budgetary impacts. On the other hand, several commenters believed that the delay caused by the transitional phase in rule was a reasonable compromise that allowed the Government and contractors to gradually implement the effect of the magnitude of the cost increase on the forward pricing process.

This summary of the comments and responses form part of the Board's public record in promulgating this case and are intended to enhance the public's understanding of the Board's deliberations concerning the CAS Pension Harmonization Rule.

Responses to Specific Public Comments

Topic 1: Harmonization.

Comments: Some commenters focused on the meaning of the Congressional mandate under section 106 of the PPA, the proposed continued recognition of pension liabilities on a going concern basis, and the relationship between the pension cost for contract costing and the ERISA minimum required contribution. One commenter stated that ''By allowing the recognition of the MAL and MNC [*minimum actuarial liability and minimum normal cost*] (*sic*) in determining the CAS cost, without precondition, eventually the CAS assignable cost should catch up with the ERISA funding requirements and full harmonization should be reached.''

One public comment suggested that compliance with PPA section 106 required adoption of the measurement and period assignment provisions of the PPA. This commenter believes that the NPRM as proposed did not fully implement the mandate of section 106 because the Board did not adopt the measurement and amortization rules of the PPA. The commenter stated that *Webster's II New College Dictionary* (3d ed. 2005) defines ''harmonize'' and ''harmony'' to mean ''agreement.''

Two commenters argued that ''the best approach to harmonization would

be to revamp CAS 412 and 413 to follow PPA, with modifications as necessary to meet the unique requirements of government contracts.'' One of these commenters quoted the Merriam-Webster's Online Dictionary which defines ''harmonize'' as ''to bring into consonance or accord.''

On the other hand, one commenter believed that harmonization is a more generalized goal meaning to achieve ''equity between the parties.'' And, another public commenter asked the Board to consider the language of section 106, which tells the Board to ''harmonize the [*ERISA minimum required contribution*] (*sic*) **and** government reimbursable pension plan costs, not harmonize CAS **with** the PPA.'' [Emphasis Added]

Three public commenters reminded the Board that the primary concern that prompted section 106 was the difference between the pension funding requirements imposed by ERISA and the delayed reimbursement of pension cost under contracts subject to CAS 412 and 413. Some commenters identified areas of concern that they believed were preventing the proposed rule from providing timely recovery of pension contributions.

Another public commenter reminded the Board that improving the timeliness of pension cost recovery was a goal of the NPRM writing that ''While pension funding rules have changed with the enactment of the PPA, this principle of equity—where the government does not excuse itself from requirements it is imposing on all plan sponsors—remains.'' This commenter believed that the CAS Pension Harmonization Rule, as proposed, failed to satisfy that objective and provided specific suggestions for improvement.

In contrast to the comments that the Board should fully adopt or more closely follow the measurement and amortization rules of the PPA, one commenter was concerned that ''the CAS Board is straying from the intent and historical precepts of contract cost accounting and veering toward tax-driven cash accounting.'' This commenter examined the goals of the Cost Accounting Standards vis-à-vis the goals of the PPA:

> As the Board's response notes, ''strictly tying pension accounting to settlement liabilities and current fair market values will cause volatility that will be counterproductive to predictability and disrupt the contract forward pricing process. Contract price predictability must remain a critical concern for the Board. ''

The commenter's letter continues:

> The long standing concept of accounting is that pension plans are presumed to continue absent evidence to the contrary. We understand that actuaries include assumptions concerning settlement payment (lump sum) elections by terminating and retiring employees—thus the likely risk of paying the extra settlement cost is already anticipated in actuarial measurements. Furthermore, the expected return on investment should reflect a contractor's investment policy for the plan, rather than theories of financial economics that are in vogue.

Several public commenters suggested that success in achieving harmonization should be measured by reduction in ''mandatory'' prepayment credits, where mandatory prepayments refers to minimum funding requirements in excess of the allocable pension costs measured and assigned in accordance with CAS 412 and 413. These commenters were not only concerned with the prospective harmonization of the contract cost with the ERISA minimum contribution once the CAS Pension Harmonization Rule was applicable, but also with a reduction in the substantive mandatory prepayment credits that had been accumulated since the passage of the PPA and the recent dramatic decline in asset values.

One public commenter stated this concern directly: ''Under the NPRM, there is no mechanism present to ensure that contractors will be able to assign mandatory prepayment credits.'' This commenter later continued: ''To eliminate these situations in which recovery of accumulated mandatory prepayment credits are indefinitely delayed, we ask the Board to reintroduce the mandatory prepayment credit mechanism that was contained in the ANPRM.''

Another commenter expressed the belief that: ''Without such amortization, [mandatory prepayment credits] (sic) are not recovered in a reasonable time period, and situations may arise where the balances are inaccessible.'' This commenter cautioned the Board that: ''Without these suggested changes, we respectfully submit that the Board will not have met its mandate under section 106 of the PPA.''

Response: As previously stated, the Board's review of the PPA, as well as its legislative history, did not reveal any expression of Congressional intent that ''harmonize'' under PPA section 106(d) requires the Board to adopt ERISA's minimum required contribution for measuring, assigning, and allocating pension costs to Government contracts. The Board's historical recognition that financial accounting and tax accounting rules have inherently different goals, that preclude them from being used for Government contract cost accounting, is well established. In the Board's view, PPA section 106 did not seek to change that historical recognition. Based on the Board's analysis, adopting either financial accounting or tax accounting rules for contract cost accounting purposes would have resulted in inequities to both contracting parties. The Board noted that the contracting parties most directly affected by the CAS Pension Harmonization Rule tended to agree with the general concepts articulated in the NPRM, except for a few matters which are dealt with later in this final rule.

The Board does not believe adopting tax accounting rules, which establish a funding range rather than an accrual for the period, is appropriate for contract cost accounting purposes. Recognition of the minimum actuarial liability is a reflection of the potential risk of inadequate funding imposed by the ''mark-to-market,'' *i.e.,* settlement liability, in the event that there is an immediate liquidation of the pension plan. To accomplish this, the minimum actuarial liability and minimum normal cost are treated as minimum values to the actuarial accrued liability and normal cost measurements. Apart from these minimum values, the measurement and period assignment rules continue to be based on the going concern concept wherein actuarial assumptions reflect long-term trends and avoid distortions caused by short-term fluctuations, which the Board has determined appropriate for contract cost accounting purposes. Furthermore, recognition of no less than the minimum actuarial liability and minimum normal cost for contract costing purposes ensures that over time the assignable pension cost is at least equal to the ERISA minimum required contribution computed using the funding target liability and target normal cost, which are mark-to-market values.

By ensuring that the pension cost measurement recognizes the minimum actuarial liability and minimum normal cost in a manner similar to the basis for the PPA's funding target and target normal cost, the Board believes that the final rule will over time accumulate contract pension costs that are at least equal to the accumulated value of the PPA minimum required contributions.

The Board agrees that timely recovery of the accumulated prepayments is essential to the degree practicable, but notes that there are some situations where recovery opportunities are limited, *i.e.,* overfunded plans with benefits that have been frozen. Section 106 of the PPA did not require direct reduction of accumulated prepayment

credits when CAS is harmonized. However, the Board acknowledges the importance of such a reduction, and the final rule will improve recovery of accumulated prepayment credits through recognition of the higher of either the settlement or going concern liability.

Topic 2: Proposed Threshold Criteria

Comments: Several public commenters believed that the proposed rule was too complex because it combines going concern and settlement measurements. One public commenter expressed the belief that ''the Board's goal—to create a version of CAS that harmonizes with both the minimum funding requirements of PPA and the historical versions of CAS 412 and 413—is not viable.'' Another commenter believed that continuing to compute an actuarial accrued liability and normal cost measured using an expected rate of return on investments as the interest assumption, solely for Government cost accounting purposes, would add a layer of complexity and expense that is not warranted, and which could not be directly verified. And one public commenter remarked that the description of the ''minimum required amount'' needed clarification.

The industry associations were generally supportive of the proposed rule and believed that ''use of the new liability measure, the minimum actuarial liability (MAL), in conjunction with the existing actuarial accrued liability (AAL) provides for a balanced liability measurement despite varying economic circumstances and is a reasonable balance between long- and short-term approaches.'' Another commenter also gave general support for the rule as proposed, writing:

> We understand that given the urgency of the mandate to harmonize CAS, the CASB has chosen an approach to make modifications to the existing CAS rules rather than undertake a complete overhaul of the rules. We understand and support this approach. In addition, we continue to support the CAS modifications to adopt the PPA-like minimum actuarial liability (MAL) and shorter ten-year amortization period for actuarial gains/losses in order to achieve harmonization.

In addition to the concern with complexity from using two different liability measures, a commenter found that imposition of a series of three threshold criteria as a prerequisite for recognizing the minimum actuarial liability and minimum normal cost values created a complexity that potentially would make the rule unmanageable.

First Threshold Criterion (''Trigger 1'')

The first of the proposed threshold criteria, *i.e.,* ''trigger 1,'' was the primary concern expressed in many public comments about the proposed rule. Most of the commenters believed that ''trigger 1'' prevented harmonization by limiting the periods during which the minimum actuarial liability could be recognized. Based on several analyses of ''trigger 1,'' these commenters concluded that ''trigger 1'' retarded the recovery of prepayments accumulated before and after the applicability of the CAS Pension Harmonization Rule.

Other concerns that were raised included the difficulty in predicting the minimum required contribution for forward pricing and the added volatility caused by using multiple ''triggers.'' These commenters uniformly urged the Board to eliminate ''trigger 1.''

One commenter offered the following observations to assuage the Board's concerns with inappropriate increases in contract pension costs:

> But note that even with the elimination of this gateway, there would still be the five-year transition phase-in, the longer amortization period (a ten-year period versus the seven-year period in PPA), and greater asset smoothing than is permitted in PPA. These features will adequately control the cost increases that would otherwise be seen with a more direct and immediate harmonization.

Another commenter remarked that, if the Board had added to the NPRM the three ''trigger'' prerequisite for using the minimum actuarial liability and minimum normal cost as a way of responding to its comment on the ANPRM, then the commenter believed that its prior recommendation was not properly implemented in the NPRM:

> In our ANPRM letter, we stated the following:
>
> If the intent of the CAS Harmonization Rule is to adjust the CAS assignable costs so that the excess of the PPA funding requirements over the CAS assignable costs are recovered on a timely basis, increasing the regular AAL to the MAL when the CAS cost is already greater than the PPA funding requirement for a given year may not be necessary, particularly if there are no existing prepayment credits.
>
> It appears that our suggestion was partly considered. However, Threshold Test 1 does not consider the existence of (mandatory) prepayment credits; it considers only the annual comparison of the minimum funding requirement and the regular CAS cost. As a result, it is too restrictive and will hinder full recovery of minimum funding requirements particularly for contractors who have been subject to the PPA requirements since 2008. Pension plans will eventually require funding contributions lower than CAS costs because the plans will become fully funded under the PPA earlier than when they will become fully funded under CAS. The plans will become fully funded under the PPA sooner because of the following reasons:
>
> • The PPA became effective before the CAS Pension Harmonization Rule will become effective.
>
> • The PPA has a 7-year amortization for unfunded liabilities, compared to the ten-year amortization period for gains/losses and even longer amortization periods for other amortization bases (*e.g.,* plan amendments, assumption changes, *etc.*) in the NPRM.
>
> • The MAL and MNC are phased in and are not fully recognized during the transition period.
>
> Thus, plans will fail the ''trigger 1'' threshold test before contractors can recover all of the minimum funding contributions required of them.

Second and Third Threshold Criteria (''Trigger 2 and Trigger 3'')

Several commenters recommended that the Board also eliminate ''trigger 2,'' which requires that the sum of the minimum actuarial liability (MAL) and the minimum normal cost (MNC) exceed the sum of the actuarial accrued liability (AL) and normal cost (NC) as a precondition for recognition of the minimum actuarial liability and minimum normal cost. The general recommendation was to retain only the final threshold criterion, *i.e.,* ''trigger 3'' and eliminate ''trigger 2'' because it was duplicative and added unnecessary complexity. One of these commenters believed that rather than comparing the liabilities and normal costs as a pre-condition, the rule should simply use the contract pension cost computed using the minimum actuarial liability and minimum normal cost as a minimum pension cost:

> Considering the ANPRM's ''MAL > AL'' criterion and how it impacts the calculations, we recommended that *if no* (*mandatory) prepayment credits exist and if the regular CAS cost already exceeds the PPA minimum funding requirement,* then the CAS cost need not be adjusted to reflect the MAL and the MNC to result in an even higher CAS assignable cost. Our recommendation was intended for the specific—and less frequent—situations when CAS reimbursements will have already caught up with the ERISA required cash funding of the plan on a cumulative basis, *i.e.,* when there are no mandatory prepayment credits.
>
> In our ANPRM comment letter, we also recommended considering a minimum CAS cost approach for harmonization, *in lieu of* the ''MAL > AL'' criterion. In other words, there is no need to impose a ''MAL > AL'' criterion when satisfaction of this criterion simply results in reflecting the MAL and the MNC as ''floor'' liabilities and normal costs in the calculations. Instead, we recommended directly calculating the CAS cost based on the MAL and MNC, and use the result as a floor for the CAS cost.

Some commenters made suggestions for improving the second criterion (''trigger 2'') if retained in the final rule. One commenter recommended that the final rule should ''provide that when ERISA or GAAP asset, liability, cost, or other values are to be used for CAS purposes, such values are per se CAS-compliant amounts. This will avoid unnecessary disputes with government auditors regarding whether these values are appropriate.''

Another public comment recommended that ''the Board restore the ANPRM interest rate definition as it provides the necessary leeway for contractors to set interest rates assumptions that will be more stable than rates tied to current periods. Along with this definition, it will be helpful to retain the NPRM provision allowing the PPA rates as a safe harbor option.'' The comment noted that the ANPRM required that the interest rate be based on ''high quality'' corporate bonds, rather than the NPRM requirement that the rate be based on ''investment grade'' bonds.

Response: The Board has been persuaded to eliminate the first threshold criterion (''trigger 1''), which was proposed in the NPRM, from the final rule. This test, which had been recommended in public comments to the ANPRM, adds complexity and inserts the vagaries of tax accounting into contract cost accounting.

The Board has reviewed the advantages and disadvantages of retaining either the second threshold criterion (''trigger 2'') or the third threshold criterion (''trigger 3'') as the single prerequisite for using recognition of the minimum actuarial liability and minimum normal cost. Based on this review, the Board has concluded the second criterion directly implements the Board's intent that the minimum actuarial liability and minimum normal cost are minimum values for the pension cost measurement. The Board also notes that unless the second criterion is satisfied, the effort needed to compute the contract pension cost using the minimum values is not necessary. Moreover, first determining which liability to use lessens the potential for computation errors because the contract pension cost needs to be computed once instead of twice. Therefore, the third threshold criterion, ''trigger 3,'' has also been eliminated.

The interest rate criteria used for measuring the minimum actuarial liability and minimum normal cost proposed in the NPRM referenced ''investment grade'' fixed-income investments, which infers the top four levels of investments (*e.g.,* Moody's Baa or higher) and differed from the ANPRM reference to ''high quality'' (*e.g.,* Moody's Aa or higher) fixed-income investments, which as used for GAAP is restricted to the top two levels of investments. The Board believes that the criterion of ''the top three quality levels of investment grade'' is appropriate because it is restricted to the higher tier ratings from the bond rating agencies, *e.g.,* Moody's' single ''A'' rated or higher, and is consistent with the investment quality required by the PPA as cited in 26 U.S.C. 430(h)(2)(D)(i). A lesser rated bond would pay more coupon interest, but the additional default risk is unacceptable for determining the contingent cost of liquidating all benefit obligations for contract cost accounting. The Board also believes that the criteria proposed in the NPRM permits less stringent interest rate criteria than the PPA. The final rule requirement for ''investment grade corporate bonds with varying maturities and that are in the top 3 quality levels available, such as Moody's' single 'A' rated or higher,'' supports consistency and is less likely to engender disputes. The ANPRM criteria relied upon GAAP requirements, which must reflect the expected rates at which the pension benefits could be effectively settled. The criteria used in this final rule, which is the slightly more stringent than the criteria proposed in the NPRM, should also satisfy the GAAP requirements.

The provisions of 9904.412–50(b)(7)(iii)(B) allows the contractor to elect to use investment grade corporate bond yield rates ''published or defined by the Secretary of the Treasury for determination of the minimum contribution required by ERISA'' as its established cost accounting practice for setting the interest to be used for 9904.412–50(b)(7)(iii)(A) purposes. This permits the PPA yield curve to be used as a ''safe harbor.'' The 9904.412–50(b)(7)(iii)(A) criteria is consistent with, although less stringent than, the discount rate used to compute the accrued benefit obligation as described by GAAP which refers to ''high quality'' (*e.g.,* Moody's Aa or higher) corporate bonds.

Because all other assumptions must be based on best estimate assumptions that reflect long-term trends in accordance with 9904.412–50(b)(4), this provision will preclude the use of the ''most valuable'' benefit assumptions, *i.e.,* most conservative assumptions used to value the funding target for an ''at risk'' plan, unless there is a persuasive actuarial study that supports such assumptions as appropriate based on the past experience and future expectations for the plan. All other actuarial assumptions are also required by 9904.412–50(b)(7)(iii)(D) to be the same as the assumptions used to compute the actuarial accrued liability on a going concern basis. Also, CAS 412 generally requires that the plan's liability be based on the terms of the written plan document, whereas GAAP requires that patterns of benefit improvements and other features of the ''substantive plan'' be recognized. These differences in the basis for measuring the liability for ERISA's funding target and GAAP's accrued benefit obligation can cause variances between those values and the minimum actuarial liability. Therefore the Board believes the automatic adoption of ERISA's funding target or GAAP's accrued benefit obligation is inappropriate.

Topic 3: Suggested Alternative Means of Achieving Harmonization

Comments: Several commenters continue to recommend that the Board replace the going concern basis for liability measurement with the current mark-to-market measurement adopted by Congress for the PPA, and by the Financial Accounting Standards Board for financial statement reporting and disclosure. These commenters believe that issues unique to contract cost accounting can be addressed through existing or modified provisions, *e.g.,* volatility might be addressed through longer amortization periods for contract costing purposes.

There were differing views presented as to whether the CAS should directly reference ERISA and GAAP liabilities or simply establish a mark-to-market measurement basis. Proponents of direct reference believed that direct adoption of ERISA or GAAP values would permit contractors and auditors to rely on values already subject to review by the Internal Revenue Service (IRS) or independent audit. However, the opponents of this approach noted differences in the criteria concerning assumptions and events that must be recognized, such as ''at risk'' status under ERISA or anticipation of plan changes that may occur under GAAP.

One commenter was concerned with switching back to a going concern liability basis when the ERISA or GAAP liability was fully funded. Besides the potential for complexity, the concern was that the proposed rule would impose a requirement to fund a contract cost for pensions in a period in which ERISA would have a lesser minimum required contribution or GAAP would recognize a lower pension expense.

Another commenter agreed that the Board should recognize the mark-to-market based liability, but

recommended that the current going concern measurement basis be phased out over a five-year transition period. The commenter believed that once the entire transition period was completed, then contract cost accounting should rely solely on the mark-to-market based liability.

A different alternative to pension harmonization suggested by one commenter would be to retain exclusive use of the going concern basis for measuring pension liability, but allow the difference between the going concern actuarial accrued liability and the mark-to-market minimum actuarial liability during the initial year of harmonization to be amortized as the costs of a transitional ''special event.'' This commenter believes that this approach would greatly simplify harmonization while permitting the previously unrecognized portion of the mark-to-market liability to be included in contract costs.

The third alternative approach suggested came from a commenter who believed that the CAS should retain the going concern basis for measuring the liability, but that any excess of the ERISA minimum required contribution over the contract cost would be amortized over a relatively short period, such as a five-year period. This commenter also argued that certain contractors, whose business is predominantly from cost-based Government contracts, be permitted to recognize the full excess in the current period because they do not have a sufficient business base to subsidize the excess during the amortization period.

Response: The Board reiterates its belief that absent evidence to the contrary, defined benefit plans are ongoing commitments, and therefore contract costing should reflect the average cost based on expected average asset returns in the future. However, the Board believes that the mark-to-market liability must be recognized as a minimum value in order to reflect the risk that the pension plan may have to settle its liability for pension benefits. The suggested alternative for amortizaton of the initial excess of the minimum actuarial liability over the actuarial accrued liability might reduce the accumulated value of prepayment credits, but during extended periods of low bond rates, substantial prepayment credits could again accumulate.

The Board does not believe that the suggested amortizing of the PPA minimum required contribution in excess of the going concern pension cost is a viable solution. Adding such amortization to the current computations of CAS 412 and 413 adds complexities, whereas the going concern based pension cost does adjust to the PPA minimum required contribution over a period of time. The simplier approach of adopting the PPA minimum required contribution, but using a smoothing mechanism, was one of the many options included in the Staff Discussion Paper, but it was ultimately rejected by the Board due to concerns that minimum funding might not achieve adequate funding in every economic environment.

Topic 4: Proposed Accelerated Gain & Loss Amortization

Comments: Two commenters expressed their support for the proposed accelerated amortization of actuarial gains and losses over a ten-year period instead of the current fifteen-year period. As one commenter stated:

> We also believe the change in amortization period for actuarial gains and losses from a fifteen-year to ten-year period, while longer than the seven-year amortization period used for PPA, provides a reasonable balance between timely cost recovery and an acceptable level of volatility for pension costs measured for CAS.

However, one commenter objected to the imposition of an amortization period that exceeded the amortization period required for the ERISA minimum required contribution. This commenter was concerned that the minimum required contribution would not be fully recognized for CAS purposes for a decade.

In response to the Board's inquiry concerning whether there should be special recognition of a gain or loss from an exceptional event, two commenters opined that this issue was not directly tied to harmonization and should be addressed in a separate case. Another commenter expressed their belief that ''the proposed NPRM retains effective smoothing mechanisms for gains and losses, so alternative rules for exceptional gains or losses are unnecessary.'' They were also concerned about the introduction of a new issue this late in the promulgation process.

Two commenters found confusing the proposed language added to 9904.412–50(a)(1)(v) and 9904.412–50(b)(7) regarding the adjustment to the actuarial accrued liability based on the minimum actuarial liability. They asked for clarification of the Board's intent.

Response: The Board agrees that the wording of proposed 9904.412–50(a)(1)(v) should be further clarified. The adjustment language of the proposed 9904.412–50(a)(1)(v) was intended to identify the portion of the period gain or loss attributable to the change in liability measurement basis. The adjustment language was used in the proposed 9904.412–50(b)(7) to tie the gain and loss provision and the proposed 9904.412–64.1 transitional provisions together.

In the final rule, the proposal at 9904.412–50(a)(1)(v) of the NPRM for a specific adjustment of the actuarial accrued liability to become the minimum actuarial liability, or the normal cost to become the minimum normal cost, is no longer used and has been deleted. Paragraph 9904.412–50(b)(7)(ii) of the final rule provides for a direct computation of the minimum actuarial liability and minimum normal cost.

The Board understands that standard actuarial practice is to measure the expected unfunded actuarial liability by updating the unfunded actuarial liability from the prior period for interest and expected demographic changes. The current period experience gain or loss is simply the difference between the actual and expected unfunded actuarial liability. The normal gain and loss measurement will include the effects of a switch between bases for measuring the liability. The gain and loss measurement, when the measurement basis changes, is illustrated at 9904.412–60.1(d).

The adjustment language has been deleted from the transition rule at 9904.412–50(a)(1)(v) and 9904.412–50(b)(7). The provisions of 9904.412–64.1 have been revised to address the scheduled phase in of the mark-to-market based minimum actuarial liability and minimum normal cost, and govern only the first five cost accounting periods of the Pension Harmonization Rule Transition Period.

The amortization of the experience gain or loss that occurs between the prior and current valuations is an element of the current period cost. The gain or loss is measured as the difference between the expected and actual unfunded actuarial liability as of the valuation date. Although the source of the gain or loss is the actuarial experience during the prior period, the amortization installment of the gain/loss is included in the determination of the current year cost together with amortization of the other bases. To avoid any disputes, 9904.412–64.1(b)(5) has been added to clarify that the gain or loss measured in the First Cost Accounting Period of the Pension Harmonization Rule Transition Period, which is the first cost accounting period this final rule is applicable, shall be amortized over a ten-year period.

Topic 5: General References to ERISA

Comment: Two commenters believe that the general references to ERISA in the proposed rule should be modified to cite specific provisions of ERISA. They are concerned that confusion or disputes may arise because of the numerous provisions that form ERISA. They also note that many of the provisions that affect pension contribution requirements and limitations are addressed by 26 U.S.C. 401 through 436, which implement the tax treatment of the contribution amount.

In particular, one commenter was concerned the general reference to ERISA in 9904.412–50(b)(5) and Illustration 9904.412–60(b)(3) might not provide adequate guidance regarding the projection of increases in benefits that are not based on salaries and wages. The commenter wrote the following regarding 9904.412–50(b)(5):

> In my opinion, the reference above to ''ERISA'' is tied to the current ERISA Tax Deductible Limit as defined in the Pension Protection Act of 2006. The Act Title VIII, Pension Related Revenue Provisions, added section 801 which amended Internal Revenue Code [at 26 U.S.C.] Section 404 to increase the Tax Deductible Limit for Single Employer plans. These rules became effective in 2008. The above ERISA reference should be clarified to my interpretation since ERISA also has numerous provisions tied to Minimum Funding rules.

This commenter also suggested that the reference to ERISA in 9904.413–50(c)(12)(viii) should be clarified:

> Under (viii), in my opinion the requirement is tied to the new Internal Revenue Code [26 U.S.C.] Section 436 mandated cessation of benefit accruals due to funding target attainment percentage. This section was created by the Pension Protection Act of 2006 and should be clarified.

Response: The Board agrees that the references to ERISA proposed in the NPRM require that the user ascertain the relevant U.S.C., Title 26 provision. The Board reiterates its precept that tax accounting is inappropriate for contract costing. The Board continues to believe that replacing the general references to ERISA with specific U.S.C., Title 26 provisions is not desirable because it might require frequent updates to CAS 412 and 413 to the extent that ERISA and Title 26 of the U.S.C. are amended in the future. The Board acknowledges that the tax deductibility of pension contributions is governed by the IRC at Title 26 of the U.S.C, and has made conforming technical corrections to the existing and proposed rules in the promulgation of this final rule.

The Board agrees that the general reference to ERISA in 9904.412–50(b)(5) might create confusion as to the applicable provision of ERISA. In this case the provision was intended to refer to section 801(a) of the PPA, which is implemented by 26 U.S.C. 404(o)(3)(A)(ii)(II). To avoid confusion and disputes concerning the relevant ERISA coverage, the Board has replaced the general reference to ERISA with specific provisions that parallel 26 U.S.C. 404(o)(3)(A)(ii)(II).

This new language does not indicate a loosening of the restrictions on recognizing the costs for contingencies. Certain reasonably foreseeable contingencies, such as salary increases, may be recognized in contract costing. CAS 412 has always permitted the projection of a contingent liability for future salary increases but subject to the requirement that actuarial assumptions must be individually reasonable based on future expectations and grounded by past experience. Like 26 U.S.C. 404(o)(3)(A)(ii)(II), this final rule limits the basis for projection of the contingent liability for flat benefit increases to the historical data from the last six years, and adds the restriction that the benefits must be provided under a collective bargaining agreement. The formality of collective bargaining negotiations and agreements will provide verifiable evidence of the pattern of benefit improvements because such evidence may be lacking or subject to dispute in less formal situations.

Regarding the general reference to ERISA in 9904.413–50(c)(12)(viii), the Board is not adopting a specific concept from ERISA, but instead is providing an exemption for involuntary benefit curtailments imposed by an outside authority, *i.e.,* ERISA. Use of a general reference to ERISA in this provision allows the 9904.413–50(c)(12)(viii) exemption to continue to reflect benefit curtailments required by ERISA without requiring CAS 412 and 413 to be amended for future changes in ERISA. Moreover, this is neither a measurement nor a period assignment provision; rather, 9904.413–50(c)(12) requires an immediate adjustment of the unfunded actuarial liability or actuarial surplus when specific events occur, which are defined as a segment closing, benefit curtailment, or plan termination. The purpose of 9904.413–50(c)(12)(viii) is to provide an exemption from an otherwise required immediate adjustment.

Under the current ERISA provision, the contractor can provide that benefit accruals will automatically resume if the plan's funding level sufficiently improves within 12 months. If the funding level takes longer to improve, the contractor can amend the plan to reinstate the accruals once the plan attains an adequate level of funding. Because the contractor has not unilaterally decided to change the pension plan (from an ongoing plan that grants and accrues benefits for matching contract service to a frozen state where there is no expectation of future accruals), the Board believes an immediate settlement, or true up, of assets and liabilities is inappropriate and unnecessarily disruptive to contract pricing.

It is noteworthy that 9904.413–50(c)(12)(viii) was derived from the aforementioned ERISA provision which permits the restoration of benefit accruals if the required funding level is attained within 12 months. Otherwise, under the ERISA provision, a plan amendment would be required to restore the missed accruals, which would require amortization in accordance with 9904.412–50(a)(1)(iii). Under the amendments for the CAS Pension Harmonization Rule, the contractor can elect to continue to accrue benefits that are expected to be reinstated, and thereby continue to match the pension cost with the underlying activity. If the pension plan does not automatically restore the missed accruals, then the future reinstatement of the missed accruals is contingent upon future action by the contractor, and cannot be recognized until and unless the plan is amended to restore the missed benefit accruals.

In reviewing this provision for inclusion in the final rule, the Board considered whether the ''ERISA missed accrual'' was a liability to be recognized by the normal cost under CAS, which is the measurement of the actuarial present value of the annual benefit accrual. The Board has revised this provision to ensure that there is a strong expectation that benefit accruals will be incurred. First, the employee's right to the restoration of the benefit accrual must be included in the written plan documents. (See 9904.413.50(c)(12)(viii).) Second, the contractor cannot elect to anticipate the future accruals if there is evidence to the contrary, *e.g.,* there is consideration of eliminating the restoration provision by plan amendment or the entity is facing bankruptcy due to serious financial difficulties. Finally, as with all pension costs assigned to a current period, the pension cost must be funded by the contractor to be allocable, and thereby allowable, for reimbursement by the Government through contract pricing. Reimbursement to the contractor by the Government of its allocable share of the funded pension cost attributable to the ''ERISA missed

accrual'' provides a funding source to improve the plan's funding level, which directly supports the goal of the PPA.

Topic 6: Proposed Accounting for Prepayments

Comments: Some commenters objected to the proposed revision to 9904.412–30(a)(23) and 9904.412–50(a)(4), which would adjust the prepayment credits based on investment returns and administrative expenses in accordance with 9904.413–50(c)(7). The commenters agreed that expenses associated with investment management are properly charged against the prepayment credits because the prepayments are part of the invested assets. However, the commenters believed that expenses associated with benefit administration should not be charged against prepayment credits which have not been allocated to benefit liability. As one public commenter explained:

> We have several comments concerning proposed section 412–50(a)(4) which states that accumulated prepayment credits are to be adjusted for investment returns and administrative expenses. It seems reasonable to us that a proportional share of investment returns and investment related expenses should be allocated to the prepayment credit account, as a prepayment credit represents plan assets. As such, we agree that the prepayment credit should be allocated a proportional share of investment related administrative expenses. On the other hand, it does not seem reasonable that the prepayment credit should receive an allocation of any non-investment related administrative expenses (*e.g.,* for items such as plan administration, actuarial fees, and ERISA audits)—these types of expenses are not typically based on asset size, and the existence of a prepayment credit will not generally affect these fees.

To avoid confusion, one of the commenters recommended that 9904.412–30(a)(23) ''explicitly provide that the average rate of investment return for a year can be used to adjust all cash flows occurring in that year. This would eliminate the possibility that an auditor might require a contractor to measure investment returns within a plan year, which would be a difficult and expensive task.''

Several commenters believed that illustrations, in which the application of prepayment credits to fund the current pension cost on the first day of the plan year, might be misconstrued to be a cost measurement rule that might affect the allowability of interest on prepayment credits.

Two commenters were also concerned that the illustrations, in which the prepayment credits are accounted for separately from the segment accounting, might be read to require such accounting for prepayment credits. They believed that it was the contractor's prerogative to set the accounting practice on whether prepayment credits are identified by segment. Furthermore, they believe such a rule governing the accounting for prepayment credits was beyond the scope of harmonization.

Response: The Board understands that benefit-related expenses, such as PBGC premiums, fees for processing benefit payments, *etc.,* might not be directly associated to prepayment credits that have not been allocated towards the funding of benefits. The Board is concerned about the additional effort that would be required, and the potential for disputes, if contractors were required to separately identify administrative expenses as either investment-related or benefit-related. Furthermore, the Board views the monies deposited into the pension assets as fungible, *i.e.,* not individually identifiable. Besides, the Board notes that the PPA, as implemented by 26 U.S.C. 430(f)(8), adjusts the prefunding balance—which is the ERISA equivalent of the prepayment credit—at the rate of return on plan assets taking into account ''all contributions, disbursements, and other plan payments during such period.''

Topic 7: Actuarial Value of Assets

Comments: Three public comments questioned why the Board did not propose, as part of pension harmonization, the adoption of the PPA asset averaging method and 10% corridor around the market value of assets. The commenters believed that the proposed rule should have permitted adopting the PPA asset averaging method as part of the harmonization change so that the impact of the change in asset valuation method would be includable in the equitable adjustment claim. One commenter suggested that the 20% asset corridor be maintained to address the concerns with volatility.

One commenter questioned the illustration that implies a requirement that the prepayment be subtracted from the market value of assets before determining the actuarial value of assets as a requirement. In contrast the commenter noted that minimum funding requirements include the ERISA prefunding balance (prepayment) in the determination of the asset corridor. They asked that the Board clarify its intent and the proper treatment of the prepayment credit in the determination of the actuarial value of assets.

Response: The method of measuring the average value of assets (actuarial value of assets) under the PPA limits the expected rate of return on assets to the lower of the assumed rate of return on assets or the PPA interest rate for third segment. This limitation understates expected investment return when the prevailing yield curve rates are lower than the going concern expectations. However, the PPA average value of assets is not limited when the prevailing yield curve rates exceed the going concern expectations. The PPA average value of assets does not give equal treatment to gains and losses. When the PPA interest rates are lower than the going concern assumption, the required suppression of the expected return in investments can introduce an additional element of asset loss (or reduced gain) by understating the actuarial value of assets that would be developed on a going concern basis. However when the PPA interest rates are higher than the going concern assumption, there is no limit on the recognition expected investment earnings or losses. This added element of additional asset loss (or reduction in asset gain) does not comply with 9904.413–50(b)(2), which requires that the actuarial value of the assets ''be determined by the use of any recognized asset valuation method which provides equivalent recognition of appreciation and depreciation of the market value of the assets of the pension plan.'' The conditional limitation of the actuarial value of assets can also add some volatility and difficulty in forward pricing projections. And finally, the traditional equal recognition of gains and losses allows the contractor to follow its own decisions concerning investment policy without penalty for gains in excess of the current corporate bond rate. The Board believes that the existing provisions regarding the actuarial value of assets permit a wide variety of reasonable asset valuation methods to be used. A contractor may elect to use a 2-year asset averaging method with a 10% corridor around the market value of assets, but switching to such a method is not required to achieve harmonization.

The accounting for the prepayment credit in a separate side account is an example in the NPRM of a possible methodology for measuring the actuarial value of assets. And as explained above, any reasonable asset valuation method may be used as part of a consistently applied cost accounting practice. The Board does not believe any further modification to the rule, including illustrations, is necessary.

Topic 8: Discounting of Contributions Receivable

Comments: One public commenter asked the Board to clarify the proposed 9904.413–50(b)(6)(i) requiring contributions receivable to be discounted to the beginning of the cost accounting period at the applicable effective interest rate.

Response: The PPA requires that contributions made after the end of the plan year be adjusted for interest based on the ''effective interest rate.'' The PPA defines the ''effective interest rate'' as the single interest rate that will produce the same present value of accrued benefits as the duration-specific corporate bond yield rates. In reviewing the relationship of interest adjustments under the proposed harmonization rule to the Board's conceptual framework for harmonization and contract cost accounting, the Board believes the proposed rule was internally inconsistent. The general guiding principle for contract costing under harmonization is that the assumed interest rate, based on expected rates of return on investments, shall be used for all measurement purposes except the measurement of the minimum actuarial liability and minimum normal cost under 9904.412–50(b)(7)(ii).

Under the final rule, pension costs would be adjusted to the date of funding. Accumulated balances under 9904.412–50(a)(2) and amortization installments under 9904.412–50(a)(1) would be determined based on the assumed interest rate. Adjusting contributions receivable at the current corporate bond rate, which may not be representative of the expected earnings on the pension fund, is inconsistent with the assumed interest used for other measurements. Therefore, the Board has modified 9904.413–50(b)(6) to require that all contributions receivable be adjusted based on the assumed interest rate.

The harmonization rule adjusts amounts that have been deposited into the pension fund at the net rate of return on plan investments for the period.

Topic 9: Assignable Cost Limits

Comments: Some commenters recommended that the Board restore the ANPRM proposal for a buffer on the assignable cost limitation. The commenters did note that the 25% buffer proposed in the ANPRM was too large, and suggested that a 10% buffer would be sufficient to promote predictability while not permitting the accumulation of an excessive surplus.

Response: The Board recognizes that permitting a reasonable buffer in the assignable cost limitation has the advantage of dampening cost volatility for forward pricing purposes when the plan funding is close to the limit. However, the Board remains concerned that use of a buffer may result in the accumulation of excessive surplus assets. Currently the 9904.412–50(c)(2)(i) provision prohibiting the assignment of negative pension costs inhibits the Government's ability to recover an excessive asset surplus. Addressing the buffer concept and changing the zero dollar floor (9904.412–50(c)(2)(i)) are beyond the scope of harmonization. The Board believes these issues require further research because recognizing amounts in excess of measured cost has no precedent in the Cost Accounting Standards. The issue of excessive assets and the inclusion of a buffer in the assignable cost limitation must be considered together should the Board decide to open a new case on segment closing and other such adjustments.

Topic 10: Segment Closings and Benefit Curtailments

Comments: Many commenters objected to the proposed exclusion of the minimum actuarial liability from recognition for segment closings and benefit curtailment purposes under 9904.413–50(c)(12)(i). The commenters advised the Board of their strong belief that the proposed exclusion of the minimum actuarial liability in measuring the segment closing adjustment effectively reversed the CAS Pension Harmonization Rule. One public commenter summarized the objection as follows:

> The NPRM currently requires segment closing calculations to use the unadjusted Actuarial Accrued Liability (AAL), or the ongoing liability currently applicable in the existing CAS rules. We believe that the more appropriate measure of the liability in a segment closing calculation is the Minimum Accrued Liability (MAL) to achieve harmonization. The MAL, by its nature, is intended to reflect the present value of a pension plan if its obligations were settled at a particular point in time (*i.e.,* the segment closing date), while the AAL is reflective of an ongoing plan by incorporating long-term liability assumptions. The application of the AAL at segment closing effectively reverses the impact of harmonization that may have applied in prior periods since the final true-up of plan costs will revert back to the current (non-harmonized) CAS rules. We believe this is a fundamental flaw of the current NPRM that must be modified to ensure harmonization is achieved in the spirit of the mandate within the Pension Protection Act.

The following public commenter addressed the acceptance of risk by the contractor's decisions to settle or retain the benefit liability at segment closing:

> Looking from a theoretical standpoint, a segment closing should be based on a relatively risk-free basis, which essentially calls for the MAL to be used. If a contractor wishes to assume risks inherent in the investment of assets on a greater risk basis, then the contractor should absorb any losses as well as any gains that might arise.

Another commenter noted the relationship between the market value of assets, which is required in the measurement of the segment closing adjustment, and the minimum actuarial liability, which is not recognized:

> In order to harmonize pension cost, benefit curtailment and segment closing adjustments should be based on the difference between the Market Value of Assets (MVA) and the MAL. Both the MVA and the MAL are market-based measurements of the pension plan assets and obligations at the prevailing market conditions, and this basis is consistent with the requirements of the PPA.

One commenter asked that, in addition to mandatory benefit curtailments, voluntary benefit curtailments also should be exempted from the adjustment requirements of 9904.413–50(c)(12). The commenter argued that the required adjustment was disruptive and unnecessary if the segment was continuing and pension costs would continue to be charged to the contract.

There were three public comments concerning the proposed accounting for 9904.413–50(c)(12) adjustments in subsequent periods. These comments recommended revisions to the wording of 9904.413–50(c)(12)(ix). One commenter believed that the Board should consider addressing, in a future case on segment closings, subsequent actuarial gains for which the recovery of any excessive asset surplus is limited by the zero-dollar floor of 9904.412–50(c)(2)(i).

Response: The Board limited its proposed amendment to 9904.413–50(c)(12) to the exemption of benefit curtailments mandated by ERISA. Currently such benefit curtailments are addressed by 26 U.S.C.436. The Board recognizes that there are issues concerning the risks and rewards of settling or retaining the benefit liability upon the occurrence of a segment closing or benefit curtailment. There is also a potential that an analysis would demonstrate that the risks and rewards will vary depending upon market and economic conditions at the time of the segment closing or benefit curtailment.

The Board believes that any changes to the current provisions of 9904.413–50(c)(12), including the provision at 9904.413–50(c)(12)(ix) that was

proposed in the NPRM, must be based on a full consideration of these issues. Unintended consequences might arise if all the issues are not fully vetted. The Board believes that the issues and problems with the current segment closing and benefit curtailment provisions are beyond the scope of pension harmonization required under section 106, and should be addressed in a separate case, which the Board is considering. Accordingly, the Board has deleted the proposed provision at 9904.413–50(c)(12)(ix) from the final rule.

In reviewing the relationship of the segment closing liability to the liability used to compute annual pension costs, the Board noted that transfers of participants to other segments, including inactive segments, might be an integral part of winding down a segment's workforce prior to a segment closing. To fully respond to the public comments, the Board considered whether the asset transfers associated with participant transfers should be based on the same liability as used for 9904.413–50(c)(12) purposes, that is, the actuarial accrued liability determined under the accrued benefit cost method rather than the contractor's normal funding method. In the preamble to the 1995 amendments to CAS 412 and 413 (60 FR 16534, March 30, 1995), the Board noted that it was adding this distinction for the liability to be used to transfer assets because of its relationship to segment closings:

> Under the revised definition of a segment closing, some employees may remain in a segment performing non-Government work while other employees may be transferred to other segments. For consistency, the provisions for transfers of either active or retired participants specify that the assets transferred must equal the actuarial accrued liability determined under the accrued benefit cost method.

Therefore, the Board believes that to be consistent with the exemption of 9904.413–50(c)(12) from 9904.412–50(b)(7), the liability to be used to transfer assets under 9904.413–50(c)(8) and (9) should be likewise exempt. While participant and associated assets transfers also effect the measurement of ongoing pension costs, the Board believes that this treatment has the additional benefit of preserving assets within the segment in which they were accumulated. In the 1995 preamble, the Board explained its view on the impact of future costs of participant and associated asset transfers:

> If plan participants remain employed by the contractor, whether in the same or another segment, the Board believes the responsibility for future salary increases, which are attributable to future productivity, merit, and inflation, belongs to the future customers that benefit from the participants' continued employment.

Furthermore, because asset transfers under 9904.413–50(c)(8) and (9) are based on the liability measured by the accrued benefit cost method, rather than the established funding method, the Board has added to these paragraphs clarifying language regarding which actuarial assumptions are appropriate. This clarification was not previously necessary because all assumptions were required to reflect long-term trends.

Topic 11: Illustrations

Comments: Two commenters recommended that the Board eliminate proposed harmonization illustrations that ''do not focus on unique features of the rule and that could imply acceptance of tax accounting.'' They believed that, not only were the portions of the illustration related to ERISA measurements unnecessary, as ERISA is amended in the future, these illustrations could also become confusing and obsolete.

Response: The Board agrees and has limited the harmonization illustrations to those that demonstrate the measurement and assignment of the pension cost under this final rule.

Topic 12: Transition Rule

Comments: The comments from the industry associations were supportive of the proposed 9904.412–64.1 transition rule:

> We understand the transition rules are intended to mitigate any abrupt increase in costs as a result of the final rules to allow the Government to manage agency budgets. We continue to agree that this is an important reason to use such a transition and support the duration selected. In addition, we believe the phase-in will reduce the monetary amounts and number of equitable adjustments resulting from this required change in CAS, thereby lessening the opportunities for disagreements.

The associations believed that their support for the proposed rule and the transition provision was demonstrated by their acceptances of a further delay in the timeliness of cost recovery and prolonged negative cash flow burden. Other commenters were also supportive of the proposed transition.

However, two commenters believed that it was inappropriate for the Board to propose a transition rule to address the Government's budgetary concerns. One commenter opined that:

> * * * [there] will be significant gaps between CAS pension costs and the PPA funding requirements, gaps that do not exist for businesses selling commercially. These gaps will have detrimental cash flow and profit impacts on contractors because they will be required to fund shortfalls over a shorter period than they will be able to recover associated costs from the Government.

The other commenter believed it was appropriate to include the proposed transition to allow both parties to the contract a means of managing the forward pricing process and equitable adjustments from the expected large change in pension costs.

On the other hand, a joint public comment from several of the Government's military agencies expressed their belief that the magnitude of the potential pension cost increases requires a longer transition period in order to properly manage the impact on budgets and existing contracts.

Response: The Board determined that a transition period was necessary to implement the CAS Pension Harmonization Rule in a fair and equitable manner, as it has done with previous promulgations. In any attempt to promote fairness and equity, the Board would necessarily take into account the nature of the Government acquisition process, which includes the budgetary process. The Board believes that this transition period was necessary to allow the cost impact of this final rule to be gradually recognized in the pricing and costing of CAS-covered and FAR-covered contracts alike. It also moderates the difference in the pension cost allocable to FAR-covered fixed price contracts entered into prior to the effective date of the CAS Pension Harmonization Rule that are not subject to equitable adjustment.

Topic 13: Effective Date of the Final Rule and Its Applicability to Contracts

Comments: Many contractors recommended that the Board allow sufficient time to modify cost projections and permit contract cost negotiation to accommodate the change in accounting practice that would be required by the final rule. There was general agreement that the final rule should not be effective prior to January 1, 2011, and that the effective date should be delayed for 60 days from the publication of the final rule. Some of the commenters noted that delayed effective and applicability dates might ease the impact of equitable adjustments.

Response: The Board has considered the comments regarding the effective date of the final rule. This final rule is being published after January 1, 2011, which is later than the effective date mandated by section 106 of the PPA, but provides the relief requested in the

public comments to delay the effective and applicability dates. The Board decided to delay the effective date for 60 days after publication to permit time for contractors to make the necessary changes to the actuarial valuation and cost projection systems. Furthermore, to ensure that no contractor becomes immediately applicable to the final rule, the implementation date is the first cost accounting period after June 30, 2012. The Board agrees that such a delay will eliminate a portion of the equitable adjustment claims for contractors that report on a calendar year basis.

Topic 14: Guidance on Equitable Adjustments

Comments: Two commenters requested that the Board provide guidance on the calculation of the cost impact for equitable adjustment. The commenters believed such guidance was important to avoid having different interpretations that would lead to disputes over equitable adjustments. One of the commenters asked that the Board explicitly identify what constitutes a mandatory cost accounting practice change due to the CAS Pension Harmonization Rule.

Response: The Board believes that the final rule changes cost accounting practices contained in CAS 412 and 413 that are necessary to implement the CAS Pension Harmonization Rule required by section 106 of the PPA. Whether a particular accounting practice has changed, the actual determination of the cost impact and the processing of equitable adjustments are matters for CAS administration as may be undertaken by the contracting parties for CAS-covered contracts. Therefore, this final rule is limited to contract cost accounting and does not include any guidance on the administration of the change in cost accounting practice; the Board urges the Federal agency heads to issue the necessary policies and procedures.

Topic 15: Request for Additional Opportunities for Public Comment

Comments: Several commenters recommended that the Board republish the CAS Pension Harmonization Rule as a second NPRM if substantive changes are made to the rule. The commenters believed that a second NPRM would be advantageous given the complexity and cost impact of the proposed changes.

Response: The Board believes that the conceptual basis that underpinned the NPRM has been extended to the final rule. While the elimination of the threshold criteria of ''trigger 1'' and ''trigger 3'' have greatly reduced the wording and complexity of 9904.412–50(b)(7), the basic concepts for establishing a harmonization prerequisite have not changed. This final rule does not add any substantive changes to how the CAS Pension Harmonization Rule is implemented. Therefore, the Board believes that a second NPRM is not necessary, and after consideration of the public comments to the NPRM, the Board is publishing the CAS Pension Harmonization Rule as a final rule.

D. Paperwork Reduction Act

The Paperwork Reduction Act, Public Law 96–511, does not apply to this final rule because this rule imposes no additional paperwork burden on offerors, affected contractors and subcontractors, or members of the public which requires the approval of OMB under 44 U.S.C. 3501, *et seq.* The records required by this final rule are those normally maintained by contractors and subcontractors who claim reimbursement of costs under Government contracts.

E. Executive Order 12866, the Congressional Review Act, and the Regulatory Flexibility Act

Because the affected contractors and subcontractors are those who are already subject to CAS 412 and 413, the economic impact of the promulgation of this CAS Pension Harmonization Rule as a final rule on contractors and subcontractors is expected to be minor. As a result, the Board has determined that this final rule will not result in the promulgation of an ''economically significant rule'' under the provisions of Executive Order 12866, and that a regulatory impact analysis will not be required. For the same reason, the Administrator of the Office of Information and Regulatory Affairs has determined that this final rule is not a ''major rule'' under the Congressional Review Act, 5 U.S.C. Chapter 8. Furthermore, this final rule does not have a significant effect on a substantial number of small entities because small businesses are exempted from the application of the Cost Accounting Standards. Therefore, this final rule does not require a regulatory flexibility analysis under the Regulatory Flexibility Act of 1980, 5 U.S.C. chapter 6.

List of Subjects in 48 CFR 9904

Government Procurement, Cost Accounting Standards.

Daniel I. Gordon,

Chair, Cost Accounting Standards Board.

For the reasons set forth in this preamble, Chapter 99 of Title 48 of the Code of Federal Regulations is amended as set forth below:

PART 9904—COST ACCOUNTING STANDARDS

■ 1. The authority citation for Part 9904 continues to read as follows:

Authority: Pub. L. 111–350, 124 Stat. 3677, 41 U.S.C. 1502 [formerly Pub. L. 100–679, 102 Stat 4056, 41 U.S.C. 422].

■ 2. Section 9904.412–30 is amended by revising paragraphs (a)(1), (8), (9), and (23) to read as follows:

9904.412–30 Definitions.

(a) * * *

(1) *Accrued benefit cost method* means an actuarial cost method under which units of benefits are assigned to each cost accounting period and are valued as they accrue, that is, based on the services performed by each employee in the period involved. The measure of normal cost under this method for each cost accounting period is the present value of the units of benefit deemed to be credited to employees for service in that period. The measure of the actuarial accrued liability at a plan's measurement date is the present value of the units of benefit credited to employees for service prior to that date. (This method is also known as the Unit Credit cost method without salary projection.)

* * * * *

(8) *Assignable cost deficit* means the increase in unfunded actuarial liability that results when the pension cost computed for a qualified defined-benefit pension plan exceeds the maximum tax-deductible amount for the cost accounting period determined in accordance with the Internal Revenue Code at Title 26 of the U.S.C.

(9) *Assignable cost limitation* means the excess, if any, of the actuarial accrued liability and the normal cost for the current period over the actuarial value of the assets of the pension plan.

* * * * *

(23) *Prepayment credit* means the amount funded in excess of the pension cost assigned to a cost accounting period that is carried forward for future recognition. The Accumulated Value of Prepayment Credits means the value, as of the measurement date, of the prepayment credits adjusted for income and expenses in accordance with 9904.413–50(c)(7) and decreased for amounts used to fund pension costs or liabilities, whether assignable or not.

* * * * *

■ 3. Section 9904.412–40 is amended by adding paragraph (b)(3) to read as follows:

9904.412–40 Fundamental requirement.

* * * * *

(b) * * *

(3) For qualified defined benefit pension plans, the measurement of pension costs shall recognize the requirements of 9904.412–50(b)(7) for periods beginning with the ''Applicability Date of the CAS Pension Harmonization Rule.'' However, paragraphs 9904.413–50(c)(8), (9) and (12) are exempt from the requirements of 9904.412–50(b)(7).

* * * * *

■ 4. In 9904.412–50, paragraphs (a)(2), (4) and (6); (b)(5); and (c)(1), (2) and (5) are revised, and paragraph (b)(7) is added to read as follows:

9904.412–50 Techniques for application.

(a) * * *

(2)(i) Except as provided in 9904.412–50(d)(2), any portion of unfunded actuarial liability attributable to either pension costs applicable to prior years that were specifically unallowable in accordance with then existing Government contractual provisions or pension costs assigned to a cost accounting period that were not funded in that period, shall be separately identified and eliminated from any unfunded actuarial liability being amortized pursuant to paragraph (a)(1) of this subsection.

(ii) Such portions of unfunded actuarial liability shall be adjusted for interest based on the interest assumption established in accordance with 9904.412–50(b)(4) without regard to 9904.412–50(b)(7). The contractor may elect to fund, and thereby reduce, such portions of unfunded actuarial liability and future interest adjustments thereon. Such funding shall not be recognized for purposes of 9904.412–50(d).

* * * * *

(4) Any amount funded in excess of the pension cost assigned to a cost accounting period shall be accounted for as a prepayment credit. The accumulated value of such prepayment credits shall be adjusted for income and expenses in accordance with 9904.413–50(c)(7) until applied towards pension cost in a future accounting period. The accumulated value of prepayment credits shall be reduced for portions of the accumulated value of prepayment credits used to fund pension costs or to fund portions of unfunded actuarial liability separately identified and maintained in accordance with 9904.412–50(a)(2). The accumulated value of any prepayment credits shall be excluded from the actuarial value of the assets used to compute pension costs for purposes of this Standard and Cost Accounting Standard 9904.413.

* * * * *

(6) For purposes of this Standard, defined-benefit pension plans funded exclusively by the purchase of individual or group permanent insurance or annuity contracts, and thereby exempted from the minimum funding requirements implemented by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.,* as amended, shall be treated as defined-contribution pension plans. However, all other defined-benefit pension plans administered wholly or in part through insurance company contracts shall be subject to the provisions of this Standard relative to defined-benefit pension plans.

(b) * * *

(5) Pension cost shall be based on provisions of existing pension plans. This shall not preclude contractors from making salary projections for plans whose benefits are based on salaries and wages, or from considering improved benefits for plans which provide that such improved benefits must be made. For qualified defined benefit plans whose benefits are subject to a collectively bargained agreement(s) and whose benefits are not based on salaries and wages, the contractor may recognize benefit improvements expected to occur in succeeding plan years determined on the basis of the average annual increase in benefits over the 6 immediately preceding plan years.

* * * * *

(7) *CAS Pension Harmonization Rule:* For qualified defined benefit pension plans, the pension cost shall be determined in accordance with the provisions of paragraph (b)(7)(i) of this section.

(i) In any period that the sum of the minimum actuarial liability and the minimum normal cost exceeds the sum of the actuarial accrued liability and the normal cost, the contractor shall measure and assign the pension cost for the period in accordance with 9904.412 and 9904.413 by using the minimum actuarial liability and minimum normal cost as the actuarial accrued liability and normal cost, respectively, for all purposes unless otherwise excepted.

(ii) Special definitions to be used for this paragraph:

(A) The *minimum actuarial liability* shall be the actuarial accrued liability measured under the accrued benefit cost method and using an interest rate assumption as described in 9904.412–50(b)(7)(iii).

(B) The *minimum normal cost* shall be the normal cost measured under the accrued benefit cost method and using an interest rate assumption as described in 9904.412–50(b)(7)(iii). Anticipated administrative expense for the period shall be recognized as a separate incremental component of normal cost.

(iii) Actuarial Assumptions: The actuarial assumptions used to measure the minimum actuarial liability and minimum normal cost shall meet the following criteria:

(A) The interest assumption used to measure the pension cost for the current period shall reflect the contractor's best estimate of rates at which the pension benefits could effectively be settled based on the current period rates of return on investment grade fixed-income investments of similar duration to the pension benefits and that are in the top 3 quality levels available, *e.g.,* Moody's' single ''A'' rated or higher;

(B) The contractor may elect to use the same rate or set of rates, for investment grade corporate bonds of similar duration to the pension benefits, as may be published by the Secretary of the Treasury and used for determination of the minimum contribution required by ERISA. The contractor's cost accounting practice includes the election of the specific published rate or set of rates and must be consistently followed;

(C) For purposes of 9904.412–50(b)(7)(ii)(A) and (B), use of current period rates of return on investment grade corporate bonds of similar duration to the pension benefits shall not violate the provisions of 9904.412–40(b)(2) and 9904.412–50(b)(4) regarding the interest rate used to measure the minimum actuarial liability and minimum normal cost; and

(D) All actuarial assumptions, other than interest assumptions, used to measure the minimum actuarial liability and minimum normal cost shall be the same as the assumptions used elsewhere in this Standard.

(c) * * *

(1) Amounts funded in excess of the pension cost assigned to a cost accounting period pursuant to the provisions of this Standard shall be accounted for as a prepayment credit and carried forward to future accounting periods.

(2) For qualified defined-benefit pension plans, the pension cost measured for a cost accounting period is assigned to that period subject to the following adjustments, in order of application:

(i) Any amount of pension cost measured for the period that is less than zero shall be assigned to future accounting periods as an assignable cost

credit. The amount of pension cost assigned to the period shall be zero.

(ii) When the pension cost equals or exceeds the assignable cost limitation:

(A) The amount of pension cost, adjusted pursuant to paragraph (c)(2)(i) of this subsection, shall not exceed the assignable cost limitation,

(B) All amounts described in 9904.412–50(a)(1) and 9904.413–50(a), which are required to be amortized, shall be considered fully amortized, and

(C) Except for portions of unfunded actuarial liability separately identified and maintained in accordance with 9904.412–50(a)(2), any portion of unfunded actuarial liability, which occurs in the first cost accounting period after the pension cost has been limited by the assignable cost limitation, shall be considered an actuarial gain or loss for purposes of this Standard. Such actuarial gain or loss shall exclude any increase or decrease in unfunded actuarial liability resulting from a plan amendment, change in actuarial assumptions, or change in actuarial cost method effected after the pension cost has been limited by the assignable cost limitation.

(iii) An amount of pension cost of a qualified pension plan, adjusted pursuant to paragraphs (c)(2)(i) and (ii) of this subsection that exceeds the sum of (A) the maximum tax-deductible amount, determined in accordance with the Internal Revenue Code at Title 26 of the U.S.C., and (B) the accumulated value of prepayment credits, shall be assigned to future accounting periods as an assignable cost deficit. The amount of pension cost assigned to the current period shall not exceed the sum of the maximum tax-deductible amount and the accumulated value of prepayment credits.

* * * * *

(5) Any portion of pension cost measured for a cost accounting period and adjusted in accordance with 9904.412–50(c)(2) that exceeds the amount required to be funded pursuant to a waiver granted under the provisions of ERISA shall not be assigned to the current period. Rather, such excess shall be treated as an assignable cost deficit, except that it shall be assigned to future cost accounting periods using the same amortization period as used for ERISA purposes.

* * * * *

■ 5. Section 9904.412–60 is amended by revising paragraphs (b)(2) and (3), (c)(1) through (6), (c)(13), and (d)(4) to read as follows:

9904.412–60 Illustrations.

* * * * *

(b) * * *

(2) For several years Contractor H has had an unfunded nonqualified pension plan which provides for payments of $200 a month to employees after retirement. The contractor is currently making such payments to several retired employees and recognizes those payments as its pension cost. The contractor paid monthly annuity benefits totaling $24,000 during the current year. During the prior year, Contractor H made lump sum payments to irrevocably settle the benefit liability of several participants with small benefits. The annual installment to amortize these lump sum payments over fifteen years at the interest rate assumption, which is based on expected rate of return on investments and complies with 9904.412–40(b)(2) and 9904.412–50(b)(4), is $5,000. Since the plan does not meet the criteria set forth in 9904.412–50(c)(3)(ii), pension cost must be accounted for using the pay-as-you-go cost method. Pursuant to 9904.412–50(b)(3), the amount of assignable cost allocable to cost objectives of that period is $29,000, which is the sum of the amount of benefits actually paid in that period ($24,000) and the second annual installment to amortize the prior year's lump sum settlements ($5,000).

(3) Contractor I has two qualified defined-benefit pension plans that provide for fixed dollar payments to hourly employees.

(i) Under the first plan, in which the benefits are not subject to a collective bargaining agreement, the contractor's actuary believes that the contractor will be required to increase the level of benefits by specified percentages over the next several years based on an established pattern of benefit improvements. In calculating pension costs for this first plan, the contractor may not assume future benefits greater than that currently required by the plan.

(ii) With regard to the second plan, a collective bargaining agreement negotiated with the employees' labor union provides that pension benefits will increase by specified percentages over the next several years. Because the improved benefits are required to be made, the contractor can consider not only benefits increases required by the collective bargaining agreement, but may also consider subsequent benefit increases based on the average increase in benefits during the previous 6 years in computing pension costs for the current cost accounting period in accordance with 9904.412–50(b)(5). The contractor shall limit projected benefits to the increases specified in the provisions of the existing plan, as amended by the collective bargaining agreement, in accordance with 9904.412–50(b)(5).

* * * * *

(c) * * *

(1) Contractor J maintains a qualified defined-benefit pension plan. The actuarial accrued liability for the plan is $20 million and is measured by the minimum actuarial liability in accordance with 9904.412–50(b)(7)(ii) since the criterion of 9904.412–50(b)(7(i) has been satisfied. The actuarial value of the assets of $18 million is subtracted from the actuarial accrued liability of $20 million to determine the total unfunded actuarial liability of $2 million. Pursuant to 9904.412–50(a)(1), Contractor J has identified and is amortizing twelve separate portions of unfunded actuarial liabilities. The sum of the unamortized balances for the twelve separately maintained portions of unfunded actuarial liability equals $1.8 million. In accordance with 9904.412–50(a)(2), the contractor has separately identified, and eliminated from the computation of pension cost, $200,000 attributable to a pension cost assigned to a prior period that was not funded. The sum of the twelve amortization bases maintained pursuant to 9904.412–50(a)(1) and the amount separately identified under 9904.412–50(a)(2) equals $2 million ($1,800,000 + 200,000). Because the sum of all identified portions of unfunded actuarial liability equals the total unfunded actuarial liability, the plan is in actuarial balance and Contractor J can assign pension cost to the current cost accounting period in accordance with 9904.412–40(c).

(2) Contractor K's pension cost computed for 2017, the current year, is $1.5 million. This computed cost is based on the components of pension cost described in 9904.412–40(a) and 9904.412–50(a) and is measured in accordance with 9904.412–40(b) and 9904.412–50(b). The assignable cost limitation, which is defined at 9904.412–30(a)(9), is $1.3 million. In accordance with the provisions of 9904.412–50(c)(2)(ii)(A), Contractor K's assignable pension cost for 2017 is limited to $1.3 million. In addition, all amounts that were previously being amortized pursuant to 9904.412–50(a)(1) and 9904.413–50(a) are considered fully amortized in accordance with 9904.412–50(c)(2)(ii)(B). The following year, 2018, Contractor K computes an unfunded actuarial liability of $4 million. Contractor K has not changed his actuarial assumptions nor amended the provisions of his pension plan. Contractor K has not had any pension

costs disallowed or unfunded in prior periods. Contractor K must treat the entire $4 million of unfunded actuarial liability as an actuarial loss to be amortized over a ten-year period beginning in 2018 in accordance with 9904.412–50(c)(2)(ii)(C) and 9904.413–50(a)(2)(ii).

(3) Assume the same facts shown in illustration 9904.412–60(c)(2), except that in 2016, the prior year, Contractor K's assignable pension cost was $800,000, but Contractor K only funded and allocated $600,000. Pursuant to 9904.412–50(a)(2), the $200,000 of unfunded assignable pension cost was separately identified and eliminated from other portions of unfunded actuarial liability. This portion of unfunded actuarial liability was adjusted for 8% interest, which is the interest assumption for 2016 and 2017, and was brought forward to 2017 in accordance with 9904.412–50(a)(2). Therefore, $216,000 ($200,000 × 1.08) is excluded from the amount considered fully amortized in 2017. The next year, 2018, Contractor K must eliminate $233,280 ($216,000 × 1.08) from the $4 million so that only $3,766,720 is treated as an actuarial loss in accordance with 9904.412–50(c)(2)(ii)(C).

(4) Assume, as in 9904.412–60(c)(2), the 2017 pension cost computed for Contractor K's qualified defined-benefit pension plan is $1.5 million and the assignable cost limitation is $1.7 million. The accumulated value of prepayment credits is $0. However, because of the limitation on tax-deductible contributions imposed by the Internal Revenue Code at Title 26 of the U.S.C., Contractor K cannot fund more than $1 million without incurring an excise tax, which 9904.412–50(a)(5) does not permit to be a component of pension cost. In accordance with the provisions of 9904.412–50(c)(2)(iii), Contractor K's assignable pension cost for the period is limited to $1 million. The $500,000 ($1.5 million − $1 million) of pension cost not funded is reassigned to the next ten cost accounting periods beginning in 2018 as an assignable cost deficit in accordance with 9904.412–50(a)(1)(vi).

(5) Assume the same facts for Contractor K in 9904.412–60(c)(4), except that the accumulated value of prepayment credits equals $700,000. Therefore, in addition to the $1 million tax-deductible contribution which was deposited on the first day of the plan year, Contractor K could apply up to $700,000 of the accumulated value of prepayment credits towards the pension cost computed for the period. In accordance with the provisions of 9904.412–50(c)(2)(iii), the amount of pension cost assigned to the current period shall not exceed $1,700,000, which the sum of the $1 million maximum tax-deductible amount and $700,000 accumulated value of prepayment credits. Contractor K's assignable pension cost for the period is the full $1.5 million computed for the period. A new prepayment credit of $200,000 is created by the excess funding after applying sum of the $1 million contribution and $700,000 accumulated value of prepayment credits towards the $1.5 million assigned pension cost ($700,000 + $1,000,000 − $1,500,000). The $200,000 of remaining accumulated value of prepayment credits is adjusted for $14,460 of investment income allocated in accordance with 9904.412–50(a)(4) and 9904.413–50(c)(7) and the sum of $214,460 is carried forward until needed in future accounting periods in accordance with 9904.412–50(a)(4) and 9904.412–50(c)(1).

(6) Assume the same facts for Contractor K in 9904.412–60(c)(4), except that the 2017 assignable cost limitation is $1.3 million and the accumulated value of prepayment credits is $0. Pension cost of $1.5 million is computed for the cost accounting period, but the assignable cost is limited to $1.3 million in accordance with 9904.412–50(c)(2)(ii)(A). Pursuant to 9904.412–50(c)(2)(ii)(B), all existing amortization bases maintained in accordance with 9904.412–50(a)(1) are considered fully amortized. The assignable cost of $1.3 million is then compared to the maximum tax-deductible amount of $1 million. Pursuant to 9904.412–50(c)(2)(iii), Contractor K's assignable pension cost for the period is limited to $1 million. The $300,000 ($1.3 million − $1 million) excess of the assignable cost limitation over the tax-deductible maximum is assigned to future periods as an assignable cost deficit.

* * * * *

(13) The assignable pension cost for Contractor O's qualified defined-benefit plan is $600,000. For the same period Contractor O contributes $700,000 which is the minimum funding requirement under ERISA. In addition, there exists $75,000 of unfunded actuarial liability that has been separately identified pursuant to 9904.412–50(a)(2). Contractor O may use $75,000 of the contribution in excess of the assignable pension cost to fund this separately identified unfunded actuarial liability, if he so chooses. The effect of the funding is to eliminate the unassignable $75,000 portion of unfunded actuarial liability that had been separately identified and thereby eliminated from the computation of pension costs. Contractor O shall then account for the remaining $25,000 ([$700,000 − $600,000] − $75,000) of excess contribution as a prepayment credit in accordance with 9904.412–50(a)(4).

(d) * * *

(4) Again, assume the set of facts in 9904.412–60(d)(2) except that, Contractor P's contribution to the Trust is $105,000 based on an interest assumption of 8%, which is based on the expected rate of return on investments and complies with 9904.412–40(b)(2) and 9904.412–50(b)(4). Under the provisions of 9904.412–50(d)(2) the entire $100,000 is allocable to cost objectives of the period. In accordance with the provisions of 9904.412–50(c)(1) Contractor P has funded $5,000 ($105,000 − $100,000) in excess of the assigned pension cost for the period. The $5,000 shall be accounted for as a prepayment credit. Pursuant to 9904.412–50(a)(4), the $5,000 shall be adjusted for an allocated portion of the total investment income and expenses in accordance with 9904.412–50(a)(4) and 9904.413–50(c)(7). Allocated earnings and expenses, and the prepayment credits, shall be excluded from the actuarial value of assets used to compute the next year's pension cost. For the current period the net return on assets attributable to investment income and expenses was 6.5%. Therefore, the accumulated value of prepayment credits of $5,325 (5,000 × 1.065) may be used to fund the next year's assigned pension cost, if needed.

* * * * *

■ 6. Section 9904.412–60.1 is added to read as follows:

9904.412–60.1 Illustrations—CAS Pension Harmonization Rule.

The following illustrations address the measurement, assignment and allocation of pension cost on or after the Applicability Date of the CAS Harmonization Rule. The illustrations present the measurement, assignment and allocation of pension cost for a contractor that separately computes pension costs by segment or aggregation of segments. The actuarial gain and loss recognition of changes between measurements based on the actuarial accrued liability, determined without regard to the provisions of 9904.412–50(b)7) and the minimum actuarial liability are illustrated in 9904.412–60.1(d). The structural format for

9904.412.60.1 differs from the format for 9904.412–60.

(a) *Description of the pension plan, actuarial assumptions and actuarial methods used for 9904.412–60.1 Illustrations.* (1) *Introduction:* Harmony Corporation has a defined-benefit pension plan covering employees at seven segments, of which some segments have contracts that are subject to this Standard and 9904.413, while other segments perform commercial work only. The demographic experience regarding employee terminations for employees of Segment 1 is materially different from that of the other six segments so that pursuant to 9904.413–50(c)(2)(iii) the contractor must separately compute the pension cost for Segment 1. Because the factors comprising pension cost for Segments 2 through 7 are relatively equal, the contractor computes pension cost for these six segments in the aggregate and allocates the aggregate cost to segments on a composite basis. Inactive employees are retained in the segment from which they terminated employment. The contractor has received its annual actuarial valuation for its qualified defined benefit pension plan, which bases the pension benefit on the employee's final average salary.

(2) *Actuarial Methods and Assumptions:* (i) *Salary Projections:* As permitted by 9904.412–50(b)(5), the contractor includes a projection of future salary increases and uses the projected unit credit cost method, which is an immediate gain actuarial cost method that satisfies the requirements of 9904.412–40(b)(1) and 50(b)(1), for measuring the actuarial accrued liability and normal cost. The contractor uses the accrued benefit cost method (also known as the unit credit cost method without projection) to measure the minimum actuarial liability and minimum normal cost. The accrued benefit cost method satisfies 9904.412–50(b)(7)(ii) as well as 9904.412–40(b)(1) and 50(b)(1).

(ii) *Interest Rates:* (A) Assumed interest rate used to measure the actuarial accrued liability and normal cost: The contractor's basis for establishing the expected rate of return on investments assumption satisfies the criteria of 9904.412–40(b)(2) and 9904.412–50(b)(4). This is referred to as the ''assumed interest rate'' for purposes of this illustration.

(B) Corporate bond rate used to measure the minimum actuarial liability and minimum normal cost: For purposes of measuring the minimum actuarial liability and minimum normal cost the contractor has elected to use a specific set of investment grade corporate bond yield rates published by the Secretary of the Treasury for ERISA's minimum funding requirements. The basis for establishing the set of corporate bond rates meets the requirements of 9904.412–50(b)(7)(iii)(A) as permitted by 9904.412–50(b)(7)(iii)(B). This set of rates is referred to as the ''corporate bond rates'' for purposes of this illustration.

(iii) *Mortality:* The mortality assumption is based on a table of generational mortality rates published by the Secretary of the Treasury and reflects recent mortality improvements. This table satisfies 9904.412–40(b)(2) which requires assumptions to ''represent the contractor's best estimates of anticipated experience under the plan, taking into account past experience and reasonable expectations.'' The specific table used for each valuation shall be identified.

(iv) *Termination of Employment:* The termination of employment (turnover) assumption is based on an experience study of Harmony Company employee terminations or causes other than retirement. Because the experience for Segment 1 was materially different from the experience for the rest of the company, the termination of employee assumption for Segment 1 was developed based on the experience of that segment only in accordance with 9904.413–50(c)(2)(iii). The termination of employment experiences for each of Segments 2 through 7 were materially similar, and therefore the termination of employee assumption for Segments 2 through 7 was developed based on the experiences of those segments in the aggregate.

(v) *Actuarial Value of Assets:* The valuation of the actuarial value of assets used for CAS 412 and 413 is based on a recognized smoothing technique that ''provides equivalent recognition of appreciation and depreciation of the market value of the assets of the pension plan.'' The disclosed method also constrains the asset value to a corridor bounded by 80% to 120% of the market value of assets. This method for measuring the actuarial value of assets satisfies the provisions of 9904.413–50(b)(2).

(b) *Measurement of Pension Costs.* Based on the pension plan, actuarial methods and actuarial assumptions described in 9904.412–60.1(a), the Harmony Corporation determines that the pension plan, as well as Segment 1 and Segments 2 through 7, have unfunded actuarial liabilities and measures its pension cost for plan year 2017 as follows:

(1) *Asset Values:* (i) *Market Values of Assets:* The contractor accounts for the market value of assets in accordance with 9904.413–50(c)(7). The contractor has elected to separately identify the accumulated value of prepayment credits from the assets allocated to segments. The accumulated value of prepayment credits are adjusted in accordance with 9904.412–50(a)(4) and 9904.413–50(c)(7). The market value of assets as of January 1, 2017, including the accumulated value of prepayment credits, is summarized in Table 1.

TABLE 1—JANUARY 1, 2017, MARKET VALUE OF ASSETS

	Total plan	Segment 1	Segments 2 through 7	Accumulated prepayments	Note
Market Value of Assets	$14,257,880	$1,693,155	$11,904,328	$660,397	1

Note 1: Information taken directly from the actuarial valuation report prepared for CAS 412 and 413 purposes and supporting documentation.

(ii) *Actuarial Value of Assets:* Based on the contractor's disclosed asset valuation method, and recognition of the asset gain or loss, which is the difference between the expected income, based on the assumed interest rate, which complies with 9904.412–40(b)(2) and 9904.412–50(b)(4), and the actual income, including realized and unrealized appreciation and depreciation for the current and four prior periods as required by 9904.413–40(b), is delayed and amortized over a five-year period. The portion of the appreciation and depreciation that is deferred until future periods is subtracted from the market value of assets to determine the actuarial value of assets for CAS 412 and 413 purposes. The actuarial value of assets cannot be less than 80%, or more than 120%, of the market value of assets. The development of the actuarial value of assets for the total plan, as well as for

Segment 1 and Segments 2 through 7, as of January 1, 2017 is shown in Table 2.

TABLE 2—JANUARY 1, 2017, ACTUARIAL VALUE OF ASSETS

	Total plan	Segment 1	Segments 2 through 7	Accumulated prepayments	Note
Market Value at January 1, 2017	$14,257,880	$1,693,155	$11,904,328	$660,397	1
Total Deferred Appreciation	(37,537)	(4,398)	(31,400)	(1.739)	2
Unlimited Actuarial Value of Assets	14,220,343	1,688,757	11,872,928	658,658	.....
CAS 413 Asset Corridor 80% of Market Value of Assets	11,406,304	1,354,524	9,523,462	528,318	.....
Market Value at January 1, 2017	14,257,880	1,693,155	11,904,328	660,397	1
120% of Market Value of Assets	17,109,456	2,031,786	14,285,194	792,476	.....
CAS Actuarial Value of Assets	14,220,343	1,688,757	11,872,928	658,658	3, 4

Note 1: See Table 1.
Note 2: Information taken directly from the actuarial valuation report prepared for CAS 412 and 413 purposes and supporting documentation.
Note 3: CAS Actuarial Value of Assets cannot be less than 80% of Market Value of Assets or more than 120% of Market Value of Assets.
Note 4: The Actuarial Value of Assets are used in determination of any Unfunded Actuarial Liability or Unfunded Actuarial Surplus regardless of whether the liability is based on the actuarial accrued liability measured without regard to 9904.412–50(b)(7) or minimum actuarial liability measured in accordance with 9904.412–50(b)(7).

(2) *Liabilities and Normal Costs:* (i) *Actuarial Accrued Liabilities and Normal Costs:* Based on the plan population data and the disclosed methods and assumptions for CAS 412 and 413 purposes, the contractor measures the actuarial accrued liability and normal cost on a going concern basis using an assumed interest rate that satisfies the requirements of 9904.412–40(b)(2) and 9904.412–50(b)(4). The actuarial accrued liability and normal cost for each segment are measured based on the termination of employment assumption unique to that segment. The actuarial accrued liability and normal cost for the total plan is the sum of the actuarial accrued liability and normal cost for the segments. The actuarial accrued liability and normal cost are shown in Table 3.

TABLE 3—ACTUARIAL ACCRUED LIABILITIES AND NORMAL COSTS AS OF JANUARY 1, 2017

	Total plan	Segment 1	Segments 2 through 7	Notes
Actuarial Accrued Liability (AAL)	$16,325,000	$2,100,000	$14,225,000	1
Normal Cost	910,700	89,100	821,600	1
Expense Load on Normal Cost	.....	.....	.....	2 1, 2

Note 1: Information taken directly from the actuarial valuation report prepared for CAS 412 and 413 purposes and supporting documentation. The actuarial accrued liability and normal cost are computed using the assumed interest rate in accordance with 9904.412–40(b)(2) and 9904.412.50(b)(4).
Note 2: Expected administrative expenses are implicitly recognized as part of the assumed interest rate.

(ii) Likewise, based on the plan population data and the disclosed methods and assumptions for CAS 412 and 413 purposes, the contractor measures the minimum actuarial liability and minimum normal cost using a set of investment grade corporate bond yield rates published by the Secretary of the Treasury that satisfy the requirements of 9904.412–50(b)(7)(iii). The minimum actuarial liability and minimum normal cost for each segment are measured based on the termination of employment assumption for that segment. The minimum actuarial liability and minimum normal cost for the total plan is the sum of the actuarial accrued liability and normal cost for the segments as shown in Table 4.

TABLE 4—MINIMUM ACTUARIAL LIABILITIES AND MINIMUM NORMAL COSTS AS OF JANUARY 1, 2017

	Total plan	Segment 1	Segments 2 through 7	Notes
Minimum Actuarial Liability	$16,636,000	$2,594,000	$14,042,000	1
Minimum Normal Cost	942,700	102,000	840,700	1
Expense Load on Minimum Normal Cost	82,000	8,840	73,160	1, 2

Note 1: Plan level information taken directly from the actuarial valuation report prepared for ERISA purposes and supporting documentation and equals the sum of the data for the segments. Data for the segments is taken directly from the actuarial valuation report prepared for CAS 412 and 413 purposes and supporting documentation.
Note 2: Anticipated annual administrative expenses are separately recognized as an incremental component of minimum normal cost in accordance with 9904.412–50(b)(7)(ii)(B).

(3) *CAS Pension Harmonization Test:* (i) In accordance with 9904.412–50(b)(7)(i), the contractor compares the sum of the actuarial accrued liability and normal cost plus any expense load, to the sum of the minimum actuarial liability and minimum normal cost plus any expense load. Because the contractor separately computes pension costs by segment, or aggregation of segments, the applicability of 9904.412–50(b)(7)(i) is determined separately for

Segment 1 and Segments 2 through 7. See Table 5, which shows the application of the provisions of 9904.412–50(b)(7)(i), *i.e.,* the CAS pension harmonization test.

TABLE 5—CAS PENSION HARMONIZATION TEST AT JANUARY 1, 2017

	Total plan	Segment 1	Segments 2 through 7	Notes
	(Note 1)	(Note 2)	(Note 2)	
"Going Concern" Liability for Period:				3
Actuarial Accrued Liability		$2,100,000	$14,225,000	4
Normal Cost		89,100	821,600	4
Expense Load on Normal Cost				4, 5
Total Liability for Period		2,189,100	15,046,600	
Minimum Liability for Period:				
Minimum Actuarial Liability		2,594,000	14,042,000	6
Minimum Normal Cost		102,000	840,700	6
Expense Load on Minimum Normal Cost		8,840	73,160	6, 7
Total Minimum Liability for Period		2,704,840	14,955,860	

Note 1: Because the contractor determines pension costs separately for Segment 1 and Segments 2 through 7, the data for the Total Plan is not needed for purposes of the 9904.412–50(b)(7)(i) determination.

Note 2: Because the contractor determines pension cost separately for Segment 1 and Segments 2 through 7, the 9904.412–50(b)(7) CAS Pension Harmonization test is applied at the segment level to determine the larger of the Total Liability for Period or the Total Minimum Liability for Period. For Segment 1, the larger Total Minimum Liability for Period determines the measurement basis for the liability and normal cost. For Segments 2 through 7, the larger Total Liability for Period determines the measurement basis for the liability and normal cost.

Note 3: The actuarial accrued liability and normal cost plus any expense load are computed using interest assumptions based on long-term expectations in accordance with 9904.412–40(b)(2) and 9904.412–50(b)(4). For purposes of Illustration 9904.412–60.1(b), the sum of these amounts are referred to as the "Going Concern" Liability for the Period.

Note 4: See Table 3.

Note 5: Because the contractor's assumed interest rate implicitly recognizes expected administrative expenses there is no explicit amount added to the normal cost.

Note 6: See Table 4.

Note 7: The contractor explicitly identifies the expected expenses as a separate component of the minimum normal cost, as required by 9904.412–50(b)(7)(ii)(B).

(ii) As shown in Table 5 for Segment 1, the total minimum liability for the period (minimum actuarial liability and minimum normal cost) of $2,704,840 exceeds the total liability for the period (actuarial accrued liability and normal cost) of $2,189,100. Therefore, the contractor must measure the pension cost for Segment 1 using the minimum actuarial liability and minimum normal cost as the values of the actuarial accrued liability and normal cost in accordance with 9904.412–50(b)(7)(i). In other words, the contractor substitutes the minimum actuarial liability and minimum normal cost for the actuarial accrued liability and normal cost.

(iii) Conversely, as shown in Table 5 for Segments 2 through 7, the total liability for the period of $15,046,600 exceeds the total minimum liability for the period of $14,955,860 for Segments 2 through 7. Therefore, the contractor must measure the pension cost using the actuarial accrued liability and normal cost without regard for the minimum actuarial liability and minimum normal cost.

(4) *Measurement of Current Period Pension Cost:* (i) To determine the pension cost for Segment 1, the contractor measures the unfunded actuarial liability, pension cost without regard to 9904.412–50(c)(2) limitations, and the assignable cost limitation using the actuarial accrued liability and normal cost as measured by the minimum actuarial liability and minimum normal cost, respectively, which are based on the accrued benefit cost method. This measurement complies with the requirements of 9904.412–50(b)(7) and the definition of actuarial accrued liability, 9904.412–30(a)(2) and normal cost, 9904.412–30(a)(18).

(ii) To determine the pension cost for Segments 2 through 7, the contractor measures the unfunded actuarial liability, pension cost without regard to 9904.412–50(c)(2) limitations, and the assignable cost limitation using the actuarial accrued liability and normal cost based on the projected unit credit cost method, which is the contractor's established cost accounting method and the contractor's assumed interest rate based on long-term trends as required by 9904.412–50(b)(4).

(iii) Unfunded Actuarial Liability (Table 6):

TABLE 6—UNFUNDED ACTUARIAL LIABILITY AS OF JANUARY 1, 2017

	Total plan	Segment 1	Segments 2 through 7	Notes
	(Note 1)			
Actuarial Accrued Liability	$16,819,000	$ 2,594,000	$14,225,000	2
CAS Actuarial Value of Assets	(13,561,685)	(1,688,757)	(11,872,928)	3
Unfunded Actuarial Liability	3,257,315	905,243	2,352,072	

Note 1: Because the contractor determines pensions separately for Segment 1 and Segments 2 through 7, the values are the sum of the values for Segment 1 and Segments 2 through 7.

Note 2: For Segment 1, the actuarial accrued liability is measured by the accrued benefit cost method as required by 9904.412–50(b)(7), *i.e.,* the minimum actuarial liability as described in 9904.412–50(b)(7)(ii). See Table 4. For Segments 2 through 7, the actuarial accrued liability is measured by the projected unit credit cost method, which is the contractor's established actuarial cost method since these the 9904.412–50(b)(7)(i) criterion was not met for these segments. See Table 3.

Note 3: See Table 2. The CAS Actuarial Value of Assets is used regardless of the basis for determining the liabilities. The CAS Actuarial Value of Assets allocated to Segment 1 and Segments 2 through 7 excludes the accumulated value of prepayment credits as required by 9904.412–50(a)(4).

(iv) Measurement of the Adjusted Pension Cost (Table 7):

TABLE 7—MEASUREMENT OF PENSION COST AT JANUARY 1, 2017

	Total plan	Segment 1	Segments 2 through 7	Notes
	(Note 1)			
Normal Cost		$ 102,000	$821,600	2
Expense Load on Normal Cost		8,840		2, 3
Amortization Installments		140,900	366,097	4
Measured Pension Cost	1,439,437	251,740	1,187,697	

Note 1: Because the contractor separately computes pension cost for Segment 1 and Segments 2 through 7, only the total pension cost is shown.

Note 2: For Segment 1, the normal cost is measured by the accrued benefit cost method as required by 9904.412–50(b)(7), *i.e.,* the minimum normal cost as described in 9904.412–50(b)(7)(ii). See Table 4. For Segments 2 through 7, the normal cost is measured by the contractor's established immediate gain cost method since these the 9904.412–50(b)(7)(i) criterion was not met for these segments. See Table 3.

Note 3: Because the criterion of 9904.412–50(b)(7)(i) was met for Segment 1, the Normal Cost is measured by the Minimum Normal Cost, which explicitly identifies the expected expenses as a separate component of the minimum normal cost in accordance with 9904.412–50(b)(7)(ii)(B). See Table 4. For Segments 2 through 7, the normal cost is measured by the contractor's established immediate gain cost method, which implicitly recognizes expenses as a decrement to expected assumed interest rate, since the 9904.412–50(b)(7)(i) criterion was not met for these segments. See Table 3.

Note 4: Net amortization installment based on the unfunded actuarial liability of $3,257,315 ($905,243 for Segment 1, and $2,352,072 for Segments 2 through 7) and the contractor's assumed interest rate in compliance with 9904.412–40(b)(2) and 9904.412–50(b)(4). See Table 6.

(c) *Assignment of Pension Cost.* In 9904.412–60.1(b), the Harmony Corporation measured the total pension cost to be $1,439,437 ($251,740 for Segment 1 and $1,187,697 for Segments 2 through 7). The contractor must now determine if any of the limitations of 9904.412–50(c)(2) apply at the segment level.

(1) *Zero Dollar Floor:* The contractor compares the measured pension cost to a zero dollar floor as required by 9904.412–50(c)(2)(i). In this case, the measured pension cost is greater than zero and no assignable cost credit is established. See Table 8.

TABLE 8—CAS 412–50(c)(2)(i) ZERO DOLLAR FLOOR AS OF JANUARY 1, 2017

	Total plan	Segment 1	Segments 2 through 7	Notes
	(Note 1)			
Measured Pension Cost ≥ $0		$251,740	$1,187,697	2
Assignable Cost Credit				3

Note 1: Because the provisions of CAS 412–50(c)(2)(i) are applied at the segment level, no values are shown for the Total Plan.

Note 2: See Table 7. The Assignable Pension Cost in accordance with 9904.412–50(c)(2)(i) is the greater of zero or the Harmonized Pension Cost.

Note 3: There is no Assignable Cost Credit since the Measured Pension Cost is greater than zero.

(2) *Assignable Cost Limitation:* (i) As required by 9904.412–50(c)(2)(ii), the contractor measures the assignable cost limitation amount. The pension cost assigned to the period cannot exceed the assignable cost limitation amount. Because the measured pension cost for Segment 1 met the harmonization criterion of 9904.412–50(b)(7)(i), the assignable cost limitation is based on the sum of the actuarial accrued liability and normal cost plus expense load, using the accrued benefit cost method in accordance with 9904.412–50(b)(7)(ii). Therefore, the actuarial accrued liability and normal cost plus expense load are measured by the minimum actuarial liability and minimum normal cost plus expense load. See Table 9.

TABLE 9—CAS 412–50(c)(2)(ii) ASSIGNABLE COST LIMITATION AS OF JANUARY 1, 2017

	Total plan	Segment 1	Segments 2 through 7	Notes
	(Note 1)			
Actuarial Accrued Liability		$2,594,000	$14,225,000	2
Normal Cost		102,000	821,600	3
Expense Load on Normal Cost		8,840		4

TABLE 9—CAS 412–50(c)(2)(ii) ASSIGNABLE COST LIMITATION AS OF JANUARY 1, 2017—Continued

	Total plan	Segment 1	Segments 2 through 7	Notes
	(Note 1)			
Total Liability for Period	.....	$2,704,840	$15,046,600	.....
CAS Actuarial Value of Plan Assets	.....	(1,688,757)	(11,872,928)	5
(A) Assignable Cost Limitation Amount	.....	$1,016,083	$3,173,672	6
(B) 412–50(c)(2)(i) Assigned Cost	.....	$251,740	$1,187,697	7
(C) 412–50(c)(2)(ii) Assigned Cost	$1,439,437	$251,740	$1,187,697	8

Note 1: Because the assignable cost limitation is applied at the segment level when pension costs are separately calculated by segment or aggregation of segments, no values are shown for the Total Plan other than the Assigned Cost after consideration of the Assignable Cost Limit.
Note 2: For Segment 1, the actuarial accrued liability is measured by the accrued benefit cost method as required by 9904.412–50(b)(7), *i.e.,* the minimum actuarial liability as described in 9904.412–50(b)(7)(ii)(A). See Table 4. For Segments 2 through 7, the actuarial accrued liability is measured by the contractor's established immediate gain cost method since these the 9904.412–50(b)(7)(i) criterion was not met for these segments. See Table 3.
Note 3: For Segment 1, the normal cost is measured by the accrued benefit cost method as required by 9904.412–50(b)(7), *i.e.,* the minimum normal cost as described in 9904.412–50(b)(7)(ii)(B). See Table 4. For Segments 2 through 7, the normal cost is measured by the contractor's established immediate gain cost method since these the 9904.412–50(b)(7)(i) criterion was not met for these segments. See Table 3.
Note 4: For Segment 1, the normal cost is measured by the accrued benefit cost method as required by 9904.412–50(b)(7), *i.e.,* the minimum normal cost as described in 9904.412–50(b)(7)(ii)(B), which explicitly identifies the expected expenses as a separate component of the minimum normal cost. See Table 4. For Segments 2 through 7, the normal cost is measured by the contractor's established immediate gain cost method, which implicitly recognizes expenses as a decrement to the assumed interest rate since these the 9904.412–50(b)(7)(i) criterion was not met for these segments. See Table 3.
Note 5: See Table 2. The CAS Actuarial Value of Assets is used regardless of the basis for determining the liabilities. The CAS Actuarial Value of Assets allocated to Segment 1 and Segments 2 through 7 excludes the accumulated value of prepayment credits as required by 9904.412–50(a)(4).
Note 6: The Assignable Cost Limitation cannot be less than $0.
Note 7: See Illustration 9904.412–60.1(c)(1), Table 8.
Note 8: Lesser of lines (A) or (B).

(ii) As shown in Table 9, the contractor determines that the measured pension costs for Segment 1 and Segments 2 through 7 do not exceed the assignable cost limitation and are not limited.

(3) *Measurement of Tax-Deductible Limitation on Assignable Pension Cost:* (i) Finally, after limiting the measured pension cost in accordance with 9904.412–50(c)(2)(i) and (ii), the contractor checks to ensure that the total assigned pension cost will not exceed $15,674,697, which is the sum of the maximum tax-deductible contribution ($15,014,300), which is developed in the actuarial valuation prepared for ERISA, and the accumulated value of prepayment credits ($660,397) shown in Table 1. Since the tax-deductible contribution and accumulated value of prepayment credits are maintained for the plan as a whole, these values are allocated to segments based on the assignable pension cost after adjustment, if any, for the assignable cost limitation in accordance with 9904.413–50(c)(1)(ii). See Table 10.

TABLE 10—CAS 412–50(c)(2)(iii) TAX-DEDUCTIBLE LIMITATION AS OF JANUARY 1, 2017

	Total plan	Segment 1	Segments 2 through 7	Notes
Maximum Tax-deductible Amount	$15,014,300	$2,625,818	$12,388,482	1, 2
Accumulated Prepayment Credits	660,397	115,495	544,902	3, 4
(A) 412–50(c)(2)(iii) Limitation	$15,674,697	$2,741,313	$12,933,384	.....
(B) 412–50(c)(2)(ii) Assigned Cost	$1,439,437	$251,740	$1,187,697	5
Assigned Pension Cost	$1,439,437	$251,740	$1,187,697	6

Note 1: The Maximum Deductible Amount for the Total Plan is obtained from the valuation report prepared for ERISA purposes.
Note 2: The Maximum Tax-deductible Amount for the Total Plan is allocated to segments based on the assigned cost after application of 9904.412–50(c)(2)(ii) in accordance with 9904.413–50(c)(1)(i) for purposes of this assignment limitation test.
Note 3: The Accumulated Prepayment Credits for the Total Plan are allocated to segments based on the assigned cost after application of 9904.412–50(c)(2)(ii) in accordance with 9904.413–50(c)(1)(i) for purposes of this assignment limitation test.
Note 4: See Table 1.
Note 5: See Table 9.
Note 6: Lesser of lines (A) or (B).

(ii) For Segment 1, the assignable pension cost of $251,740, measured after considering the assignable cost limitation, does not exceed the 9904.412–50(c)(2)(iii) limit of $2,716,649. For Segments 2 through 7, the assignable pension cost of $1,187,697, measured after considering the assignable cost limitation, does not exceed the 9904.412–50(c)(2)(iii) limit of $12,958,048.

(d) *Actuarial Gain and Loss—Change in Liability Basis.* (1) Assume the same facts shown in 9904.412–60.1(b) for Segment 1 of the Harmony Corporation for 2017. Table 11 shows the actuarial liabilities and normal costs plus any expense loads for Segment 1 for 2016 through 2018.

TABLE 11—SUMMARY OF LIABILITIES FOR SEGMENT 1 AS OF JANUARY 1

	2016	2017	2018	Notes
"Going Concern" Liabilities for the Period:				
Actuarial Accrued Liability	$1,915,000	$2,100,000	$2,305,000	1
Normal Cost	89,600	89,100	99,500	1
Expense Load on Normal Cost	.....	.....	.....	1, 2
Total Liability for Period	$2,004,600	$2,189,100	$2,404,500	.....
Minimum Liabilities for the Period:				
Minimum Actuarial Liability	$1,901,000	$2,594,000	$2,212,000	3
Minimum Normal Cost	83,800	102,000	96,500	3
Expense Load on Minimum Normal Cost	8,300	8,840	9,300	3, 4
Total Minimum Liability for Period	$1,993,100	$2,704,840	$2,317,800	.....
Interest Basis as Determined by Segment's Liabilities for Period	9904.412–50(b)(4)	9904.412–50(b)(7)(iii)	9904.412–50(b)(4)	5

Note 1: See Table 3 for 2017 values. For 2016 and 2018, the data for Segment 1 is taken directly from the actuarial valuation report prepared for CAS 412 and 413 purposes and supporting documentation, including subtotals of the data by segment.

Note 2: Because the contractor's interest assumption, which satisfies the requirements of 9904.412–40(b)(2) and 9904.412–50(b)(4), implicitly recognizes expected administrative expenses there is no explicit amount shown for the normal cost.

Note 3: See Table 4 for 2017 values. For 2016 and 2018, the data for Segment 1 is taken directly from the actuarial valuation report prepared for ERISA purposes and supporting documentation, including subtotals of the data by segment. The values for 2016 are based on the transitional minimum actuarial liability and transitional minimum normal cost measured in accordance with 9904.412–64.1(a) and (b).

Note 4: For purposes of determining minimum normal cost, the contractor explicitly identifies the expected administrative expense as a separate component as required by 9904.412–50(b)(7)(ii)(B).

Note 5: For determining the pension cost for the period, the measurements are based on the actuarial accrued liability and normal cost unless the total minimum liability for the period exceeds the "Going Concern" total liability for the period. The measurement basis was separately determined for each segment in accordance with 9904.412–50(b)(7)(i).

(2) For 2016, the sum of the minimum actuarial liability and minimum normal cost does not exceed the sum of the actuarial accrued liability and normal cost. Therefore the criterion of 9904.412–50(b)(7)(i) is not met, and the actuarial accrued liability and normal cost are used to compute the pension cost for 2016. For 2017, the sum of the minimum actuarial liability and minimum normal cost exceeds the sum of the actuarial accrued liability and normal cost, and therefore the pension cost is computed using minimum actuarial liability and minimum normal cost as required by 9904.412–50(b)(7)(i). For 2018, the sum of the minimum actuarial liability and minimum normal cost does not exceed the sum of the actuarial accrued liability and normal cost, and the actuarial accrued liability and normal cost are used to compute the pension cost for 2018 because the criterion of 9904.412–50(b)(7)(i) is not met. Table 12 shows the measurement of the unfunded actuarial liability for 2016 through 2018.

TABLE 12—UNFUNDED ACTUARIAL LIABILITY FOR SEGMENT 1 AS OF JANUARY 1

	2016	2017	2018	Notes
Current Year Actuarial Liability Basis	9904.412–50(b)(4)	9904.412–50(b)(7)(iii)	9904.412–50(b)(4)	1
Actuarial Accrued Liability	$1,915,000	$2,594,000	$2,305,000	1
CAS Actuarial Value of Assets	(1,500,000)	(1,688,757)	(1,894,486)	2
Unfunded Actuarial Liability (Actual)	$415,000	$905,243	$410,514	.....

Note 1: See Table 11.

Note 2: The 2017 CAS Actuarial Value of Assets is developed in Table 2. For 2016 and 2018, the Actuarial Value of Assets for Segment 1 is taken directly from the actuarial valuation report prepared for CAS 412 and 413 purposes and supporting documentation.

(3) Except for changes in the value of the assumed interest rate used to measure the minimum actuarial liability and minimum normal cost, there were no changes to the pension plan's actuarial assumptions or actuarial cost methods during the period of 2016 through 2018. The contractor's actuary measured the expected unfunded actuarial liability and determined the actuarial gain or loss for 2017 and 2018 as shown in Table 13.

TABLE 13—MEASUREMENT OF ACTUARIAL GAIN OR LOSS FOR SEGMENT 1 AS OF JANUARY 1

	2016	2017	2018	Notes
Actual Unfunded Actuarial Liability	(Note 1)	$905,243	$410,514	2
Expected Unfunded Actuarial Liability	.....	(381,455)	(848,210)	3
Actuarial Loss (Gain)	.....	$523,788	$(437,696)	.....

Note 1: The determination of the actuarial gain or loss that occurred during 2015 and measured on 2016 is outside the scope of this Illustration.

Note 2: See Table 12.

Note 3: Information taken directly from the actuarial valuation report prepared for CAS 412 and 413 purposes and supporting documentation. The expected unfunded actuarial liability is based on the prior unfunded actuarial liability updated based on the assumed interest rate in compliance with 9904.412–40(b)(2) and 9904.412–50(b)(4). Note that in accordance with 9904.412–50(b)(7)(iii)(D), the corporate bond yield rate is only used to determine the minimum actuarial liability but not to adjust the liability for the passage of time.

(4) According to the actuarial valuation report, the 2017 actuarial loss of $523,788 includes a $494,000 actuarial loss due to a change in measurement basis from using an actuarial accrued liability of $2,100,000 to using a minimum actuarial liability of $2,594,000, including the effect of any change in the interest rate basis. (See Table 11 for the actuarial accrued liability and the minimum actuarial liability.) The $494,000 loss ($2,594,000–$2,100,000) due to the change in the liability basis is amortized as part of the total actuarial loss of $523,788 over a ten-year period in accordance with 9904.412–50(a)(1)(v) and 9904.413–50(a)(2)(ii). Similarly, the next year's valuation report shows a 2018 actuarial gain of $437,696, which includes a $93,000 actuarial gain ($2,305,000–$2,212,000) due to a change from a minimum actuarial liability back to a an actuarial accrued liability basis, which includes the effect of any change in interest rate basis. The $93,000 gain due the change in the liability basis will be amortized as part of the total $437,696 actuarial gain over a ten-year period in accordance with 9904.412–50(a)(1) and 9904.413–50(a)(2)(ii).

■ 7. Section 9904.412–63 is revised to read as follows:

9904.412–63 Effective Date.

(a) This Standard is effective as of February 27, 2012, hereafter known as the ''Effective Date'', and is applicable for cost accounting periods after June 30, 2012, hereafter known as the ''Implementation Date.''

(b) Following receipt of a contract or subcontract subject to this Standard on or after the Effective Date, contractors shall follow this Standard, as amended, beginning with its next cost accounting period beginning after the later of the Implementation Date or the receipt date of a contract or subcontract to which this Standard is applicable in accordance with paragraph (a) of this section. The first day of the cost accounting period that this Standard, as amended, is first applicable to a contractor or subcontractor is the ''Applicability Date of the CAS Pension Harmonization Rule'' for purposes of this Standard. Prior to the Applicability Date of the CAS Pension Harmonization Rule, contractors or subcontractors shall follow the Standard in 9904.412 in effect prior to the Effective Date.

(1) Following the award of a contract or subcontract subject to this Standard received on or after the Effective Date, contractors with contracts or subcontracts subject to this Standard that were received prior to the Effective Date shall continue to follow the Standard in 9904.412 in effect prior to the Effective Date. Beginning with the Applicability Date of the CAS Pension Harmonization Rule, such contractors shall follow this Standard, as amended, for all contracts or subcontracts subject to this Standard.

(2) Following the award of a contract or subcontract subject to this Standard received during the period beginning on or after the date published in the **Federal Register** and ending before the Effective Date, contractors shall follow the Standard in 9904.412 in effect prior to the Effective Date. If another contract or subcontract, subject to this Standard, is received on or after the Effective Date, the provisions of 9904.412–63(b)(1) shall apply.

■ 8. Section 9904.412–64.1 is added to read as follows:

9904.412–64.1 Transition Method for the CAS Pension Harmonization Rule.

Contractors or subcontractors that become subject to the Standard, as amended, during the Pension Harmonization Transition Period shall recognize the change in cost accounting method in accordance with paragraphs (a) and (b).

(a) The Pension Harmonization Rule Transition Period is the five cost accounting periods beginning with a contractor's first cost accounting period beginning after June 30, 2012, and is independent of the receipt date of a contract or subcontract subject to this Standard. The Pension Harmonization Rule Transition Period begins on the first day of a contractor's first cost accounting period that begins after June 30, 2012.

(b) Phase in of the Minimum Actuarial Liability and Minimum Normal Cost. During each successive accounting period of Pension Harmonization Rule Transition Period, the contractor shall recognize on a scheduled basis the amount by which the minimum actuarial liability differs from the actuarial accrued liability; and the amount by which the sum of the minimum normal cost plus any expense load differs from the sum of the normal cost plus any expense load.

(1) For purposes of determining the amount of the difference, the minimum actuarial liability and minimum normal cost shall be measured in accordance with 9904.412–50(b)(7)(ii).

(2) During each successive accounting period of the Pension Harmonization Rule Transition Period, the transitional minimum actuarial liability shall be set equal to the actuarial accrued liability adjusted by an amount equal to the difference between the minimum actuarial liability and actuarial accrued liability, multiplied by the scheduled applicable percentage for that period. The sum of the transitional minimum normal cost plus any expense load shall be set equal to the sum of normal cost plus any expense load, adjusted by an amount equal to the difference between the minimum normal cost and the normal cost, plus expense loads, multiplied by the scheduled applicable percentage for that period.

(3) The scheduled applicable percentages for each successive accounting period of the Pension Harmonization Rule Transition Period are as follows: 0% for the First Cost Accounting Period, 25% for the Second Cost Accounting Period, 50% for the Third Cost Accounting Period, 75% for the Fourth Cost Accounting Period, and 100% for the Fifth Cost Accounting Period.

(4) The transitional minimum actuarial liability and transitional minimum normal cost measured in accordance with this provision shall be used for purposes of the 9904.412–50(b)(7) minimum actuarial liability and minimum normal cost.

(5) The actuarial gain or loss attributable to experience since the prior valuation, measured as of the First Cost Accounting Period of the Pension Harmonization Rule Transition Period, shall be amortized over a ten-year period in accordance with 9904.413–50(a)(2)(ii).

(c) Transition Illustration. Assume the same facts for the Harmony Corporation in Illustration 9904.412–60.1(a) and (b), except that this is the Fourth Cost Accounting Period of the Pension Harmonization Rule Transition Period. As in Illustration 9904.412–60.1(a) and (b), the contractor separately computes pension costs for Segment 1, and computes pension costs for Segments 2 through 7 in the aggregate. The contractor has two actuarial valuations prepared: one measures the actuarial accrued liability and normal cost using the contractor's expected rate of return on investments assumption, in accordance with 9904.412–40(b)(2) and

9904.412–50(b)(4), and the other valuation measures the minimum actuarial liability and minimum normal cost based on the assumed current yields on investment quality corporate bonds in accordance with 9904.412–50(b)(7)(iii)(A). The actuarial valuations present the values subtotaled for each segment and in total for the plan as a whole.

(1) The contractor applies 9904.412–64.1(b) as follows:

(i) (A) For Segment 1, the $494,000 ($2,594,000—$2,100,000) difference between the minimum actuarial liability and the actuarial accrued liability is multiplied by 75%. Therefore for Segment 1, the minimum actuarial liability for purposes of 9904.412–50(b)(7) is adjusted to a transitional minimum actuarial liability of $2,470,500 ($2,100,000 + [75% × $494,000]).

(B) For Segments 2 through 7, the ($183,000) difference ($14,042,000 – $14,225,000) between the minimum actuarial liability and the actuarial accrued liability is multiplied by 75%. For Segment 2 through 7, the minimum actuarial liability for purposes of 9904.412–50(b)(7) is adjusted to a transitional minimum actuarial liability of $14,115,200 ($14,087,750 + [75% × ($183,000)]).

(C) The computation of the transitional minimum actuarial liability that incrementally recognizes the difference between the minimum actuarial liability and the actuarial accrued liability for Segment 1, and for Segments 2 through 7, is shown in Table 1 below:

TABLE 1—DEVELOPMENT OF TRANSITIONAL MINIMUM ACTUARIAL LIABILITY FOR FOURTH TRANSITION PERIOD

	Total plan	Segment 1	Segments 2 through 7	Notes
	(Note 1)			
Minimum Actuarial Liability		$2,594,000	$14,042,000	2
		(2,100,000)	(14,225,000)	3
Actuarial Accrued Liability Difference		$494,000	$(183,000)	4
Phase In Percentage (Period 4)		75%	75%	5
Phase In Liability Difference		$370,500	$(137,250)	6
Actuarial Accrued Liability		2,100,000	14,225,000	6
Transitional Minimum:				
Actuarial Liability		$2,470,500	$14,087,750	

Note 1: The values for the Total Plan are not shown because the 9904.412–50(b)(7)(i) threshold criterion is applied separately for each segment.
Note 2: See Illustration 9904.412–60.1(b)(2)(ii), Table 4.
Note 3: See Illustration 9904.412–60.1(b)(2)(i), Table 3.
Note 4: The phase in percentage will be applied to positive or negative differences in the actuarial liabilities, since the purpose of the phase in is to incrementally move the measurement away from the actuarial accrued liability to the minimum actuarial liability, regardless of the direction of the movement.
Note 5: Appropriate transition percentage for the Fourth Cost Accounting Period of the Pension Harmonization Rule Transition Period as stipulated in 9904.412–64.1(b)(3).
Note 6: The actuarial accrued liability is adjusted by the phase in difference between liabilities, either positive or negative, in accordance with 9904.412–64.1(b)(2).

(ii) (A) For Segment 1, the $21,740 ($110,840–$89,100) difference between the minimum normal cost and the normal cost, plus expense loads, is multiplied by 75%. Therefore for Segment 1, the minimum normal cost plus expense load, for purposes of 9904.412–50(b)(7), is adjusted to a transitional minimum normal cost plus expense load of $105,405 ($89,100 + [75% × $21,740]).

(B) For Segments 2 through 7, the 92,260 ($913,860–$821,600) difference between the minimum normal cost and the normal cost, plus expense loads, is multiplied by 75%. Therefore, for Segments 2 through 7, the minimum normal cost for purposes of 9904.412–50(b)(7) is adjusted to a transitional minimum normal cost plus expense load of $890,795 ($821,600 + [75% × $92,260]).

(C) The computation of the transitional minimum normal cost plus expense load for Segment 1, and for Segments 2 through 7, is shown in Table 2 below:

TABLE 2—DEVELOPMENT OF TRANSITIONAL MINIMUM NORMAL COST FOR FOURTH TRANSITION PERIOD

	Total plan	Segment 1	Segments 2 through 7	Notes
	(Note 1)			
Minimum Normal Cost		$102,000	$840,700	2
Expense Load on Normal Cost		8,840	73,160	2, 3
Minimum Normal Cost Plus Expense Load		$110,840	$913,860	2
Normal Cost Plus Expense Load		(89,100)	(821,600)	4
Difference		$21,740	$92,260	5
Phase In Percentage (Period 4)		75%	75%	6
Phase In Normal Cost Difference		$16,305	$69,195	7
Normal Cost Plus Expense Load		89,100	821,600	7
Transitional Minimum:				

TABLE 2—DEVELOPMENT OF TRANSITIONAL MINIMUM NORMAL COST FOR FOURTH TRANSITION PERIOD—Continued

	Total plan	Segment 1	Segments 2 through 7	Notes
Normal Cost Plus Expense Load		$105,405	$890,795	

Note 1: The values for the Total Plan are not shown because the 9904.412–50(b)(7)(i) threshold criterion is applied separately for each segment.
Note 2: See Illustration 9904.412–60.1(b)(2)(ii), Table 4.
Note 3: For minimum normal cost valuation purposes, the contractor explicitly identifies the expected administrative expenses as a separate component of minimum normal cost.
Note 4: See Illustration 9904.412–60.1(b)(2)(i), Table 3. Expected expenses are implicitly recognized as part of the contractor's expected rate of return on investments assumption.
Note 5: The phase in percentage will be applied to positive and negative differences in the normal costs plus expense loads, since the purpose of the phase in is to incrementally move the measurement from the normal cost plus expense load, to the minimum normal cost plus expense load, regardless of the direction of the movement.
Note 6: Appropriate transition percentage for the Fourth Cost Accounting Period of the Pension Harmonization Rule Transition Period stipulated in 9904.412–64.1(b)(3).
Note 7: The sum of the normal cost plus expense load is adjusted by the phase in difference between normal costs, either positive or negative, in accordance with 9904.412–64.1(b)(2).

(2) The contractor applies the provisions of with 9904.412–50(b)(7)(i) using the transitional minimum actuarial liability and transitional minimum normal cost plus expense load, in accordance with 9904.412–64.1(b)(4).

(i) The comparison of the sum of the actuarial accrued liability and normal cost plus expense load, and the sum of the transitional minimum actuarial liability and minimum normal cost plus expense load, for Segment 1, and for Segments 2 through 7, is summarized in Table 3 below:

TABLE 3—SUMMARY OF LIABILITY AND NORMAL COST VALUES FOR FOURTH TRANSITION PERIOD

	Total plan	Segment 1	Segments 2 through 7	Notes
	(Note 1)			
"Going Concern" Liabilities for Period:				
Actuarial Accrued Liability		$2,100,000	$14,225,000	2
Normal Cost Plus Expense Load		89,100	821,600	3
Total Liability for Period		2,189,100	15,046,600	
Transitional Minimum Liabilities for the Period:				
Transitional Minimum Actuarial Liability		2,470,500	14,087,750	1
Transitional Minimum Normal Cost Plus Expense Load		105,405	890,795	3
Total Transitional Minimum Liability for Period		2,575,905	14,978,545	4

Note 1: The values for the Total Plan are not shown because the 9904.412–50(b)(7)(i) threshold criterion is applied separately for each segment.
Note 2: See Table 1.
Note 3: See Table 2.
Note 4: If the threshold criterion is met, then the pension cost for the period is measured based on the Transitional Minimum Actuarial Liability and Transition Normal Cost Plus Expense Load.

(ii) For Segment 1, the Total Transitional Minimum Liability for the Period of $2,575,905 exceeds the total liability for the period of $2,189,100. (See Table 3.) Therefore, in accordance with 9904.412–50(b)(7)(i), the pension cost for Segment 1 is measured using the actuarial accrued liability and normal cost as measured by the transitional minimum actuarial liability and transitional minimum normal cost, which are based on the accrued benefit cost method. This measurement complies with the requirements of 9904.412–50(b)(7) and with the definition of actuarial accrued liability, 9904.412–30(a)(2), and normal cost, 9904.412–30(a)(18).

(iii) For Segments 2 through 7, the total liability for the period of $15,046,600 exceeds the Total Transitional Minimum Liability for the Period of $14,978,545. (See Table 3.) Therefore, in accordance with 9904.412–50(b)(7)(i), the pension cost for Segment 2 through 7 is measured using the actuarial accrued liability and normal cost, which are based on the projected benefit cost method.

(3) The contractor computes the pension cost for the period in accordance with the provisions of 9904.412–50(b)(7)(i), which considers the transitional minimum actuarial liability and transitional minimum normal cost plus expense load, in accordance with 9904.412–64.1(b).

(i) The contractor computes the unfunded actuarial liability as shown in Table 4 below:

TABLE 4—UNFUNDED ACTUARIAL LIABILITY FOR FOURTH TRANSITION PERIOD

	Total Plan	Segment 1	Segments 2 through 7	Notes
	(Note 1)			
Actuarial Accrued Liability		$2,470,500	$14,225,000	2

TABLE 4—UNFUNDED ACTUARIAL LIABILITY FOR FOURTH TRANSITION PERIOD—Continued

	Total Plan	Segment 1	Segments 2 through 7	Notes
CAS Actuarial Value of Assets		(1,688,757)	(11,872,928)	3
Unfunded Actuarial Liability		781,743	2,352,072	

Note 1: The values for the Total Plan are not shown because the 9904.412–50(b)(7)(i) threshold criterion is applied separately for each segment.

Note 2: Because the Pension Harmonization criterion of 9904.412–50(b)(7)(i) has been met for Segment 1, the actuarial accrued liability is measured by the transitional minimum actuarial liability as required by 9904.412–64.1(b)(4). See Table 3. Because the Pension Harmonization criterion of 9904.412–50(b)(7)(i) was not satisfied for Segments 2 through 7, the actuarial accrued liability is based on the actuarial assumptions that reflect long-term trends in accordance with 9904.412–50(b)(4), *i.e.,* the transitional minimum actuarial liability does not apply.

Note 3: See Illustration 9904.412–60.1(b)(1)(ii), Table 2.

(ii) Measurement of the Pension Cost for the current period (Table 5):

TABLE 5—PENSION COST FOR FOURTH TRANSITION PERIOD

	Total plan	Segment 1	Segments 2 through 7	Notes
	(Note 1)			
Normal Cost Plus Expense Load		$105,405	$821,600	2
Amortization Installments		101,990	314,437	3, 4
Pension Cost Computed for the Period	1,343,432	207,395	1,136,037	

Note 1: Except for the Total Pension Cost Computed for the Period, the values for the Total Plan are not shown because the 9904.412–50(b)(7)(i) threshold criterion is applied separately for each segment.

Note 2: See Table 3. Because the Pension Harmonization criterion of 9904.412–50(b)(7)(i) has been met for Segment 1, the sum of the normal cost plus the expense load is measured by the sum of the transitional minimum normal cost plus the expense load, as required by 9904.412–64.1(a). Because the Pension Harmonization criterion of 9904.412–50(b)(7)(i) was not satisfied for Segments 2 through 7, the sum of the normal cost plus any applicable expense load is based on the contractor's actuarial assumptions reflecting long-term trends in accordance with 9904.412–40(b)(2) and 9904.412–50(b)(4), *i.e.,* the transitional minimum normal cost plus the expense load does not apply.

Note 3: Net amortization installment based on the unfunded actuarial liability of $781,743 for Segment 1, and $2,352,072 for Segments 2 through 7, including an interest equivalent on the unamortized portion of such liability. See Table 4. The interest adjustment is based on the contractor's interest rate assumption in compliance with 9904.412–40(b)(2) and 9904.412–50(b)(4).

Note 4: See 9904.64–1(c)(4) for details concerning the recognition of the unfunded actuarial liability during the first Pension Harmonization Rule Transition Period.

(4) The Silvertone Corporation separately computes pension costs for Segment 1, and computes pension costs for Segments 2 through 7 in the aggregate.

(i) For the First Cost Accounting Period of the Pension Harmonization Rule Transition Period, the difference between the actuarial accrued liability and the minimum actuarial liability, and the difference between the normal cost and the minimum normal cost, are multiplied by 0%. Therefore the transitional minimum actuarial liability and transitional minimum normal are equal to the actuarial accrued liability and normal cost. The total transitional minimum liability for the period does not exceed the total liability for the period in conformity with the criterion of 9904.412–50(b)(7)(i). Therefore, the pension cost for the First Cost Accounting Period of the Pension Harmonization Rule Transition Period is computed using the actuarial accrued liability and normal cost.

(ii) The actuarial gain attributable to experience during the prior period that is measured for the cost accounting period is amortized over a ten-year period in accordance with 9904.412–50(a)(1)(v) and 9904.413–50(a)(2)(ii).

(iii) The contractor computes the pension cost for First Cost Accounting Period of the Pension Harmonization Rule Transition Period as shown in Table 6 below.

TABLE 6—COMPUTATION OF THE PENSION FOR THE FIRST TRANSITION PERIOD

	Total plan	Segment 1	Segments 2 through 7	Notes
	(Note 1)			
Amortization of Unfunded Liability Net Amortization Installment from Prior Periods		$81,019	$523,801	2
January 1, 2013, Actuarial Loss (Gain) Amortization Installment		(9,369)	(68,740)	3
Net Amortization Installment		71,650	455,061	
Normal Cost plus expense load		78,400	715,000	4
Pension Cost Computed for the Period		150,050	1,170,061	

Note 1: The values for the Total Plan are not shown because the 9904.412–50(b)(7)(i) threshold criterion is applied separately for each segment.

Note 2: Amortization installments of actuarial gains and losses, and other portions of the unfunded actuarial liability identified prior to January 1, 2013, in accordance with 9904.412–50(a)(1)(v) and 9904.413–50(b)(2)(ii), including an interest adjustment based on the contractor's long-term interest assumption in compliance with 9904.412–40(b)(2) and 9904.412–50(b)(4).

Note 3: The actuarial gains for both Segment 1, and Segments 2 through 7, as measured as of January 1, 2013, are amortized over a ten-year period in accordance with 9904.413–50(a)(2)(ii) and 9904.412–64–1(b)(4). Note that although the source of the actuarial gains was the deviation between assumed and actual changes during the prior period, the gain is measured on January 1, 2013, and so the ten-year amortization period applies in the current period, including an interest adjustment based on the contractor's long-term interest assumption in compliance with 9904.412–40(b)(2) and 9904.412–50(b)(4).

Note 4: For the first period of the Pension Harmonization Rule transition period, the adjustment to the sum of the actuarial accrued liability and normal cost is adjusted by $0. Therefore the sum of the transitional minimum actuarial liability and transitional minimum normal cost plus expense load is equal to the sum of the actuarial accrued liability and normal cost plus expense load, and the criterion of 9904.412–50(b)(7)(i) was not met for either Segment 1, or Segments 2 through 7. The sum of the normal cost plus expense load is based on the sum of the going concern normal cost plus expense load.

■ 9. Section 9904.413–30 is amended by revising paragraphs (a)(1) and (16) to read as follows:

9904.413–30 Definitions.

(a) * * *

(1) *Accrued benefit cost method* means an actuarial cost method under which units of benefits are assigned to each cost accounting period and are valued as they accrue; that is, based on the services performed by each employee in the period involved. The measure of normal cost under this method for each cost accounting period is the present value of the units of benefit deemed to be credited to employees for service in that period. The measure of the actuarial accrued liability at a plan's measurement date is the present value of the units of benefit credited to employees for service prior to that date. (This method is also known as the Unit Credit cost method without salary projection.)

* * * * *

(16) *Prepayment credit* means the amount funded in excess of the pension cost assigned to a cost accounting period that is carried forward for future recognition. The Accumulated Value of Prepayment Credits means the value, as of the measurement date, of the prepayment credits adjusted for income and expenses in accordance with 9904.413–50(c)(7) and decreased for amounts used to fund pension costs or liabilities, whether assignable or not.

* * * * *

■ 10. Section 9904.413–40 is amended by revising paragraph (c) to read as follows:

9904.413–40 Fundamental requirement.

* * * * *

(c) *Allocation of pension cost to segments.* Contractors shall allocate pension costs to each segment having participants in a pension plan.

(1) A separate calculation of pension costs for a segment is required when the conditions set forth in 9904.413–50(c)(2) or (3) are present. When these conditions are not present, allocations may be made by calculating a composite pension cost for two or more segments and allocating this cost to these segments by means of an allocation base.

(2) When pension costs are separately computed for a segment or segments, the provisions of Cost Accounting Standard 9904.412 regarding the assignable cost limitation shall be based on the actuarial value of assets, actuarial accrued liability and normal cost for the segment or segments for purposes of such computations. In addition, for purposes of 9904.412–50(c)(2)(iii), the amount of pension cost assignable to a segment or segments shall not exceed the sum of:

(i) The maximum tax-deductible amount computed for the plan as a whole, and

(ii) The accumulated value of prepayment credits not already allocated to segments apportioned among the segment(s).

■ 11. Section 9904.413–50 is amended by revising paragraphs (a)(2), (c)(1)(i) and (c)(7), (8), and (9) and adding paragraphs (b)(6) and (c)(12)(viii) to read as follows:

9904.413–50 Techniques for application.

(a) * * *

* * * * *

(2) Actuarial gains and losses shall be amortized as required by 9904.412–50(a)(1)(v).

(i) For periods beginning prior to the ''Applicability Date of the CAS Pension Harmonization Rule,'' actuarial gains and losses determined under a pension plan whose costs are measured by an immediate-gain actuarial cost method shall be amortized over a fifteen-year period in equal annual installments, beginning with the date as of which the actuarial valuation is made.

(ii) For periods beginning on or after the ''Applicability Date of the CAS Pension Harmonization Rule,'' such actuarial gains and losses shall be amortized over a ten-year period in equal annual installments, beginning with the date as of which the actuarial valuation is made.

(iii) The installment for a cost accounting period shall consist of an element for amortization of the gain or loss, and an element for interest on the unamortized balance at the beginning of the period. If the actuarial gain or loss determined for a cost accounting period is not material, the entire gain or loss may be included as a component of the current or ensuing year's pension cost.

* * * * *

(b) * * *

(6) The market value of the assets of a pension plan shall include the present value of contributions received after the date the market value of plan assets is measured.

(i) The assumed rate of interest, established in accordance with 9904.412–40(b)(2) and 9904.412–50(b)(4), shall be used to determine the present value of such receivable contributions as of the valuation date.

(ii) The market value of plan assets measured in accordance with paragraphs (b)(6)(i) of this section shall be the basis for measuring the actuarial value of plan assets in accordance with this Standard.

(c) * * *

(1) * * *

(i) When apportioning to the segments the sum of (A) the maximum tax-deductible amount, which is determined for a qualified defined-benefit pension plan as a whole pursuant to the Internal Revenue Code at Title 26 of the U.S. C., as amended, and (B) the accumulated value of the prepayment credits not already allocated to segments, the contractor shall use a base that considers the otherwise assignable pension costs or the funding levels of the individual segments.

* * * * *

(7) After the initial allocation of assets, the contractor shall maintain a record of the portion of subsequent contributions, permitted unfunded accruals, income, benefit payments, and expenses attributable to the segment, and paid from the assets of the pension plan. Income shall include a portion of any investment gains and losses attributable to the assets of the pension plan. Income and expenses of the pension plan assets shall be allocated to the segment in the same proportion that

the average value of assets allocated to the segment bears to the average value of total pension plan assets, including the accumulated value of prepayment credits, for the period for which income and expenses are being allocated.

(8) If plan participants transfer among segments, contractors need not transfer assets or actuarial accrued liabilities, unless a transfer is sufficiently large to distort the segment's ratio of pension plan assets to actuarial accrued liabilities determined using the accrued benefit cost method. If assets and liabilities are transferred, the amount of assets transferred shall be equal to the actuarial accrued liabilities transferred, determined using the accrued benefit cost method and long-term assumptions in accordance with 9904.412–40(b)(2) and 9904.412–50(b)(4).

(9) Contractors who separately calculate the pension cost of one or more segments may calculate such cost either for all pension plan participants assignable to the segment(s) or for only the active participants of the segment(s). If costs are calculated only for active participants, a separate segment shall be created for all of the inactive participants of the pension plan and the cost thereof shall be calculated. When a contractor makes such an election, assets shall be allocated to the segment for inactive participants in accordance with paragraphs (c)(5), (6), and (7) of this subsection. When an employee of a segment becomes inactive, assets shall be transferred from that segment to the segment established to accumulate the assets and actuarial liabilities for the inactive plan participants. The amount of assets transferred shall be equal to the actuarial accrued liabilities, determined under the accrued benefit cost method and long-term assumptions in accordance with 9904.412–40(b)(2) and 9904.412–50(b)(4), for these inactive plan participants. If inactive participants become active, assets and liabilities shall similarly be transferred to the segments to which the participants are assigned. Such transfers need be made only as of the last day of a cost accounting period. The total annual pension cost for a segment having active employees shall be the amount calculated for the segment and an allocated portion of the pension cost calculated for the inactive participants. Such an allocation shall be on the same basis as that set forth in paragraph (c)(1) of this subsection.

* * * * *

(12) * * *

(viii) If a benefit curtailment is caused by a cessation of benefit accruals mandated by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.,* as amended based on the plan's funding level, then no adjustment for the curtailment of benefit pursuant to this paragraph (c)(12) is required. Instead, the curtailment of benefits shall be recognized as follows:

(A) If the written plan document provides that benefit accruals are nonforfeitable once employment service has been rendered, and shall be retroactively restored if, and when, the benefit accrual limitation ceases, then the contractor may elect to recognize the expected benefit accruals in the actuarial accrued liability and normal cost during the period of cessation for the determination of pension cost in accordance with the provisions of 9904–412 and 413.

(B) Otherwise, the curtailment of benefits shall be recognized as an actuarial gain or loss for the period. The subsequent restoration of missed benefit accruals shall be recognized as an actuarial gain or loss in the period in which the restoration occurs.

■ 12. Section 9904.413–60 is amended by revising paragraphs (a) and (c)(12) and (18) and adding paragraphs (b)(3) and (c)(26) to read as follows:

9904.413–60 Illustrations.

(a) *Assignment of actuarial gains and losses.* Contractor A has a defined-benefit pension plan whose costs are measured under an immediate-gain actuarial cost method. The contractor makes actuarial valuations every other year. In the past, at each valuation date, the contractor has calculated the actuarial gains and losses that have occurred since the previous valuation date, and has merged such gains and losses with the unfunded actuarial liabilities that are being amortized. Pursuant to 9904.413–40(a), the contractor must make an actuarial valuation annually, and any actuarial gains or losses measured must be separately amortized over a specific period of years beginning with the period for which the actuarial valuation is made in accordance with 9904.413–50(a)(1) and (2). If the actuarial gain or loss is measured for a period beginning prior to the ''Applicability Date for the CAS Pension Harmonization Rule,'' the gain or loss shall be amortized over a fifteen-year period. For gains and losses measured for periods beginning on or after the ''Applicability Date for the CAS Pension Harmonization Rule,'' the gain or loss shall be amortized over a ten-year period.

(b) * * *

(3) Assume that besides the market value of assets of $10 million that Contractor B has on the valuation date of January 1, 2017, the contractor makes a contribution of $100,000 on July 1, 2017, to cover its prior year's pension cost. For ERISA purposes, the contractor measures $98,000 as the present value of the contribution on January 1, 2017, and therefore recognizes $10,098,000 as the market value of assets. The contractor must also use this market value of assets for contract costing purposes as required by 9904.413–50(b)(6)(ii). The actuarial value of assets on January 1, 2017, must also reflect $98,000 as the present value of the July 1, 2017, contribution of $100,000.

(c) * * *

(12) Contractor M sells its only Government segment. Through a contract novation, the buyer assumes responsibility for performance of the segment's Government contracts. Just prior to the sale, the actuarial accrued liability under the actuarial cost method in use is $18 million, and the market value of assets allocated to the segment of $22 million. In accordance with the sales agreement, Contractor M is required to transfer $20 million of plan assets to the new plan sponsored by the buyer. In determining the segment closing adjustment under 9904.413–50(c)(12), the actuarial accrued liability and the market value of assets are reduced by the amounts transferred to the buyer's new plan in accordance with the terms of the sales agreement. The adjustment amount, which is the difference between the remaining assets ($2 million) and the remaining actuarial liability ($0), is $2 million.

* * * * *

(18) Contractor Q terminates its qualified defined-benefit pension plan without establishing a replacement plan. At termination, the market value of assets is $85 million. All obligations for benefits are irrevocably transferred to an insurance company by the purchase of annuity contracts at a cost of $55 million, which thereby determines the actuarial liability in accordance with 9904.413–50(c)(12)(i). The contractor receives a reversion of $30 million ($85 million – $55 million). The adjustment is equal to the reversion amount, which is the excess of the market value of assets over the actuarial liability. However, the Internal Revenue Code imposes a 50% excise tax of $15 million (50% of $30 million) on the reversion amount. In accordance with 9904.413–50(c)(12)(vi), the $30 million adjustment amount is reduced by the $15 million excise tax. Pursuant to 9904.413–50(c)(12)(vi), a share of the $15 million net adjustment ($30 million – $15 million) shall be allocated,

without limitation, as a credit to CAS-covered contracts.

* * * * *

(26) Assume the same facts as Illustration 9904.413–60(c)(20), except that ERISA required Contractor R to cease benefit accruals. In this case, the segment closing adjustment is exempted by 9904.413–50(c)(12)(viii). If the written plan document provides that benefit accruals will automatically be retroactively reinstated when permitted by ERISA, then the pension cost measured pursuant to CAS 412 and this Standard for contract costing purposes may continue to recognize the benefit accruals, if the contractor has so elected. If there is evidence that the contractor might revoke the plan provision to restore the missed benefit accruals, then the contractor shall not make such election. Otherwise, the pension cost measured pursuant to CAS 412 and this Standard shall not recognize any benefit accruals until, and unless, the plan is subsequently amended to reinstate the accruals. Furthermore, when the plan is amended, the change in the actuarial accrued liability shall be measured as an actuarial gain or loss, and amortized in accordance with 9904.412–50(a)(1)(v) and 9904.413–50(a)(2)(ii).

■ 13. Section 9904.413–63 is revised to read as follows:

9904.413–63 Effective Date.

(a) This Standard is effective as February 27, 2012, hereafter known as the ''Effective Date'', and is applicable for cost accounting periods after June 30, 2012, hereafter known as the ''Implementation Date.''

(b) Following receipt of a contract or subcontract subject to this Standard on or after the Effective Date, contractors shall follow this Standard, as amended, beginning with its next cost accounting period beginning after the later of the Implementation Date or the receipt date of a contract or subcontract to which this Standard is applicable in accordance with this paragraph (a). The first day of the cost accounting period that this Standard, as amended, is first applicable to a contractor or subcontractor is the ''Applicability Date of the CAS Pension Harmonization Rule'' for purposes of this Standard. Prior to the Applicability Date of the CAS Pension Harmonization Rule, contractors or subcontractors shall follow the Standard in 9904.413 in effect prior to the Effective Date.

(1) Following the award of a contract or subcontract subject to this Standard received on or after the Effective Date, contractors with contracts or subcontracts subject to this Standard that were received prior to the Effective Date shall continue to follow the Standard in 9904.413 in effect prior to the Effective Date. Beginning with the Applicability Date of the CAS Pension Harmonization Rule, such contractors shall follow this Standard, as amended, for all contracts or subcontracts subject to this Standard.

(2) Following the award of a contract or subcontract subject to this Standard received during the period beginning on or after the date published in the **Federal Register** and ending before the Effective Date, contractors shall follow the Standard in 9904.413 in effect prior to the Effective Date. If another contract or subcontract, subject to this Standard, is received on or after the Effective Date, the provisions of 9904.413–63(b)(1) shall apply.

■ 14. Section 9904.413–64.1 is added to read as follows:

9904.413–64.1 Transition Method for the CAS Pension Harmonization Rule.

The transition method for the CAS Pension Harmonization Rule under this Standard shall be in accordance with 9904.412.64.1 Transition Method for CAS Pension Harmonization Rule.

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Part VIII

Environmental Protection Agency

40 CFR Part 63

National Emission Standards for Hazardous Air Pollutants From the Pulp and Paper Industry; Proposed Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 63

[EPA–HQ–OAR–2007–0544; FRL–9609–8]

RIN 2060–AQ41

National Emission Standards for Hazardous Air Pollutants From the Pulp and Paper Industry

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The EPA is proposing amendments to the national emission standards for hazardous air pollutants for the pulp and paper industry to address the results of the residual risk and technology review that the EPA is required to conduct under sections 112(d)(6) and (f)(2) of the Clean Air Act. These proposed amendments include revisions to the kraft pulping process condensates standards; a requirement for 5-year repeat emissions testing for selected process equipment; revisions to provisions addressing periods of startup, shutdown and malfunction; additional test methods for measuring methanol; and technical and editorial changes.

DATES: *Comments.* Comments must be received on or before February 27, 2012. Under the Paperwork Reduction Act, comments on the information collection provisions are best assured of having full effect if the Office of Management and Budget receives a copy of your comments on or before January 26, 2012.

Public Hearing. If anyone contacts the EPA requesting to speak at a public hearing by January 6, 2012, a public hearing will be held on January 11, 2012.

ADDRESSES: Submit your comments, identified by Docket ID Number EPA–HQ–OAR–2007–0544, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Agency Web site: http://www.epa.gov/oar/docket.html.* Follow the instructions for submitting comments on the EPA Air and Radiation Docket Web site.
- *Email: a-and-r-docket@epa.gov.* Include EPA–HQ–OAR–2007–0544 in the subject line of the message.
- *Fax:* Fax your comments to: (202) 566–9744, Attention Docket ID Number EPA–HQ–OAR–2007–0544.
- *Mail:* Send your comments to: EPA Docket Center (EPA/DC), Environmental Protection Agency, Mailcode: 2822T, 1200 Pennsylvania Ave. NW., Washington, DC 20460, Attention: Docket ID Number EPA–HQ–OAR–2007–0544. Please include a total of two copies. In addition, please mail a copy of your comments on the information collection provisions to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attn: Desk Officer for EPA, 725 17th Street NW., Washington, DC 20503.
- *Hand Delivery or Courier:* In person or by courier, deliver comments to the EPA Docket Center, EPA West (Air Docket), Room 3334, 1301 Constitution Ave. NW., Washington, DC 20460, Attention: Docket ID Number EPA–HQ–OAR–2007–0544. Such deliveries are only accepted during the Docket's normal hours of operation (8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays), and special arrangements should be made for deliveries of boxed information. Please include two copies.

Instructions. Direct your comments to Docket ID Number EPA–HQ–OAR–2007–0544. The EPA policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be confidential business information or other information whose disclosure is restricted by statute. Do not submit information that you consider to be confidential business information or otherwise protected through *http://www.regulations.gov* or email. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means the EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to the EPA without going through *http://www.regulations.gov*, your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, the EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If the EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, the EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption and be free of any defects or viruses. For additional information about the EPA public docket, visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

Docket. The EPA has established a docket for this rulemaking under Docket ID Number EPA–HQ–OAR–2007–0544. All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available (*e.g.,* confidential business information or other information whose disclosure is restricted by statute). Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the EPA Docket Center, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the EPA Docket Center is (202) 566–1742.

Public Hearing. If a public hearing is held, it will begin at 10 a.m. on January 11, 2012 and will be held at the EPA campus in Research Triangle Park, North Carolina, or at an alternate facility nearby. Persons interested in presenting oral testimony or inquiring as to whether a public hearing is to be held should contact Ms. Joan Rogers, Office of Air Quality Planning and Standards, Sector Policies and Programs Division, Natural Resources Group (E143–03), U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number: (919) 541–4487.

FOR FURTHER INFORMATION CONTACT: For questions about this proposed action, contact Mr. John Bradfield, Office of Air Quality Planning and Standards, (E143–03), Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number: (919) 541–3062; fax number: (919) 541–3470; and email address: *bradfield.john@epa.gov.* For specific information regarding the risk modeling methodology, contact Mr. James Hirtz, Health and Environmental Impacts Division (C539–02), Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number: (919) 541–0881; fax number: (919) 541–0840; and email address: *hirtz.james@epa.gov.* For information about the applicability of the national emission standards for hazardous air pollutants to a particular entity, contact the appropriate person listed in Table 1 to this preamble.

TABLE 1—LIST OF EPA CONTACTS FOR THE NESHAP ADDRESSED IN THIS PROPOSED ACTION

NESHAP for:	OECA Contact [1]	OAQPS Contacts [2]
Pulp and Paper	Sara Ayres (202) 564–5391 *ayres.sara@epa.gov.*.	John Bradfield (919) 541–3062 *bradfield.john@epa.gov.*

[1] EPA's Office of Enforcement and Compliance Assurance.
[2] EPA's Office of Air Quality Planning and Standards.

SUPPLEMENTARY INFORMATION:

Preamble Acronyms and Abbreviations

Several acronyms and terms used to describe industrial processes, data inventories and risk modeling are included in this preamble. While this may not be an exhaustive list, to ease the reading of this preamble and for reference purposes, the following terms and acronyms are defined here:

ACGIH American Conference of Governmental Industrial Hygienists
ADAF Age-Dependent Adjustment Factors
AEGL Acute Exposure Guideline Levels
AERMOD Air dispersion model used by the HEM–3 model
ASME American Society of Mechanical Engineers
ATSDR Agency for Toxic Substances and Disease Registry
BACT Best Available Control Technology
BBDR Biologically-Based Dose-Response
CAA Clean Air Act
CalEPA California Environmental Protection Agency
CBI Confidential Business Information
CCA Clean Condensate Alternative
CD ROM Compact Disk Read Only Memory
CDX Central Data Exchange
CEEL Community Emergency Exposure Levels
CEMS Continuous Emissions Monitoring System
CFR Code of Federal Regulations
CIIT Chemical Industry Institute of Toxicology
EIA Economic Impact Analysis
EJ Environmental Justice
EPA Environmental Protection Agency
ERPG Emergency Response Planning Guidelines
ERT Electronic Reporting Tool
ft Feet
ft^3 Cubic Feet
FTE Full-Time Equivalents
HAP Hazardous Air Pollutants
HEM–3 Human Exposure Model version 3
HI Hazard Index
HON Hazardous Organic National Emissions Standards for Hazardous Air Pollutants
HQ Hazard Quotient
hr Hour
HVLC High Volume Low Concentration
ICR Information Collection Request
IRIS Integrated Risk Information System
ISIS Industrial Sectors Integrated Solution Model
km Kilometer
LAER Lowest Achievable Emission Rate
lb Pounds
LVHC Low Volume High Concentration
m^3 Cubic Meters
MACT Maximum Achievable Control Technology
MACT Code Code within the NEI used to identify processes included in a source category
MEK Methyl Ethyl Ketone
mg Milligrams
MIR Maximum Individual Risk
MRL Minimal Risk Level
NAC/AEGL National Advisory Committee for Acute Exposure Guideline Levels for Hazardous Substances
NAICS North American Industry Classification System
NAS National Academy of Sciences
NATA National Air Toxics Assessment
NCASI National Council for Air and Stream Improvement
NEI National Emissions Inventory
NESHAP National Emissions Standards for Hazardous Air Pollutants
NIOSH National Institutes for Occupational Safety and Health
NRC National Research Council
NSPS New Source Performance Standard
NTTAA National Technology Transfer and Advancement Act of 1995
O&M Operation and Maintenance
OAQPS EPA's Office of Air Quality Planning and Standards
ODTP Oven-Dried Tons of Pulp
OECA EPA's Office of Enforcement and Compliance Assurance
OMB Office of Management and Budget
PB–HAP Hazardous air pollutants known to be persistent and bio-accumulative in the environment
POM Polycyclic Organic Matter
ppm Parts Per Million
ppmw Parts Per Million by Weight
PRA Paperwork Reduction Act
QA Quality Assurance
QC Quality Control
RACT Reasonably Available Control Technology
RBLC RACT/BACT/LAER Clearinghouse
REL Reference Exposure Level
RFA Regulatory Flexibility Act
RfC Reference Concentration
RfD Reference Dose
RTR Residual Risk and Technology Review
SAB Science Advisory Board
SBA Small Business Administration
SCC Source Classification Code
Sec Second
SISNOSE Significant Impact on a Substantial Number of Small Entities
SOP Standard Operating Procedures
SSM Startup, Shutdown, and Malfunction
TOSHI Target Organ-Specific Hazard Index
TPY Tons Per Year
TRI Toxics Release Inventory
TRIM Total Risk Integrated Modeling System
TRIM.FaTE Fate, Transport and Environmental Exposure module of EPA's Total Risk Integrated Modeling System
TTN Technology Transfer Network
UF Uncertainty Factor
UMRA Unfunded Mandates Reform Act of 1995
URE Unit Risk Estimate
VCS Voluntary Consensus Standards
VOC Volatile Organic Compound
WWW Worldwide Web
µg Micrograms

Organization of This Document

The information in this preamble is organized as follows:

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I. General Information

A. What is the statutory authority for this action?

Section 112 of the CAA establishes a two-stage regulatory process to address emissions of HAP from stationary sources. In the first stage, after the EPA has identified categories of sources emitting one or more of the HAP listed in CAA section 112(b), CAA section 112(d) calls for us to promulgate NESHAP for those sources. ''Major sources'' are those that emit or have the potential to emit 10 tpy or more of a single HAP or 25 tpy or more of any combination of HAP. For major sources, these technology-based standards must reflect the maximum degree of emissions reductions of HAP achievable (after considering cost, energy requirements and nonair quality health and environmental impacts) and are commonly referred to as MACT standards.

Maximum achievable control technology standards must require the maximum degree of emissions reduction through the application of measures, processes, methods, systems or techniques, including, but not limited to, measures that: (A) Reduce the volume of or eliminate pollutants through process changes, substitution of materials or other modifications; (B) enclose systems or processes to eliminate emissions; (C) capture or treat pollutants when released from a process, stack, storage or fugitive emissions point; (D) are design, equipment, work practice or operational standards (including requirements for operator training or certification); or (E) are a combination of the above (CAA section 112(d)(2)(A)–(E)). The MACT standards may take the form of design, equipment, work practice or operational standards where the EPA first determines either that: (A) A pollutant cannot be emitted through a conveyance designed and constructed to emit or capture the pollutants, or that any requirement for, or use of, such a conveyance would be inconsistent with law; or (B) the application of measurement methodology to a particular class of sources is not practicable due to technological and economic limitations (CAA sections 112(h)(1)–(2)).

The MACT ''floor'' is the minimum control level allowed for MACT standards promulgated under CAA section 112(d)(3) and may not be based on cost considerations. For new sources, the MACT floor cannot be less stringent than the emission control that is achieved in practice by the best-controlled similar source. The MACT floors for existing sources can be less stringent than floors for new sources, but they cannot be less stringent than the average emissions limitation achieved by the best-performing 12 percent of existing sources in the category or subcategory (or the best-performing five sources for categories or subcategories with fewer than 30 sources). In developing MACT standards, we must also consider control options that are more stringent than the floor. We may establish standards more stringent than the floor based on the consideration of the cost of achieving the emissions reductions, any nonair quality health and environmental impacts and energy requirements.

The EPA is then required to review these technology-based standards and to revise them ''as necessary (taking into account developments in practices, processes, and control technologies)'' no less frequently than every 8 years, under CAA section 112(d)(6). In conducting this review, the EPA is not obliged to completely recalculate the prior MACT determination and, in particular, is not obligated to recalculate the MACT floors. *NRDC* v. *EPA,* 529 F.3d 1077, 1084 (DC Cir., 2008).

The second stage in standard-setting focuses on reducing any remaining ''residual'' risk according to CAA section 112(f). This provision requires, first, that the EPA prepare a *Report to Congress* discussing (among other things) methods of calculating the risks posed (or potentially posed) by sources after implementation of the MACT standards, the public health significance of those risks, and the EPA's recommendations as to legislation regarding such remaining risk. The EPA prepared and submitted this report (*Residual Risk Report to Congress,* EPA–453/R–99–001) in March 1999. Congress did not act in response to the report, thereby triggering the EPA's obligation under CAA section 112(f)(2) to analyze and address residual risk.

Section 112(f)(2) of the CAA requires us to determine, for source categories subject to certain MACT standards, whether those emissions standards provide an ample margin of safety to protect public health. If the MACT standards apply to a source category emitting a HAP that is ''classified as a known, probable, or possible human carcinogen do not reduce lifetime excess cancer risks to the individual most exposed to emissions from a source in the category or subcategory to less than one in one million,'' the EPA must promulgate residual risk standards for the source category (or subcategory) as necessary to provide an ample margin of safety to protect public health (CAA section 112(f)(2)(A)). This requirement is procedural. It mandates that the EPA establish CAA section 112(f) residual risk standards if certain risk thresholds are not satisfied but does not determine the level of those standards. *NRDC* v. *EPA,* 529 F. 3d at 1083. The second sentence of CAA section 112(f)(2) sets out the substantive requirements for residual risk standards: Protection of public health with an ample margin of safety based on the EPA's interpretation of this standard in effect at the time of the CAA amendments. *Id.* This refers to the Benzene NESHAP, described in the next paragraph. The EPA may adopt residual risk standards equal to existing MACT standards (or to standards adopted after the technology review required by CAA section 112(d)(6)) if the EPA determines that the existing standards are sufficiently protective, even if (for example) excess cancer risks to a most exposed individual are not reduced to less than 1 in 1 million. *Id.* at 1083, (''If EPA determines that the existing technology-based standards provide an 'ample margin of safety,' then the Agency is free to readopt those standards during the residual risk rulemaking''). Section 112(f)(2) of the CAA further authorizes the EPA to adopt more stringent standards, if necessary, ''to prevent, taking into consideration costs, energy, safety and other relevant factors, an adverse environmental effect.'' [1]

As just noted, CAA section 112(f)(2) expressly preserves our use of the two-step process for developing standards to address any residual risk and our

[1] ''Adverse environmental effect'' is defined in CAA section 112(a)(7) as any significant and widespread adverse effect, which may be reasonably anticipated to wildlife, aquatic life, or natural resources, including adverse impacts on populations of endangered or threatened species or significant degradation of environmental qualities over broad areas.

interpretation of ''ample margin of safety'' developed in the *National Emission Standards for Hazardous Air Pollutants: Benzene Emissions from Maleic Anhydride Plants, Ethylbenzene/Styrene Plants, Benzene Storage Vessels, Benzene Equipment Leaks, and Coke By-Product Recovery Plants* (Benzene NESHAP) (54 FR 38044, September 14, 1989). The first step in this process is the determination of acceptable risk. The second step provides for an ample margin of safety to protect public health, which is the level at which the standards are set (unless a more stringent standard is required to prevent, taking into consideration costs, energy, safety and other relevant factors, an adverse environmental effect).

The terms ''individual most exposed,'' ''acceptable level,'' and ''ample margin of safety'' are not specifically defined in the CAA. However, CAA section 112(f)(2)(B) preserves the EPA's interpretation set out in the Benzene NESHAP, and the Court in *NRDC* v. *EPA* concluded that the EPA's interpretation of CAA section 112(f)(2) is a reasonable one. See *NRDC* v. *EPA,* 529 F.3d at 1083 (D. C. Cir. 2008), which says ''[S]ubsection 112(f)(2)(B) expressly incorporates EPA's interpretation of the Clean Air Act from the Benzene standard, complete with a citation to the **Federal Register**.'' See also, *A Legislative History of the Clean Air Act Amendments of 1990,* volume 1, p. 877 (Senate debate on Conference Report). We also notified Congress in the *Residual Risk Report to Congress* that we intended to use the Benzene NESHAP approach in making CAA section 112(f) residual risk determinations (EPA–453/R–99–001, p. ES–11).

In the Benzene NESHAP, we stated as an overall objective:

> * * * in protecting public health with an ample margin of safety, we strive to provide maximum feasible protection against risks to health from hazardous air pollutants by: (1) protecting the greatest number of persons possible to an individual lifetime risk level no higher than approximately 1 in 1 million; and (2) limiting to no higher than approximately 1 in 10 thousand [*i.e.,* 100 in 1 million] the estimated risk that a person living near a facility would have if he or she were exposed to the maximum pollutant concentrations for 70 years.

The agency also stated that, ''The EPA also considers incidence (the number of persons estimated to suffer cancer or other serious health effects as a result of exposure to a pollutant) to be an important measure of the health risk to the exposed population. Incidence measures the extent of health risks to the exposed population as a whole, by providing an estimate of the occurrence of cancer or other serious health effects in the exposed population.'' The agency went on to conclude that ''estimated incidence would be weighed along with other health risk information in judging acceptability.'' As explained more fully in our *Residual Risk Report to Congress,* the EPA does not define ''rigid line[s] of acceptability,'' but rather considers broad objectives to be weighed with a series of other health measures and factors (EPA–453/R–99–001, p. ES–11). The determination of what represents an ''acceptable'' risk is based on a judgment of ''what risks are acceptable in the world in which we live'' (*Residual Risk Report to Congress,* p. 178, quoting the D.C. Circuit's en banc *Vinyl Chloride* decision at 824 F.2d 1165) recognizing that our world is not risk-free.

In the Benzene NESHAP, we stated that ''EPA will generally presume that if the risk to [the maximum exposed] individual is no higher than approximately 1 in 10 thousand, that risk level is considered acceptable.'' 54 FR 38045. We discussed the maximum individual lifetime cancer risk as being ''the estimated risk that a person living near a plant would have if he or she were exposed to the maximum pollutant concentrations for 70 years.'' *Id.* We explained that this measure of risk ''is an estimate of the upper bound of risk based on conservative assumptions, such as continuous exposure for 24 hours per day for 70 years.'' *Id.* We acknowledge that maximum individual lifetime cancer risk ''does not necessarily reflect the true risk, but displays a conservative risk level which is an upper-bound that is unlikely to be exceeded.'' *Id.*

Understanding that there are both benefits and limitations to using maximum individual lifetime cancer risk as a metric for determining acceptability, we acknowledged in the 1989 Benzene NESHAP that ''consideration of maximum individual risk * * * must take into account the strengths and weaknesses of this measure of risk.'' *Id.* Consequently, the presumptive risk level of 100 in 1 million (1 in 10 thousand) provides a benchmark for judging the acceptability of maximum individual lifetime cancer risk, but does not constitute a rigid line for making that determination. *Id.* Further, in the Benzene NESHAP, we noted that, ''Particular attention will also be accorded to the weight of evidence presented in the risk assessment of potential carcinogenicity or other health effects of a pollutant. While the same numerical risk may be estimated for an exposure to a pollutant judged to be a known human carcinogen, and to a pollutant considered a possible human carcinogen based on limited animal test data, the same weight cannot be accorded to both estimates. In considering the potential public health effects of the two pollutants, the Agency's judgment on acceptability, including the MIR, will be influenced by the greater weight of evidence for the known human carcinogen.'' *Id.* at 38046.

The agency also explained in the 1989 Benzene NESHAP the following: ''In establishing a presumption for MIR [maximum individual cancer risk], rather than a rigid line for acceptability, the Agency intends to weigh it with a series of other health measures and factors. These include the overall incidence of cancer or other serious health effects within the exposed population, the numbers of persons exposed within each individual lifetime risk range and associated incidence within, typically, a 50 km exposure radius around facilities, the science policy assumptions and estimation uncertainties associated with the risk measures, weight of the scientific evidence for human health effects, other quantified or unquantified health effects, effects due to co-location of facilities, and co-emission of pollutants.'' *Id.*

In some cases, these health measures and factors taken together may provide a more realistic description of the magnitude of risk in the exposed population than that provided by maximum individual lifetime cancer risk alone. As explained in the Benzene NESHAP, ''[e]ven though the risks judged ''acceptable'' by the EPA in the first step of the *Vinyl Chloride* inquiry are already low, the second step of the inquiry, determining an ''ample margin of safety,'' again includes consideration of all of the health factors, and whether to reduce the risks even further.'' Beyond that information, additional factors relating to the appropriate level of control will also be considered, including costs and economic impacts of controls, technological feasibility, uncertainties, and any other relevant factors. Considering all of these factors, the Agency will establish the standard at a level that provides an ample margin of safety to protect the public health as required by section 112.''

In *NRDC* v. *EPA,* 529 F.3d 1077, 1082 (D.C. Cir. 2008), the Court of Appeals held that section 112(f)(2) ''incorporates EPA's 'interpretation' of the Clean Air Act from the Benzene Standard, and the text of this provision draws no distinction between carcinogens and non-carcinogens.'' Additionally, the

Court held there is nothing on the face of the statute that limits the agency's section 112(f) assessment of risk to carcinogens. *Id.* at 1081–82. In the *NRDC* case, the petitioners argued, among other things, that section 112(f)(2)(B) applied only to non-carcinogens. The D.C. Circuit rejected this position, holding that the text of that provision ''draws no distinction between carcinogens and non-carcinogens,'' I*d.,* and that Congress' incorporation of the Benzene standard applies equally to carcinogens and non-carcinogens.

In the ample margin of safety decision process, the agency again considers all of the health risks and other health information considered in the first step. Beyond that information, additional factors relating to the appropriate level of control will also be considered, including costs and economic impacts of controls, technological feasibility, uncertainties and any other relevant factors. Considering all of these factors, the agency will establish the standard at a level that provides an ample margin of safety to protect the public health, as required by CAA section 112(f). 54 FR 38046.

B. Does this action apply to me?

The regulated industrial source category that is the subject of this proposal is listed in Table 2 of this preamble. Table 2 of this preamble is not intended to be exhaustive, but rather provides a guide for readers regarding the entities likely to be affected by this proposed action. This standard, and any changes considered in this rulemaking, would be directly applicable to affected sources. Federal, state, local and tribal government entities are not affected by this proposed action. As defined in the Source Category Listing Report published by the EPA in 1992, the pulp and paper production source category includes any facility engaged in the production of pulp and/or paper. This category includes, but is not limited to, integrated mills (where pulp and paper or paperboard are manufactured on-site), non-integrated mills (where either pulp or paper/paperboard are manufactured on-site, but not both), and secondary fiber mills (where waste paper is used as the primary raw material). Examples of pulping methods include kraft, soda, sulfite, semi-chemical and mechanical.

TABLE 2—NESHAP AND INDUSTRIAL SOURCE CATEGORIES AFFECTED BY THIS PROPOSED ACTION

Source category	NESHAP	NAICS code [1]	MACT code [2]
Pulp and Paper	Pulp and Paper	322	1626–1

[1] North American Industry Classification System.
[2] Maximum Achievable Control Technology.

C. Where can I get a copy of this document and other related information?

In addition to being available in the docket, an electronic copy of this proposal will also be available on the WWW through the EPA's TNN. Following signature by the EPA Administrator, a copy of this proposed action will be posted on the TTN's policy and guidance page for newly proposed or promulgated rules at the following address: *http://www.epa.gov/ttn/atw/rrisk/rtrpg.html.* The TTN provides information and technology exchange in various areas of air pollution control.

Additional information is available on the RTR Web page at *http://www.epa.gov/ttn/atw/rrisk/rtrpg.html.* This information includes source category descriptions and detailed emissions estimates and other data that were used as inputs to the risk assessments.

D. What should I consider as I prepare my comments for the EPA?

Submitting CBI. Do not submit information containing CBI to the EPA through *http://www.regulations.gov* or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information on a disk or CD ROM that you mail to the EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. If you submit a CD ROM or disk that does not contain CBI, mark the outside of the disk or CD ROM clearly that it does not contain CBI. Information not marked as CBI will be included in the public docket and the EPA's electronic public docket without prior notice. Information marked as CBI will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. Send or deliver information identified as CBI only to the following address: Roberto Morales, OAQPS Document Control Officer (C404–02), Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711, Attention Docket ID Number EPA–HQ–OAR–2007–0544.

II. Background

A. What is this source category and how did the MACT standard regulate its HAP emissions?

The pulp and paper production source category includes any facility engaged in the production of pulp and/or paper. This category includes, but is not limited to, integrated mills (where pulp and paper or paperboard are manufactured on-site), non-integrated mills (where paper/paperboard or pulp are manufactured, but not both), and secondary fiber mills (where waste paper is used as the primary raw material). The pulp and paper production process includes operations such as pulping, bleaching, chemical recovery and papermaking. Different pulping processes are used, including chemical processes (kraft, soda, sulfite and semi-chemical) and mechanical, secondary fiber or non-wood processes.

The NESHAP from the pulp and paper Industry (or MACT rule) was promulgated on April 15, 1998 (63 FR 18504) and codified at 40 CFR part 63, subpart S. As promulgated in 1998, the subpart S MACT standard applies to major sources of HAP emissions from the pulp production areas (*e.g.,* pulping system vents, pulping process condensates) at chemical, mechanical, secondary fiber and non-wood pulp mills; bleaching operations; and papermaking systems. A separate NESHAP (40 CFR part 63, subpart MM) applicable to chemical recovery processes at kraft, soda, sulfite and stand-alone semi-chemical pulp mills was promulgated on January 12, 2001 (66 FR 3180). However, only subpart S is undergoing the RTR that is the subject of this proposal.

This is the first in a series of rules being developed for the pulp and paper

industrial sector. This proposal includes both a risk assessment and a technology review of the emission sources in subpart S, as well as a risk assessment of the whole facility. The whole facility risk assessment includes emissions from the other sources in the pulp and paper industrial sector: boilers covered under subpart DDDDD, chemical recovery systems covered under subpart MM, various sources covered under the NSPS for kraft pulp mills (40 CFR part 60, subpart BB), and other applicable MACT emission sources. In the future, we will also conduct a RTR for the subpart MM category, as well as a review of the kraft pulp mills NSPS, subpart BB. When we conduct the RTR for the subpart MM rule, subpart S emission sources will be included in the facilitywide risk assessment.

According to results of the EPA's 2011 pulp and paper ICR, there are a total of 171 major sources in the United States including:

- 111 major sources that carry out chemical wood pulping (kraft, sulfite, soda or semi-chemical);
- 33 major sources that carry out mechanical, groundwood, secondary fiber and non-wood pulping (without chemical wood pulping);
- 94 major sources that perform bleaching; and
- 156 major sources that manufacture paper or paperboard products.

Facilities in the category perform at least one of several pulp and papermaking operations (*e.g.,* chemical pulping, bleaching and papermaking; pulping and unbleached papermaking; *etc.*).

Subpart S includes numerical emission limits for pulping system vents, pulping process condensates and bleaching system vents. The control systems used by most mills to meet the subpart S emission limits are as follows:

- Pulping system vents—thermal oxidizers, power boilers, lime kilns and recovery furnaces.
- Pulping process condensates—steam strippers, biological treatment and recycling to pulping equipment that is controlled by the pulping vent standards.
- Bleaching system vents—caustic scrubbers (for chlorinated HAPs, other than chloroform) and process modifications to eliminate the use of chlorine and hypochlorite.

Facilities that only purchase pre-consumer paper or paperboard stock products and convert them into other products (*i.e.,* converting operations) are not part of the subpart S source category and are not affected by today's action.

B. What data collection activities were conducted to support this action?

In February 2011, the EPA issued an ICR, pursuant to CAA section 114, to United States pulp and paper manufacturers to gather information needed to conduct the regulatory reviews required under CAA sections 112(d)(6) and (f)(2). The ICR was divided into three parts, with each part due on a different date. Part I requested available information regarding subpart S process equipment, control devices, pulp and paper production, bleaching and other aspects of facility operations, to support the subpart S technology review and a later review of the kraft pulp mills NSPS under 40 CFR part 60, subpart BB. Part II requested updated inventory data for all pulp and paper emission sources, to support the residual risk assessment for the pulp and paper sector (including subparts S and MM) and to both supplement and update the NEI for the source category. Part III requested available information on subpart MM chemical recovery combustion equipment, control devices, *etc.,* to support a later subpart MM technology review (which will include a source category and a facilitywide risk assessment) and a subpart BB NSPS review. Responses to all three parts of the ICR have been received and data from the first two parts of the ICR have been compiled. The response rate for the subpart S ICR was 100 percent.[2]

III. Analyses Performed

In this section, we describe the analyses performed to support the proposed decisions for the RTR for this source category.

A. How did we estimate risks posed by the source category?

The EPA conducted risk assessments that provided estimates of (1) the MIR posed by the HAP emissions from the 171 pulp and paper mills in the source category, (2) the distribution of cancer and noncancer risks within the exposed populations, (3) the total cancer incidence, (4) estimates of the maximum TOSHI for chronic exposures to HAP with the potential to cause chronic noncancer health effects, (5) worst-case screening estimates of HQ for acute exposures to HAP with the potential to cause noncancer health effects, and (6) an evaluation of the potential for adverse environmental effects. The risk assessments consisted of seven primary steps, as discussed below.[3] The methods used to assess risks (as described in the seven primary steps below) are consistent with those peer-reviewed by a panel of the EPA's SAB in 2009 and described in their peer review report issued in 2010; they are also consistent with the key recommendations contained in that report.

1. Establishing the Nature and Magnitude of Actual Emissions and Identifying the Emissions Release Characteristics

As discussed in section II.B of this preamble, we used data from Part II of the pulp and paper ICR as the basis for the risk assessment. Part II of the ICR, which concluded in June 2011, targeted facilities that are major sources of HAP emissions and involved an update of pre-populated NEI data spreadsheets (or creation of new NEI datasets). The NEI is a database that contains information about sources that emit criteria air pollutants, their precursors and HAP. The NEI database includes estimates of actual annual air pollutant emissions from point and volume sources; emission release characteristic data such as emission release height, temperature, diameter, velocity and flow rate; and location latitude/longitude coordinates.

The actual annual emissions data in the NEI database were based on data from actual emissions tests and estimates of actual emissions (based on emission factors) provided by subpart S sources surveyed in Part II of the ICR. We received a comprehensive set of emissions test data and emissions estimates that enabled us to conduct risk modeling of detectable HAP emissions for all major source facilities in the pulp and paper category.

Two substantial QA efforts were conducted on the Part II data in order to create the modeling files needed for the residual risk assessment, which included: (1) QA of the updated inventory spreadsheets submitted by each mill prior to import into the compiled database; and (2) QA and standardization of the compiled database.

We reviewed the NEI datasets to ensure that the major pulp and paper processes and pollutants were included and properly identified, to ensure that emissions from the various processes were allocated to the correct source category (*e.g.,* MACT code 1626–1), and to identify emissions and other data anomalies that could affect risk

[2] Part II of the ICR will be available for download on the RTR Web page at: *http://www.epa.gov/ttn/atw/rrisk/rtrpg.html.*

[3] The docket for this rulemaking contains the following document which provides more information on the risk assessment inputs and models: *Draft Residual Risk Assessment for Pulp and Paper Source Category.*

estimates. We also standardized the various codes (*e.g.,* SCCs, pollutant codes), eliminated duplicate records and checked geographic coordinates. We reviewed emissions release parameters for data gaps and errors, assigned the proper default parameters where necessary, segregated the emission points into logical emission process groups and ensured that fugitive release dimensions were specified or given default values where necessary. We made changes based on available information, including updated information voluntarily submitted by pulp and paper mills.[4]

We assigned emissions process groups to distinguish between processes with related SCCs. For mills with VOC emissions data but no HAP emissions data, we developed HAP-to-VOC ratios to estimate HAP emissions, using HAP and VOC emission factors provided by NCASI.[5] However, as noted above, most emissions factors were based on actual tests or actual tests conducted at similar sources (see NCASI Technical Bulletin No. 973).[6] Additionally, the largest HAP emission compound in the category, methanol, at approximately 86 percent of the HAP in the category, is required to be quantified in each compliance test referenced in the standard. Consequently, the greatest proportion of HAP emissions at each facility are based on emission factors derived from actual source specific tests.

For purposes of risk modeling, we reviewed emissions data for chromium, mercury, POM and glycol ether in order to properly speciate emissions. Chromium emissions were speciated as hexavalent chromium (chromium VI) and trivalent chromium (chromium III).[7] Mercury emissions were speciated as particulate divalent mercury, gaseous divalent mercury and elemental gaseous mercury.[8] Total POM emissions were speciated differently for each emission unit type (*e.g.,* gas- or oil-fired paper machine dryers) based on the most common POM compounds emitted from that unit (*e.g.,* phenanthrene, fluorene, pyrene, fluoranthene and/or 2-methylnaphthalene). We speciated all total glycol ether records as 1,2-dimethoxyethane, since this pollutant represents 99 percent of all emissions reported under the glycol ether compounds category from pulp and paper emission sources.[9] Acrolein emissions were removed from the subpart S modeling file due to uncertainty in the emissions estimates.[10]

In addition, we reviewed facilitywide data included in the NEI dataset from the EPA's TRI to ensure that combustion-related dioxin/furan emissions were apportioned to the proper MACT code (0107 or 1626–2). As expected, there were no dioxin/furan emissions data for subpart S sources (MACT code 1626–1).[11]

The Part II NEI emissions dataset for the pulp and paper (subpart S) source category shows 45,000 tpy of total HAP emissions from the 171 mills in the dataset. Methanol, acetaldehyde, cresol/cresylic acid (mixed isomers), phenol, chloroform, formaldehyde, hydrochloric acid, biphenyl, hexachloroethane, xylenes, propionaldehyde and 1,2,4-trichlorobenzene account for the majority of the HAP emissions reported for pulp and paper production (approximately 43,900 tpy, or 97 percent). The remaining 3 percent of the HAP, reported in lesser quantities, include acetophenone, benzene, cumene, carbon disulfide, chlorine, methyl isobutyl ketone, methylene chloride (dichloromethane), naphthalene, styrene, tetrachloroethylene (perchloroethylene), toluene, trichloroethylene and 56 others. Methanol, which accounts for about 86 percent of the total HAP mass emissions, is the HAP emitted by the largest number of facilities, with methanol reported for 166 out of 171 mills in the dataset (or 97 percent). Emissions of the following PB–HAP were identified in the emissions inventory for the pulp and paper (subpart S) source category: cadmium compounds, lead compounds, mercury compounds and POM. As a standard practice in conducting risk assessments for source categories, the EPA conducts a two-step process: (1) Are PB–HAPs being emitted; and (2) are they being released above screening thresholds? If these releases are significantly above the screening thresholds and the EPA has detailed information on the releases and the site, a complete multipathway analysis of the site will be conducted to estimate pathway risks for the source category. Further information about the analysis performed for this category follows in section III.B.4 of this preamble.

2. Establishing the Relationship Between Actual Emissions and MACT-Allowable Emissions Levels

The available emissions data in the Part II NEI emissions dataset include estimates of the mass of HAP actually emitted during the 2009 time period covered under the survey. These ''actual'' emissions levels are often lower than the emissions levels that a facility might be allowed to emit and still comply with the MACT standards. The emissions levels allowed to be emitted by the MACT standards are referred to as the ''MACT-allowable'' emissions levels. These represent the highest emissions levels that could be emitted by the facility without violating the MACT standards.

We discussed the use of both MACT-allowable and actual emissions in the final Coke Oven Batteries residual risk rule (70 FR 19998–19999, April 15, 2005) and in the proposed and final HON residual risk rules (71 FR 34428, June 14, 2006, and 71 FR 76609, December 21, 2006, respectively). In those previous actions, we noted that assessing the risks at the MACT-allowable level is inherently reasonable since these risks reflect the maximum level at which sources could emit while still complying with the MACT standards. However, we also explained that it is reasonable to consider actual emissions, where such data are available, in both steps of the risk analysis, in accordance with the Benzene NESHAP (54 FR 38044, September 14, 1989). It is reasonable to consider actual emissions because sources typically seek to perform better than required by emissions standards to provide an operational cushion to accommodate the variability in manufacturing processes and control device performance. Facilities' actual emissions may also be significantly lower than MACT-allowable emissions for other reasons such as state requirements, better performance of control devices than required by the MACT standards or reduced production.

As described earlier in this section, actual emissions were based on the Part II NEI emissions dataset. To estimate emissions at the MACT-allowable level, we developed a ratio of MACT-allowable to actual emissions for each source type for the facilities in the source category. This ratio is based on the level of control required by the subpart S MACT standards compared to the level of reported actual emissions and available information from the Part I survey on the level of control achieved by the emissions controls in use. For example, if survey data indicated that

[4] For more information, see the memorandum in the docket titled, *Inputs to the Pulp and Paper Industry October 2011 Residual Risk Modeling.*

[5] *Ibid.*

[6] A. Someshwar, NCASI. Compilation of ''Air Toxic'' and Total Hydrocarbon Emissions Data for Pulp and Paper Mill Sources—A Second Update. Technical Bulletin No. 973. February 2010.

[7] For more information, see the memorandum in the docket titled, *Inputs to the Pulp and Paper Industry October 2011 Residual Risk Modeling.*

[8] *Ibid.*

[9] *Ibid.*

[10] *Ibid.*

[11] *Ibid.*

an emission point type was being controlled by 92 percent, while the MACT standard required only 87 percent control, we would estimate that MACT-allowable emissions from that emission point type could be as much as 1.6 times higher (13 percent allowable emissions compared with 8 percent actually emitted), and the ratio of MACT-allowable to actual would be 1.6:1 for this emission point type.[12]

After developing these ratios for each emission point type in this source category, we next applied these ratios on an emission process unit basis to the Part II actual emissions data to obtain risk estimates based on MACT-allowable emissions.[13]

3. Conducting Dispersion Modeling, Determining Inhalation Exposures and Estimating Individual and Population Inhalation Risks

Both long-term and short-term inhalation exposure concentrations and health risks from the source category addressed in this proposal were estimated using the HEM–3 human exposure model. The HEM–3 performs three of the primary risk assessment activities listed above: (1) Conducting dispersion modeling to estimate the concentrations of HAP in ambient air, (2) estimating long-term and short-term inhalation exposures to individuals residing within 50 km of the modeled sources, and (3) estimating individual and population-level inhalation risks using the exposure estimates and quantitative dose-response information.

The dispersion model used by HEM–3 is AERMOD, which is one of the EPA's preferred models for assessing pollutant concentrations from industrial facilities.[14] To perform the dispersion modeling and to develop the preliminary risk estimates, HEM–3 draws on three data libraries. The first is a library of meteorological data, which is used for dispersion calculations. This library includes 1 year of hourly surface and upper air observations for 130 meteorological stations, selected to provide coverage of the United States and Puerto Rico. A second library of United States Census Bureau census block[15] internal point locations and populations provides the basis of human exposure calculations based on the year 2000 U.S. Census. In addition, for each census block, the census library includes the elevation and controlling hill height which are also used in dispersion calculations. A third library of pollutant unit risk factors and other health benchmarks is used to estimate health risks. These risk factors and health benchmarks are the latest values recommended by the EPA for HAP and other toxic air pollutants. These values are available at *http://www.epa.gov/ttn/atw/toxsource/summary.html* and are discussed in more detail later in this section.

In developing the risk assessment for chronic exposures, we used the estimated annual average ambient air concentration of each of the HAP emitted by each source for which we have emissions data in the source category. The air concentrations at each nearby census block centroid were primarily used as a surrogate for the chronic inhalation exposure concentration for all the people who reside in that census block. There were two exceptions to this. In those cases where we identified census block centroids which were located on-site, these centroids were re-assigned to a nearby residential location. In those cases where nearby census blocks were abnormally large, additional residential receptors were placed within those census blocks at observable residences to ensure an adequate representation of chronic risks to the nearby residences. We calculated the MIR for each facility as the cancer risk associated with a continuous lifetime (24 hours per day, 7 days per week and 52 weeks per year for a 70-year period) exposure to the maximum concentration at the centroid of an inhabited census block. Individual cancer risks were calculated by multiplying the estimated lifetime exposure to the ambient concentration of each of the HAP (in micrograms per cubic meter) by its URE, which is an upper bound estimate of an individual's probability of contracting cancer over a lifetime of exposure to a concentration of 1 microgram of the pollutant per cubic meter of air. In general, for residual risk assessments, we use URE values from the EPA's IRIS.[16] For carcinogenic pollutants without the EPA IRIS values, we look to other reputable sources of cancer dose-response values, often using CalEPA URE values, where available. In cases where new, scientifically credible dose-response values have been developed in a manner consistent with EPA guidelines and have undergone a peer review process similar to that used by the EPA, we may use such dose-response values in place of, or in addition to, other values, if appropriate.

In 2004, the EPA determined that the CIIT cancer dose-response value for formaldehyde (5.5×10^{-9} per μg/m^3) was based on better science than the IRIS dose-response value (1.3×10^{-5} per μg/m^3), and we switched from using the IRIS value to the CIIT value in risk assessments supporting regulatory actions. Based on subsequent published research, however, the EPA changed its determination regarding the CIIT model, and, in 2010, the EPA returned to using the 1991 IRIS value. The NAS completed its review of the EPA's draft assessment in April of 2011 (*http://www.nap.edu/catalog.php?recordid=13142*), and the EPA has been working on revising the formaldehyde assessment. The EPA will follow the NAS Report recommendations and will present results obtained by implementing the BBDR model for formaldehyde. The EPA will compare these estimates with those currently presented in the External Review draft of the assessment and will discuss their strengths and weaknesses. As recommended by the NAS committee, appropriate sensitivity and uncertainty analyses will be an integral component of implementing the BBDR model. The draft IRIS assessment will be revised in response to the NAS peer review and public comments and the final assessment will be posted on the IRIS database. In the interim, we will present findings using the 1991 IRIS value as a primary estimate and may also consider other information as the science evolves.

We note here that POM, a carcinogenic HAP with a mutagenic mode of action, is emitted by some of the facilities in this category.[17] For this compound,[18] the ADAF described in the EPA's *Supplemental Guidance for Assessing Susceptibility from Early-Life Exposure to Carcinogens*[19] were applied. This adjustment has the effect of increasing the estimated lifetime risks for this pollutant by a factor of 1.6. In addition, although only a small fraction

[12] *Ibid.*

[13] *Ibid.*

[14] U.S. EPA. *Revision to the Guideline on Air Quality Models: Adoption of a Preferred General Purpose (Flat and Complex Terrain) Dispersion Model and Other Revisions* (70 FR 68218, November 9, 2005).

[15] A census block is generally the smallest geographic area for which census statistics are tabulated.

[16] The IRIS information is available at *http://www.epa.gov/IRIS*.

[17] U.S. EPA, 2006. Performing risk assessments that include carcinogens described in the *Supplemental Guidance* as having a mutagenic mode of action. *Science Policy Council Cancer Guidelines Implementation Work Group Communication II:* Memo from W.H. Farland, dated June 14, 2006.

[18] See the *Risk Assessment for Source Categories* document available in the docket for a list of HAP with a mutagenic mode of action.

[19] U.S. EPA, 2005. *Supplemental Guidance for Assessing Early-Life Exposure to Carcinogens*. EPA/630/R–03/003F. *http://www.epa.gov/ttn/atw/childrens_supplement_final.pdf*.

of the total POM emissions were not reported as individual compounds, the EPA expresses carcinogenic potency for compounds in this group in terms of benzo[a]pyrene equivalence, based on evidence that carcinogenic POM has the same mutagenic mechanism of action as does benzo[a]pyrene. For this reason, the EPA's Science Policy Council [20] recommends applying the *Supplemental Guidance* to all carcinogenic polycyclic aromatic hydrocarbons for which risk estimates are based on relative potency. Accordingly, we have applied the ADAF to the benzo[a]pyrene equivalent portion of all POM mixtures.

Incremental individual lifetime cancer risks associated with emissions from the source category were estimated as the sum of the risks for each of the carcinogenic HAP (including those classified as carcinogenic to humans, likely to be carcinogenic to humans and suggestive evidence of carcinogenic potential [21]) emitted by the modeled source. Cancer incidence and the distribution of individual cancer risks for the population within 50 km of the source were also estimated for the source category as part of these assessments by summing individual risks. A distance of 50 km is consistent with both the analysis supporting the 1989 Benzene NESHAP (54 FR 38044) and the limitations of Gaussian dispersion models, including AERMOD.

To assess risk of noncancer health effects from chronic exposures, we summed the HQ for each of the HAP that affects a common target organ system to obtain the HI for that target organ system (or TOSHI). The HQ is the estimated exposure divided by the chronic reference value, which is either the EPA RfC, defined as ''an estimate (with uncertainty spanning perhaps an order of magnitude) of a continuous inhalation exposure to the human population (including sensitive subgroups) that is likely to be without an appreciable risk of deleterious effects during a lifetime,'' or, in cases where a RfC is not available, the ATSDR chronic MRL or the CalEPA Chronic REL. The REL is defined as ''the concentration level at or below which no adverse health effects are anticipated for a specified exposure duration.'' As noted above, in cases where new, scientifically credible dose-response values have been developed in a manner consistent with EPA guidelines and have undergone a peer review process similar to that used by the EPA, we may use those dose-response values in place of or, in addition to, other values.

Worst-case screening estimates of acute exposures and risks were also evaluated for each of the HAP at the point of highest offsite exposure for each facility (*i.e.,* not just the census block centroids) assuming that a person was located at this spot at a time when both the peak (hourly) emission rate and hourly dispersion conditions occurred. In general, acute HQ values were calculated using best available, short-term dose-response value. These acute dose-response values include REL, AEGL and ERPG for 1-hour exposure durations. As discussed below, we used conservative assumptions for emission rates, meteorology and exposure location for our acute analysis.

As described in the CalEPA's *Air Toxics Hot Spots Program Risk Assessment Guidelines, Part I, The Determination of Acute Reference Exposure Levels for Airborne Toxicants,* an acute REL value (*http://www.oehha.ca.gov/air/pdf/acuterel.pdf*) is defined as ''the concentration level at or below which no adverse health effects are anticipated for a specified exposure duration.'' Reference exposure level values are based on the most sensitive, relevant, adverse health effect reported in the medical and toxicological literature. Reference exposure level values are designed to protect the most sensitive individuals in the population by the inclusion of margins of safety. Since margins of safety are incorporated to address data gaps and uncertainties, exceeding the REL does not automatically indicate an adverse health impact.

Acute Exposure Guideline Levels were derived in response to recommendations from the NRC. As described in *Standing Operating Procedures (SOP) of the National Advisory Committee on Acute Exposure Guideline Levels for Hazardous Substances* (*http://www.epa.gov/opptintr/aegl/pubs/sop.pdf*),[22] ''the NRC's previous name for acute exposure levels—CEEL—was replaced by the term AEGL to reflect the broad application of these values to planning, response, and prevention in the community, the workplace, transportation, the military, and the remediation of Superfund sites.'' This document also states that AEGL values ''represent threshold exposure limits for the general public and are applicable to emergency exposures ranging from 10 minutes to 8 hours.'' The document lays out the purpose and objectives of AEGL by stating (page 21) that ''the primary purpose of the AEGL program and the NAC/AEGL Committee is to develop guideline levels for once-in-a-lifetime, short-term exposures to airborne concentrations of acutely toxic, high-priority chemicals.'' In detailing the intended application of AEGL values, the document states (page 31) that ''[i]t is anticipated that the AEGL values will be used for regulatory and nonregulatory purposes by United States federal and state agencies, and possibly the international community in conjunction with chemical emergency response, planning and prevention programs. More specifically, the AEGL values will be used for conducting various risk assessments to aid in the development of emergency preparedness and prevention plans, as well as real-time emergency response actions, for accidental chemical releases at fixed facilities and from transport carriers.''

The AEGL–1 value is then specifically defined as ''the airborne concentration of a substance above which it is predicted that the general population, including susceptible individuals, could experience notable discomfort, irritation, or certain asymptomatic nonsensory effects. However, the effects are not disabling and are transient and reversible upon cessation of exposure.'' The document also notes (page 3) that, ''Airborne concentrations below AEGL–1 represent exposure levels that can produce mild and progressively increasing but transient and nondisabling odor, taste, and sensory irritation or certain asymptomatic, nonsensory effects.'' Similarly, the document defines AEGL–2 values as ''the airborne concentration (expressed as ppm or mg/m^3) of a substance above which it is predicted that the general population, including susceptible individuals, could experience irreversible or other serious, long-lasting adverse health effects or an impaired ability to escape.''

Emergency Response Planning Guidelines values are derived for use in emergency response, as described in the American Industrial Hygiene

[20] U.S. EPA, 2006. *Science Policy Council Cancer Guidelines Implementation Workgroup Communication II:* Memo from W.H. Farland, dated June 14, 2006.

[21] These classifications also coincide with the terms ''known carcinogen, probable carcinogen, and possible carcinogen,'' respectively, which are the terms advocated in the EPA's previous *Guidelines for Carcinogen Risk Assessment,* published in 1986 (51 FR 33992, September 24, 1986). Summing the risks of these individual compounds to obtain the cumulative cancer risks is an approach that was recommended by the EPA's SAB in their 2002 peer review of EPA's NATA titled, *NATA—Evaluating the National-scale Air Toxics Assessment 1996 Data—an SAB Advisory,* available at: *http://yosemite.epa.gov/sab/sabproduct.nsf/214C6E915BB04E14852570CA007A682C/$File/ecadv02001.pdf.*

[22] NAS, 2001. *Standing Operating Procedures for Developing Acute Exposure Levels for Hazardous Chemicals,* page 2.

Association's document titled, *Emergency Response Planning Guidelines (ERPG) Procedures and Responsibilities* (*http://www.aiha.org/1documents/committees/ERPSOPs2006.pdf*) which states that, ''Emergency Response Planning Guidelines were developed for emergency planning and are intended as health-based guideline concentrations for single exposures to chemicals.'' [23] The ERPG–1 value is defined as ''the maximum airborne concentration below which it is believed that nearly all individuals could be exposed for up to 1 hour without experiencing other than mild transient adverse health effects or without perceiving a clearly defined, objectionable odor.'' Similarly, the ERPG–2 value is defined as ''the maximum airborne concentration below which it is believed that nearly all individuals could be exposed for up to 1 hour without experiencing or developing irreversible or other serious health effects or symptoms which could impair an individual's ability to take protective action.''

As can be seen from the definitions above, the AEGL and ERPG values include the similarly-defined severity levels 1 and 2. For many chemicals, a severity level 1 value AEGL or ERPG has not been developed; in these instances, higher severity level AEGL–2 or ERPG–2 values are compared to our modeled exposure levels to screen for potential acute concerns.

Acute REL values for 1-hour exposure durations are typically lower than their corresponding AEGL–1 and ERPG–1 values. Even though their definitions are slightly different, AEGL–1 values are often the same as the corresponding ERPG–1 values, and AEGL–2 values are often equal to ERPG–2 values. Maximum HQ values from our acute screening risk assessments typically result when basing them on the acute REL value for a particular pollutant. In cases where our maximum acute HQ value exceeds 1, we also report the HQ value based on the next highest acute threshold (usually the AEGL–1 and/or the ERPG–1 value).

To develop screening estimates of acute exposures, we first developed estimates of maximum hourly emission rates by multiplying the average actual annual hourly emission rates by a factor to cover routinely variable emissions. An acute multiplication factor of 1.6 was used for papermaking equipment (*e.g.,* paper machines, stock preparation, repulping) based on a paper machine peak-to-mean analysis. Similarly, a peak-to-mean multiplier of 2 was used for pulp and paper wastewater treatment units based on analysis of data from pulp and paper primary clarifiers and aerated stabilization basins. Peak-to-mean multipliers ranging from 1 to 3.1 were developed for other types of pulp and paper equipment based on the routine annual emissions data and peak hourly emissions data obtained from Part II survey data.[24]

In cases where all acute HQ values from the screening step were less than or equal to 1, acute impacts were deemed negligible and no further analysis was performed. In the cases where an acute HQ from the screening step was greater than 1, additional site-specific data were considered to develop a more refined estimate of the potential for acute impacts of concern. The data refinements included using site-specific facility layouts, as available, to distinguish facility property from an area where the public could access and be exposed. These refinements are discussed in the draft risk assessment documents, which are available in the docket for this source category. Ideally, we would prefer to have continuous measurements over time to see how the emissions vary by each hour over an entire year. Having a frequency distribution of hourly emission rates over a year would allow us to perform a probabilistic analysis to estimate potential threshold exceedances and their frequency of occurrence. Such an evaluation could include a more complete statistical treatment of the key parameters and elements adopted in this screening analysis. However, we recognize that having this level of data is rare, and hence our use of the multiplier approach.

4. Multipathway Exposure and Risk Screening

The potential for significant human health risks due to exposures via routes other than inhalation (*i.e.,* multipathway exposures) and the potential for adverse environmental impacts were evaluated in a three-step process. In the first step, we determined whether any facilities emitted any HAP known to be persistent and bio-accumulative in the environment (PB–HAP). There are 14 PB–HAP compounds or compound classes identified for this screening in the EPA's *Air Toxics Risk Assessment Library* (available at *http://www.epa.gov/ttn/fera/risk_atra_vol1.html*). They are cadmium compounds, chlordane, chlorinated dibenzodioxins and furans, dichlorodiphenyldichloroethylene, heptachlor, hexachlorobenzene, hexachlorocyclohexane, lead compounds, mercury compounds, methoxychlor, polychlorinated biphenyls, POM, toxaphene and trifluralin. Emissions of four different PB–HAP were identified in the Part II NEI emissions dataset for the pulp and paper (subpart S) source category: cadmium compounds, lead compounds, mercury compounds and POM. These four compounds plus chlorinated dibenzodioxins and furans were identified in the NEI dataset for the entire mill, which includes sources inside and outside the subpart S category (*e.g.,* boilers, chemical recovery combustion sources). In the second step of the screening process, we determined whether the facility-specific emission rates of each of the emitted PB–HAP were large enough to create the potential for significant non-inhalation human health or environmental risks. To facilitate this step, we have developed emission rate thresholds for each PB–HAP using a hypothetical screening exposure scenario developed for use in conjunction with the TRIM.FaTE model. The hypothetical screening scenario was subjected to a sensitivity analysis to ensure that its key design parameters were established such that environmental media concentrations were not underestimated (*i.e.,* to minimize the occurrence of false negatives or results that suggest that risks might be acceptable when, in fact, actual risks are high), and to also minimize the occurrence of false positives for human health endpoints. We call this application of the TRIM.FaTE model TRIM-Screen. The facility specific emission rates of each of the PB–HAP in each source category were compared to the emission threshold values for each of the PB–HAP identified in the source category datasets.

For all of the facilities in the source category addressed in this proposal, all of the PB–HAP emission rates were less than the emission threshold values, except for one facility with POM emissions as benzo(a)pyrene that exceeded the screening emission rate by a factor of 2. For POM, exceeding the screening emission rate relates to a potential for creating a cancer risk in excess of 1 in a million. In performing the screening for potential multipathway exposures and risks of

[23] *ERP Committee Procedures and Responsibilities.* November 1, 2006. American Industrial Hygiene Association.

[24] More information supporting the use of these factors for Pulp and Paper production is presented in the memorandum, *Inputs to the Pulp and Paper Industry October 2011 Residual Risk Modeling,* which is available in the docket for this action.

concern, we determined that emissions of POM were not significant enough to pose multipathway impacts of concern for human health or the environment. If the emission rates of the PB–HAP had been determined to be significant, the source category would have been further evaluated for potential non-inhalation risks and adverse environmental effects in a third step through site-specific refined assessments using the EPA's TRIM.FaTE model.

For further information on the multipathway analysis approach, see the residual risk documentation as referenced in section IV.A of this preamble.

5. Assessing Risks Considering Emissions Control Options

This rulemaking does not require the installation of any new emission controls to reduce risk; therefore, no risk modeling was conducted to estimate risk reductions following installation of emission controls for this proposal.

6. Conducting Facilitywide Risk Assessments

To put the source category risks in context, we also examine the risks from the entire ''facility,'' where the facility includes all HAP-emitting operations within a contiguous area and under common control. In other words, we examine the HAP emissions not only from the source category of interest but also emissions of HAP from all other emissions sources at the facility. Nearly all 171 major sources in the subpart S category include boilers, and 111 of the 171 major sources include chemical recovery combustion sources (*e.g.,* recovery furnace, smelt dissolving tank, lime kiln). Pulp and paper mills also include paper coating, landfills, petroleum storage and transfer and other operations. Therefore, where data were available, we performed a facilitywide risk assessment for these major sources as part of today's action.

We estimated the risks due to the inhalation of HAP that are emitted ''facilitywide'' for the populations residing within 50 km of each facility, consistent with the methods used for the source category analysis described above. For these facilitywide risk analyses, the modeled source category risks were compared to the facilitywide risks to determine the portion of facilitywide risks that could be attributed to the source categories addressed in this proposal. We specifically examined the facilities associated with the highest estimates of risk and determined the percentage of that risk attributable to the source category of interest. The risk documentation available through the docket for this action provides all the facilitywide risks and the percentage of source category contribution for all source categories assessed.

The methodology and the results of the facilitywide analyses for each source category are included in the residual risk documentation as referenced in section IV.A of this preamble, which is available in the docket for this action.

7. Considering Uncertainties in Risk Assessment

Uncertainty and the potential for bias are inherent in all risk assessments, including that performed for the source category addressed in this proposal. Although uncertainty exists, we believe the approach that we took, which used conservative tools and assumptions to bridge data gaps, ensures that our decisions are health-protective. A brief discussion of the uncertainties in the emissions dataset, dispersion modeling, inhalation exposure estimates and dose-response relationships follows below.[25]

a. Uncertainties in the Emissions Dataset

Although the development of the RTR dataset involved QA/QC processes, the accuracy of emissions values will vary depending on: (1) The source of the data, (2) the degree to which data are incomplete or missing, (3) the degree to which assumptions made to complete the datasets are accurate, (4) whether and to what extent errors were made in estimating emissions values, (5) whether the emissions were based on or extrapolated from stack tests or estimates of fugitive emissions, and (6) miscellaneous other factors.

The annual HAP emissions estimates used in the risk assessment are derived from data provided by mills in response to the Part II survey. Many of these emissions estimates are based on emission factors, developed from the most comprehensive dataset available for this industry, provided by NCASI. The uncertainties associated with emission factors include the uncertainties in the measurement of the data, limitations in the size and quality of the dataset, the presence of non-detects and outliers in the dataset, the emission factor calculations used, *etc.* As noted in section III.A.1 of this preamble, acrolein emissions were not modeled due to uncertainties in the emissions estimates.[26]

b. Uncertainties in Dispersion Modeling

Although the analysis employed the EPA's recommended regulatory dispersion model, AERMOD, we recognize that there is uncertainty in ambient concentration estimates associated with any model, including AERMOD. In circumstances where we had to choose between various model options, where possible, we selected model options (*e.g.,* rural/urban, plume depletion, chemistry) that provided an overestimate of ambient concentrations of the HAP rather than an underestimate. However, because of practicality and data limitation reasons, some factors (*e.g.,* building downwash) have the potential in some situations to overestimate or underestimate ambient impacts. Despite these uncertainties, we believe that at offsite locations and census block centroids, the approach considered in the dispersion modeling analysis should generally yield overestimates of ambient HAP concentrations.

c. Uncertainties in Inhalation Exposure

The effects of human mobility on exposures were not included in the assessment. Specifically, short-term mobility and long-term mobility between census blocks in the modeling domain were not considered.[27] The assumption of not considering short- or long-term population mobility does not bias the estimate of the theoretical MIR, nor does it affect the estimate of cancer incidence since the total population number remains the same. It does, however, affect the shape of the distribution of individual risks across the affected population, shifting it toward higher estimated individual risks at the upper end and reducing the number of people estimated to be at lower risks, thereby increasing the estimated number of people at specific risk levels.

In addition, the assessment predicted the chronic exposures at the centroid of each populated census block as surrogates for the exposure concentrations for all people living in that block. Using the census block centroid to predict chronic exposures tends to over-predict exposures for people in the census block who live

[25] A more thorough discussion of these uncertainties is included in the risk assessment documentation (*Draft Residual Risk Assessment for the Pulp and Paper Category*) available in the docket for this action.

[26] For more information, see the memorandum in the docket titled, *Inputs to the Pulp and Paper Industry October 2011 Residual Risk Modeling.*

[27] Short-term mobility is movement from one microenvironment to another over the course of hours or days. Long-term mobility is movement from one residence to another over the course of a lifetime.

farther from the facility and under-predict exposures for people in the census block who live closer to the facility. Thus, using the census block centroid to predict chronic exposures may lead to a potential understatement or overstatement of the true maximum impact for any one individual but is an unbiased estimate of average risk and incidence.

The assessments evaluate the projected cancer inhalation risks associated with pollutant exposures over a 70-year period, which is the assumed lifetime of an individual. In reality, both the length of time that modeled emissions sources at facilities actually operate (*i.e.,* more or less than 70 years), and the domestic growth or decline of the modeled industry (*i.e.,* the increase or decrease in the number or size of United States facilities), will influence the future risks posed by a given source or source category. Depending on the characteristics of the industry, these factors will, in most cases, result in an overestimate both in individual risk levels and in the total estimated number of cancer cases. However, in rare cases, where a facility maintains or increases its emissions levels beyond 70 years, residents live beyond 70 years at the same location and the residents spend most of their days at that location, then the risks could potentially be underestimated. Annual cancer incidence estimates from exposures to emissions from these sources would not be affected by uncertainty in the length of time emissions sources operate.

The exposure estimates used in these analyses assume chronic exposures to ambient levels of pollutants. Because most people spend the majority of their time indoors, actual exposures may not be as high, depending on the characteristics of the pollutants modeled. For many of the HAP, indoor levels are roughly equivalent to ambient levels, but for very reactive pollutants or larger particles, these levels are typically lower. This factor has the potential to result in an overstatement of 25 to 30 percent of exposures for some HAP.[28]

In addition to the uncertainties highlighted above, there are several factors specific to the acute exposure assessment that should be highlighted. The accuracy of an acute inhalation exposure assessment depends on the simultaneous occurrence of independent factors that may vary greatly, such as hourly emissions rates, meteorology and human activity patterns. In this assessment, we assume that individuals remain for 1 hour at the point of maximum ambient concentration as determined by the co-occurrence of peak emissions and worst-case meteorological conditions. These assumptions would tend to be worst-case actual exposures since it is unlikely that a person would be located at the point of maximum exposure during the time of worst-case impact.

d. Uncertainties in Dose-Response Relationships

There are uncertainties inherent in the development of the dose-response values used in our risk assessments for cancer effects from chronic exposures and noncancer effects from both chronic and acute exposures. Some uncertainties may be considered quantitatively, and others generally are expressed in qualitative terms. We note as a preface to this discussion a point on dose-response uncertainty that is brought out in the EPA's *2005 Cancer Guidelines;* namely, that ''the primary goal of EPA actions is protection of human health; accordingly, as an agency policy, risk assessment procedures, including default options that are used in the absence of scientific data to the contrary, should be health protective'' (*EPA 2005 Cancer Guidelines,* pages 1–7). This is the approach followed here as summarized in the next several paragraphs. A complete detailed discussion of uncertainties and variability in dose-response relationships is given in the residual risk documentation which is available in the docket for this action.

Cancer URE values used in our risk assessments are those that have been developed to generally provide an upper bound estimate of risk. That is, they represent a ''plausible upper limit to the true value of a quantity'' (although this is usually not a true statistical confidence limit).[29] In some circumstances, the true risk could be as low as zero; however, in other circumstances the risk could be greater.[30] When developing an upper bound estimate of risk and to provide risk values that do not underestimate risk, health-protective default approaches are generally used. To err on the side of ensuring adequate health protection, the EPA typically uses the upper bound estimates rather than lower bound or central tendency estimates in our risk assessments, an approach that may have limitations for other uses (*e.g.,* priority-setting or expected benefits analysis).

Chronic noncancer reference (RfC and RfD) values represent chronic exposure levels that are intended to be health-protective levels. Specifically, these values provide an estimate (with uncertainty spanning perhaps an order of magnitude) of a continuous inhalation exposure (RfC) or a daily oral exposure (RfD) to the human population (including sensitive subgroups) that is likely to be without an appreciable risk of deleterious effects during a lifetime. To derive values that are intended to be ''without appreciable risk,'' the methodology relies upon an UF approach (EPA 1993, 1994) which considers uncertainty, variability and gaps in the available data. The UF are applied to derive reference values that are intended to protect against appreciable risk of deleterious effects. The UF are commonly default values,[31] *e.g.,* factors of 10 or 3, used in the absence of compound-specific data; where data are available, UF may also be developed using compound-specific information. When data are limited, more assumptions are needed and more UF are used. Thus, there may be a greater tendency to overestimate risk in the sense that further study might support development of reference values that are higher (*i.e.,* less potent) because fewer default assumptions are needed. However, for some pollutants, it is possible that risks may be underestimated. While collectively termed ''UF,'' these factors account for a number of different quantitative considerations when using observed animal (usually rodent) or human toxicity data in the development of the RfC. The UF are intended to account for:

[28] U.S. EPA. *National-Scale Air Toxics Assessment for 1996.* EPA 453/R–01–003; January 2001; page 85.

[29] IRIS glossary (*http://www.epa.gov/NCEA/iris/help_gloss.htm*).

[30] An exception to this is the URE for benzene, which is considered to cover a range of values, each end of which is considered to be equally plausible and which is based on maximum likelihood estimates.

[31] According to the NRC report, *Science and Judgment in Risk Assessment* (NRC, 1994) ''[Default] options are generic approaches, based on general scientific knowledge and policy judgment, that are applied to various elements of the risk assessment process when the correct scientific model is unknown or uncertain.'' The 1983 NRC report, *Risk Assessment in the Federal Government: Managing the Process,* defined default option as ''the option chosen on the basis of risk assessment policy that appears to be the best choice in the absence of data to the contrary'' (NRC, 1983a, p. 63). Therefore, default options are not rules that bind the agency; rather, the agency may depart from them in evaluating the risks posed by a specific substance when it believes this to be appropriate. In keeping with the EPA's goal of protecting public health and the environment, default assumptions are used to ensure that risk to chemicals is not underestimated (although defaults are not intended to overtly overestimate risk). See EPA, 2004, *An Examination of EPA Risk Assessment Principles and Practices,* EPA/100/B–04/001 available at: *http://www.epa.gov/osa/pdfs/ratf-final.pdf.*

(1) Variation in susceptibility among the members of the human population (*i.e.,* inter-individual variability); (2) uncertainty in extrapolating from experimental animal data to humans (*i.e.,* interspecies differences); (3) uncertainty in extrapolating from data obtained in a study with less-than-lifetime exposure (*i.e.,* extrapolating from sub-chronic to chronic exposure); (4) uncertainty in extrapolating the observed data to obtain an estimate of the exposure associated with no adverse effects; and (5) uncertainty when the database is incomplete or there are problems with the applicability of available studies. Many of the UF used to account for variability and uncertainty in the development of acute reference values are quite similar to those developed for chronic durations, but they more often use individual UF values that may be less than 10. Uncertainty factors are applied based on chemical-specific or health effect-specific information (*e.g.,* simple irritation effects do not vary appreciably between human individuals, hence a value of 3 is typically used), or based on the purpose for the reference value (see the following paragraph). The UF applied in acute reference value derivation include: (1) Heterogeneity among humans; (2) uncertainty in extrapolating from animals to humans; (3) uncertainty in lowest observed adverse effect (exposure) level to no observed adverse effect (exposure) level adjustments; and (4) uncertainty in accounting for an incomplete database on toxic effects of potential concern. Additional adjustments are often applied to account for uncertainty in extrapolation from observations at one exposure duration (*e.g.,* 4 hours) to derive an acute reference value at another exposure duration (*e.g.,* 1 hour).

Not all acute reference values are developed for the same purpose, and care must be taken when interpreting the results of an acute assessment of human health effects relative to the reference value or values being exceeded. Where relevant to the estimated exposures, the lack of short-term dose-response values at different levels of severity should be factored into the risk characterization as potential uncertainties.

Although every effort is made to identify peer-reviewed reference values for cancer and noncancer effects for all pollutants emitted by the sources included in this assessment, some HAP continue to have no reference values for cancer or chronic noncancer or acute effects. Since exposures to these pollutants cannot be included in a quantitative risk estimate, an understatement of risk for these pollutants at environmental exposure levels is possible. For a group of compounds that are either unspeciated or do not have reference values for every individual compound (*e.g.,* glycol ethers), we conservatively use the most protective reference value to estimate risk from individual compounds in the group of compounds.

Additionally, chronic reference values for several of the compounds included in this assessment are currently under the EPA IRIS review (*e.g.,* formaldehyde), and revised assessments may determine that these pollutants are more or less potent than the current value. We may re-evaluate residual risks for the final rulemaking if these reviews are completed prior to our taking final action for this source category and if a dose-response metric changes enough to indicate that the risk assessment supporting this notice may significantly understate human health risk.

e. Uncertainties in the Multipathway and Environmental Effects Screening

We generally assume that when exposure levels are not anticipated to adversely affect human health, they also are not anticipated to adversely affect the environment. For each source category, we generally rely on the site-specific levels of PB–HAP emissions to determine whether a full assessment of the multipathway and environmental effects is necessary. Our screening methods use worst-case scenarios to determine whether multipathway impacts might be important. The results of such a process are biased high for the purpose of screening out potential impacts. Thus, when individual pollutants or facilities screen out, we are confident that the potential for multipathway impacts is negligible. On the other hand, when individual pollutants or facilities do not screen out, it does not mean that multipollutant impacts are significant, only that we cannot rule out that possibility. The site-specific PB–HAP emission levels were almost all far below levels which would trigger a refined assessment of multipathway impacts. The only PB–HAP to exceed the screening threshold was POM with emissions exceeding the screening threshold by a factor of 2. Thus, we are confident that these types of impacts are insignificant for the facilities in this source category.

B. How did we consider the risk results in making decisions for this proposal?

As discussed in the previous section of this preamble, we apply a two-step process for determining whether to develop standards to address residual risk. In the first step, the EPA determines whether risks are acceptable. This determination ''considers all health information, including risk estimation uncertainty, and includes a presumptive level on maximum individual lifetime [cancer] risk (MIR) [32] of approximately one in 10 thousand [*i.e.,* 100 in 1 million].'' 54 FR 38045. In the second step of the process, the EPA determines what level of the standard is needed to provide an ample margin of safety ''in consideration of all health information, including the number of persons at risk levels higher than approximately one in one million, as well as other relevant factors, including costs and economic impacts, technological feasibility, and other factors relevant to each particular decision.'' *Id.*

In past residual risk actions, the EPA presented and considered a number of human health risk metrics associated with emissions from the category under review, including: the MIR; the numbers of persons in various risk ranges; cancer incidence; the maximum noncancer HI; and the maximum acute noncancer hazard. See, *e.g.,* 75 FR 65068, 65072–74 (October 21, 2010) and 76 FR 22566, 22575 (April 21, 2011). In estimating risks, the EPA considered sources under review that are located near each other and that affect the same population. The EPA developed risk estimates based on the actual emissions from the source category under review as well as based on the maximum emissions allowed pursuant to the source category MACT standards. The EPA also discussed and considered risk estimation uncertainties. The EPA is providing this same type of information in support of this action.

The agency is considering all available health information to inform our determinations of risk acceptability and ample margin of safety under CAA section 112(f). Specifically, as explained in the Benzene NESHAP, ''the first step judgment on acceptability cannot be reduced to any single factor'' and thus ''[t]he Administrator believes that the acceptability of risk under [previous] section 112 is best judged on the basis of a broad set of health risk measures and information'' (54 FR 38046). Similarly, with regard to making the ample margin of safety determination, as stated in the Benzene NESHAP, ''[in the ample margin decision, the agency again considers all of the health risk and other health information considered in the first step. Beyond that information,

[32] Although defined as ''maximum individual risk,'' MIR refers only to cancer risk. MIR, one metric for assessing cancer risk, is the estimated risk were an individual exposed to the maximum level of a pollutant for a lifetime.

additional factors relating to the appropriate level of control will also be considered, including cost and economic impacts of controls, technological feasibility, uncertainties, and any other relevant factors.'' *Id.*

The agency acknowledges that the Benzene NESHAP provides flexibility regarding what factors the EPA might consider in making determinations and how they might be weighed for each source category. In responding to comment on our policy under the Benzene NESHAP, the EPA explained that: ''The policy chosen by the Administrator permits consideration of multiple measures of health risk. Not only can the MIR figure be considered, but also incidence, the presence of noncancer health effects, and the uncertainties of the risk estimates. In this way, the effect on the most exposed individuals can be reviewed as well as the impact on the general public. These factors can then be weighed in each individual case. This approach complies with the Vinyl Chloride mandate that the Administrator ascertain an acceptable level of risk to the public by employing [her] expertise to assess available data. It also complies with the Congressional intent behind the CAA, which did not exclude the use of any particular measure of public health risk from the EPA's consideration with respect to CAA section 112 regulations, and, thereby, implicitly permits consideration of any and all measures of health risk which the Administrator, in [her] judgment, believes are appropriate to determining what will 'protect the public health.'" (54 FR at 38057).

Thus, the level of the MIR is only one factor to be weighed in determining acceptability of risks. The Benzene NESHAP explained that ''an MIR of approximately 1 in 10 thousand should ordinarily be the upper end of the range of acceptability. As risks increase above this benchmark, they become presumptively less acceptable under CAA section 112, and would be weighed with the other health risk measures and information in making an overall judgment on acceptability. Or, the agency may find, in a particular case, that a risk that includes MIR less than the presumptively acceptable level is unacceptable in the light of other health risk factors'' (*Id.* at 38045). Similarly, with regard to the ample margin of safety analysis, the EPA stated in the Benzene NESHAP that: ''* * * EPA believes the relative weight of the many factors that can be considered in selecting an ample margin of safety can only be determined for each specific source category. This occurs mainly because technological and economic factors (along with the health-related factors) vary from source category to source category'' (*Id.* at 38061).

C. How did we perform the technology review?

Our technology review focused on the identification and evaluation of developments in practices, processes and control technologies that have occurred since the 1998 NESHAP was promulgated. In cases where the technology review identified such developments, we conducted an analysis of the technical feasibility of applying these developments, along with the estimated impacts (costs, emissions reductions, risk reductions, *etc.*) of applying these developments. We then made decisions on whether it is necessary and appropriate to propose amendments to the regulation to require any of the identified developments.

Based on specific knowledge of the source category, we began by identifying known developments in practices, processes and control technologies. For the purpose of this exercise, we considered any of the following to be a ''development'':

- Any add-on control technology or other equipment that was not identified and considered during development of the 1998 NESHAP;
- Any improvements in add-on control technology or other equipment (that were identified and considered during development of the 1998 NESHAP) that could result in significant additional emissions reductions;
- Any work practice or operational procedure that was not identified or considered during development of the 1998 NESHAP; and
- Any process change or pollution prevention alternative that could be broadly applied to the industry and that was not identified or considered during development of the 1998 NESHAP.

In addition to reviewing the practices, processes or control technologies that were not considered at the time we developed the 1998 NESHAP, we reviewed a variety of data sources in our evaluation of whether there were additional practices, processes or controls to consider for the pulp and paper industry. To aid in our evaluation of whether there were additional practices, processes or controls to consider, one of these sources of data was subsequent air toxics rules. Since the promulgation of the MACT standards for the source category addressed in this proposal, the EPA has developed air toxics regulations for a number of additional source categories. In these subsequent air toxic regulatory actions, we consistently evaluated any new practices, processes and control technologies. We reviewed the regulatory requirements and/or technical analyses associated with these subsequent regulatory actions to identify any practices, processes and control technologies considered in these efforts that could possibly be applied to emission sources in the source category under this current RTR review.

We also consulted the EPA's RBLC to identify potential technology advances.[33] Control technologies, classified as RACT, BACT or LAER apply to stationary sources depending on whether the sources are existing or new, and on the size, age and location of the facility. Best available control technology and LAER (and sometimes RACT) are determined on a case-by-case basis, usually by state or local permitting agencies. The EPA established the RBLC to provide a central database of air pollution technology information (including technologies required in source-specific permits) to promote the sharing of information among permitting agencies and to aid in identifying future possible control technology options that might apply broadly to numerous sources within a category or apply only on a source-by-source basis. The RBLC contains over 5,000 air pollution control permit determinations that can help identify appropriate technologies to mitigate many air pollutant emission streams. We searched this database to determine whether it contained any practices, processes or control technologies for the types of processes covered by the pulp and paper source category. We also further analyzed a number of BACT determinations listed in the RBLC to obtain further information.

Additionally, we conducted a general search of the Internet and other sources for information on control technologies applicable to pulp and paper production. Finally, we conducted a search of the database containing the responses received from the Part I survey to obtain information on process and emission controls currently in use in pulp and paper production.

Each of the evaluations listed above considered and reviewed the technologies suitable to demonstrate compliance with the requirements listed in §§ 63.440 through 63.449 (subpart S).[34]

[33] See the memorandum in the docket titled, *Summary of RBLC and Other Findings to Support Section 112(d)(6) Technology Review for Pulp and Paper NESHAP.*

[34] See the memoranda titled, *Section 112(d)(6) Technology Review for Pulping and Papermaking*

Continued

D. What other issues are we addressing in this proposal?

In addition to the analyses described above, we also reviewed other aspects of the MACT standards for possible revision as appropriate and necessary. Based on this review, we have identified aspects of the MACT standards that we believe need revision.

This includes proposing revisions to the SSM provisions of the MACT rule in order to ensure that they are consistent with the court decision in *Sierra Club* v. *EPA,* 551 F. 3d 1019 (DC Cir. 2008). In addition, we are proposing various changes based on our review of the rule for testing and monitoring sufficiency, including a requirement for 5-year repeat air emissions testing for selected equipment and additional test methods for measuring methanol. We are also proposing minor changes with regards to editorial errors. The analyses and proposed decisions for these actions are presented in section IV of this preamble.

IV. Analytical Results and Proposed Decisions

This section of the preamble provides the results of our RTR for the pulp and paper source category and our proposed decisions concerning changes to the 1998 NESHAP.

A. What are the results of the risk assessments?

For the pulp and paper source category, we conducted an inhalation risk assessment based upon actual and allowable emissions for all HAP emitted, as well as a multipathway analysis. This assessment also included a whole-facility analysis to estimate inhalation risks from all source categories for the pulp and paper industry.

1. Inhalation Risk Assessment Results

Table 3 provides an overall summary of the results of the inhalation risk assessment from the 171 modeled mills subject to this source category. We also conducted an assessment of facilitywide risk. Details of the risk assessments and analyses can be found in the residual risk documentation referenced in section IV.A of this preamble, which is available in the docket for this action.

TABLE 3—PULP AND PAPER PRODUCTION INHALATION RISK ASSESSMENT RESULTS [1]

Maximum individual cancer risk (in 1 million) [2]		Estimated population at increased risk of cancer ≥ 1 in 1 Million	Estimated annual cancer incidence (cases per year)	Maximum chronic noncancer TOSHI [3]		Worst-case maximum refined screening acute noncancer HQ [4]
Based on actual emissions level	Based on allowable emissions level			Based on actual emissions level	Based on allowable emissions level	
10	10	76,000	0.01	0.4	0.6	HQ_{REL} = 20 HQ_{ERPG-1} = 0.4 (acetaldehyde) HQ_{REL} = 6. HQ_{ERPG-1} = 0.004 (chloroform). HQ_{REL} = 5. HQ_{AEGL-1} = 0.2 (formaldehyde) HQ_{REL} = 2. HQ_{ERPG-1} = 0.2 (methanol)

[1] As noted in section III.A.1 of this preamble, acrolein emissions were not modeled due to uncertainties in the emissions estimates.
[2] Estimated maximum individual excess lifetime cancer risk due to HAP emissions from the source category.
[3] Maximum TOSHI. The target organ with the highest TOSHI for the pulp and paper source category is the respiratory system.
[4] See section III.B of this preamble for explanation of acute dose-response values.

As shown in Table 3, the results of the inhalation risk assessment performed using actual emissions data indicate the maximum lifetime individual cancer risk could be up to 10 in 1 million, primarily due to hexachloroethane emissions; the maximum chronic noncancer TOSHI value could be up to 0.4, primarily due to acetaldehyde emissions; and the maximum offsite worst-case acute HQ value could be up to 20, based on the REL value for acetaldehyde. The HQ of 20 represents an upper-bound risk estimate and is located in an uninhabited location with limited public access or an offsite area that is owned by the facility. An acute noncancer HQ of 3 reflects the risk where people are living with access to a public road. This would then result in the next highest HQ of 6 for this source category based on the acute REL dose-response value for chloroform. One hundred sixty-two of the 171 facilities in this source category had an estimated worst-case HQ less than or equal to 1; the remaining 9 facilities had an estimated worst-case HQ less than or equal to 6.[35]

To better characterize the potential health risks associated with estimated worst-case acute exposures to HAP, and in response to a key recommendation from the SAB's peer review of EPA's RTR risk assessment methodologies,[36] we examine a wider range of available acute health metrics than we do for our chronic risk assessments. This is in response to the acknowledgement that there are generally more data gaps and inconsistencies in acute reference values than there are in chronic reference values. By definition, the acute CalEPA REL represents a health-protective level of exposure, with no risk anticipated below those levels, even for repeated exposures; however, the health risk from higher-level exposures is unknown. Therefore, when a CalEPA REL is exceeded and an AEGL–1 or ERPG–1 level is available (*i.e.,* levels at which mild effects are anticipated in the general public for a single exposure), we have used them as a second comparative measure. Historically, comparisons of the estimated maximum offsite 1-hour exposure levels have not been typically made to occupational levels for the purpose of characterizing public health risks in RTR assessments. This is because occupational ceiling values are not generally considered protective for the general public since they are

Processes and *Summary of Pulp Bleaching Technology Review,* in the docket for this rulemaking.

[35] The acute refined HQ values for this source category can be found in Appendix 6, Table 1 of the Risk Assessment report. A summary of the refined acute 1-hour HQ values that were greater than 1 for this source category are as follows: 20,6,5,5,4,3,2,2,2,2,2.

[36] The SAB peer review of RTR Risk Assessment Methodologies is available at: *http://yosemite.epa.gov/sab/sabproduct.nsf/4AB3966E263D943A8525771F00668381/$File/EPA-SAB-10-007-unsigned.pdf.*

designed to protect the worker population (presumed healthy adults) for short-duration (less than 15-minute) increases in exposure.[37] As a result, for most chemicals, the 15-minute occupational ceiling values are set at levels higher than a 1-hour AEGL–1, making comparisons to them irrelevant unless the AEGL–1 or ERPG–1 levels are exceeded. Such is not the case when comparing the available acute inhalation health effect reference values for formaldehyde.

The worst-case maximum estimated 1-hour exposure to formaldehyde outside the facility fence line for the pulp and paper source category is 0.25 mg/m^3. This estimated worst-case exposure exceeds the 1-hour REL by a factor of 5 (HQ_{REL}=5) and is below the 1-hour AEGL–1 (HQ_{AEGL-1}=0.2). This exposure estimate is below the AEGL–1, and exceeds the workplace ceiling level guideline for the formaldehyde value developed by NIOSH[38] ''for any 15 minute period in a work day'' (NIOSH REL-ceiling value of 0.12 mg/m^3; HQ_{NIOSH}=2). The estimate is at the value developed by the ACGIH[39] as ''not to be exceeded at any time'' (ACGIH TLV-ceiling value of 0.37 mg/m^3; HQ_{ACGIH}=1). Additionally, the estimated maximum acute exposure exceeds the Air Quality Guideline value that was developed by the World Health Organization[40] for 30-minute exposures (0.1 mg/m^3; HQ_{WHO}=2.5).

All other HAP and facilities modeled had worst-case acute HQ values less than 1, indicating that they carry no potential to pose acute concerns. The maximum HQ based on an ERPG–1 dose-response value is 0.4 for acetaldehyde. In characterizing the potential for acute noncancer impacts of concern, it is important to remember the upward bias of these exposure estimates (*e.g.,* worst-case meteorology coinciding with a person located at the point of maximum concentration during the hour) and to consider the results along with the uncertainties related to the emissions estimates and the screening methodology. However, it is acknowledged that the acute emission multipliers ranged from 1.4 to 3 and approached the annual hourly average emission rate for the facilities within the source category.

The total estimated cancer incidence from these facilities based on actual emissions levels is 0.01 excess cancer cases per year, or 1 case in every 100 years. The cancer incidence is primarily driven by emissions of acetaldehyde and formaldehyde from papermaking and kraft wastewater operations.[41]

There are 68 facilities with maximum individual cancer risks of 1 in 1 million or greater and two facilities with maximum individual cancer risks of 10 in a million that represented the highest cancer risks for the source category. The MIR of 10 in a million for the source category was driven by emissions of hexachloroethane.

As explained above, our analysis of potential differences between actual emissions levels and emissions allowable under the pulp and paper MACT standards indicate that MACT-allowable emission levels are roughly equal to the actual emission levels.[42] The risk results from the inhalation risk assessment indicate the maximum lifetime individual cancer risks are the same at 20 in a million, and the maximum chronic noncancer TOSHI value could be up to 0.6 at the MACT-allowable emissions level.

2. Multipathway Risk Screening Results

The results of a multipathway screening analysis showed that emissions of POM, cadmium and mercury were almost all below their respective screening emission rates, thereby indicating a negligible risk of adverse health effects associated with multipathway exposures. The only PB–HAP to exceed the screening threshold was POM, with emissions exceeding the screening threshold by a factor of 2.

3. Facilitywide Risk Assessment Results

A facilitywide risk analysis was also conducted based on actual emissions levels. Table 4 displays the results of the facilitywide risk assessment.[43]

TABLE 4—PULP AND PAPER FACILITYWIDE RISK ASSESSMENT RESULTS

Number of facilities analyzed	171
Cancer Risk:	
Estimated maximum facilitywide individual cancer risk (in 1 million)	30
Number of facilities with estimated facilitywide individual cancer risk of 10 in 1 million or more	7
Number of pulp and papermaking operations contributing 50 percent or more to facilitywide individual cancer risk of 10 in 1 million or more	2
Number of facilities with facilitywide individual cancer risk of 1 in 1 million or more	99
Number of pulp and papermaking operations contributing 50 percent or more to facilitywide individual cancer risk of 1 in 1 million or more	57
Chronic Noncancer Risk:	
Maximum facilitywide chronic noncancer TOSHI	2
Number of facilities with facilitywide maximum noncancer TOSHI of 1 or more	4
Number of pulp and papermaking operations contributing 50 percent or more to facilitywide maximum noncancer TOSHI of 1 or more	0

[37] U.S. EPA. (2009) Chapter 2.9 Chemical Specific Reference Values for Formaldehyde in Graphical Arrays of Chemical-Specific Health Effect Reference Values for Inhalation Exposures (Final Report). U.S. Environmental Protection Agency, Washington, DC, EPA/600/R–09/061, and available on-line at *http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=211003.*

[38] National Institutes for Occupational Safety and Health (NIOSH). Occupational Safety and Health Guideline for Formaldehyde; *http://www.cdc.gov/niosh/docs/81-123/pdfs/0293.pdf.*

[39] ACGIH (2001) Formaldehyde. In Documentation of the TLVs® and BEIs® with Other Worldwide Occupational Exposure Values. ACGIH, 1300 Kemper Meadow Drive, Cincinnati, OH 45240 (ISBN: 978–1–882417–74–2) and available on-line at *http://www.acgih.org.*

[40] WHO (2000). Chapter 5.8 Formaldehyde, in Air Quality Guidelines for Europe, second edition. World Health Organization Regional Publications, European Series, No. 91. Copenhagen, Denmark. Available on-line at *http://www.euro.who.int/_data/assets/pdf_file/0005/74732/E71922.pdf.*

[41] We note that the MIR for this source category would not change if the CIIT URE for formaldehyde had been used in the assessment; however, the total cancer incidence would decrease by about 36 percent. There is an ongoing IRIS reassessment for formaldehyde and future RTR risk assessments will use the cancer potency for formaldehyde that results from that reassessment. As a result, the current results many not match those of future assessments.

[42] For more information, see the memorandum in the docket titled Inputs to the Pulp and Paper Industry October 2011 Residual Risk Modeling.

[43] For detailed facilityspecific results, see Appendix 6 of the *Draft Residual Risk Assessment for Pulp and Paper* in the docket for this rulemaking.

The maximum individual cancer whole-facility risk from all HAP emissions at any mill is estimated to be 30 in 1 million based on actual emissions. Of the 171 mills included in this analysis, seven have facilitywide maximum individual cancer risks of 10 in 1 million or greater. At these mills, pulp and papermaking operations account for 30 percent of the total facilitywide risk. There are 99 facilities with facilitywide maximum individual cancer risks of 1 in 1 million or greater. Of these 99 mills, 57 have pulp and papermaking operations that contribute greater than 50 percent to the facilitywide risks. The facilitywide cancer risks at these 57 mills, and at the 7 mills with risks of 10 in a million or more, are primarily driven by emissions of arsenic compounds, chromium compounds and nickel compounds from boiler and lime kiln operations. However, we note that there are uncertainties in the amount and form of chromium emitted from these mills. For many of the mills, the emissions inventory used for the risk assessment included estimates for the two main forms of chromium (*i.e.,* hexavalent and trivalent chromium). However, for other mills, we only had estimates of total chromium emitted. For those mills, we applied a hexavalent chromium speciation factor assigned by SCC for this source category.[44] Although, hexavalent chromium is toxic and is a known human carcinogen, trivalent chromium is less toxic and is currently ''not classified as to its human carcinogenicity.''[45] Therefore, the relative emissions of these two forms can have a significant effect on the cancer risk estimates.

The facilitywide maximum individual chronic noncancer TOSHI is estimated to be 2 based on actual emissions. Of the 171 mills included in this analysis, only four mills have a HI value greater than 1, with all mills having an HI value less than or equal to 2. The chronic noncancer risks at these mills are primarily driven by acrolein emissions from industrial boilers and antimony emissions from smelt dissolving tank kraft process units, which are not regulated under the Pulp and paper source category.

B. What are our proposed decisions regarding risk acceptability and ample margin of safety?

1. Risk Acceptability

As noted in section III.B of this preamble, we weigh all health risk factors and measures in our risk acceptability determination, including the MIR; the number of persons in various cancer and noncancer risk ranges; cancer incidence; the maximum noncancer HI; the maximum acute noncancer HQ; the extent of noncancer risks; the potential for adverse environmental effects; distribution of cancer and noncancer risks in the exposed population; and risk estimation uncertainty (54 FR 38044, September 14, 1989).

For the pulp and paper source category, the risk analysis we performed indicates that the cancer risks to the individual most exposed could be up to 10 in 1 million due to actual or MACT-allowable emissions. These risks are considerably less than 100 in 1 million, which is the presumptive upper limit of risk acceptability. The risk analysis also shows generally low cancer incidence (1 case every 100 years); no potential for adverse environmental effects or human health multipathway effects; no potential for chronic noncancer impacts; and, while a potential exists for some acute inhalation impacts, they are likely to be minimal.

Additional analysis of facilitywide risks showed that there are five mills with maximum facilitywide risks in between a cancer risk of 10 in 1 million and 30 in a million and four mills with a maximum chronic noncancer TOSHI between 1 and 2; it also showed that the pulp and paper source category did not drive these risks. The number of people exposed to cancer risks of 1 in 1 million or greater due to emissions from the source category is relatively low (76,000). Considering these factors and the uncertainties discussed in section III.B of this preamble, we propose that the risks from the Pulp and paper source category are acceptable.

2. Ample Margin of Safety

Under the ample margin of safety analysis, we evaluate the cost and feasibility of available control technologies and other measures (including the controls, measures and costs reviewed under the technology review) that could be applied in this source category to further reduce the risks due to emissions of HAP identified in our risk assessment.

As noted in our discussion of the technology review below in section IV.C, no technologies (beyond those already in place) were identified for reducing HAP emissions from pulp and paper production processes.[46] We are proposing to amend the kraft condensate standards to reflect increased performance of existing controls observed in the technology review, resulting in an estimated HAP reduction of approximately 4,000 tpy. Incrementally increasing the stringency of the kraft condensate standards is expected to reduce risks from kraft wastewater operations. As a result, we conclude that the current standard, before the amendments proposed here are put in place, protects public health with an ample margin of safety.

Though we did not identify any new technologies to reduce risk from this source category beyond incremental improvements in the performance of existing technology used to meet the kraft condensate standards, we are specifically requesting comment on whether there are additional cost-effective control measures that may be able to reduce risks from the pulp and paper subpart S source category. In particular, we are requesting states to identify any controls they have already required for these facilities, any controls they are currently considering or any other controls of which they may be aware.

C. What are the results and proposed decisions based on our technology review?

We evaluated developments in practices, processes and control technologies applicable to emission sources subject to the pulp and paper MACT. This included a search of the RBLC, the Internet and our database containing the 2011 Part I survey responses. For chemical pulping and bleaching, we have determined that there have been no advances in emission control measures since the subpart S standard was originally promulgated in 1998.[47] For kraft pulping process condensates, we have determined that the technology has sufficiently advanced since the 1998 MACT rule to warrant the development of an updated standard. The 1998 MACT rule required kraft pulp mills to either: (1) Recycle the condensates back to equipment that meet the control standards for pulping system vents

[44] See the memorandum in the docket titled, *Inputs to the Pulp and Paper Industry October 2011 Residual Risk Modeling.*

[45] EPA's IRIS Weight-of-Evidence Characterization for trivalent chromium *http://www.epa.gov/iris/subst/0028.htm#refinhal.*

[46] See the docket memoranda titled, *Section 112(d)(6) Technology Review for Pulping and Papermaking Processes* and *Summary of Pulp Bleaching Technology Review.*

[47] Additional details on our technology review are provided in docket memoranda titled, *Section 112(d)(6) Technology Review for Pulping and Papermaking Processes,* and *Summary of Pulp Bleaching Technology Review.*

(LVHC, HVLC), (2) treat the condensates to reduce or destroy the HAP by at least 92 percent by weight, (3) treat the condensates to remove a specified amount of HAPs (at least 10.2 lb/ODTP at mills performing bleaching or 6.6 lb/ODTP at mills without bleaching), or (4) treat the condensates to meet a specified HAP concentration at the control device outlet (330 ppmw at mills performing bleaching or 210 ppmw at mills without bleaching). The three control strategies expected to be used by most mills are recycling the condensates, biological treatment and steam stripping.

Our technology review of kraft condensates did not yield any information about new technologies that could become the basis for regulatory options. We then reviewed the 2011 pulp and paper ICR database. In our review of the database, we found that most kraft pulp mills chose the 92 percent control option for compliance demonstration for kraft condensates rather than recycling. Only five mills use recycling, two mills use both recycling and steam stripping, and four mills use the aforementioned ppmw option to control kraft condensates. Consequently, the focus of our technology review was on the control efficiencies of wastewater treatment systems and steam stripping.

We reviewed the 2011 pulp and paper ICR database to determine if, under the current control technologies, there were mills demonstrating greater than the 92 percent minimum level of control (or any equivalent demonstrations). We found that all kraft pulp mills are performing at a higher level than the 92 percent minimum level of control.

For regulatory options, we developed an incremental scale of improvement over the minimum 92 percent control, set up by percent increments from 93 percent to 98 percent. An estimated four mills would be impacted under the 93 percent option, 15 mills under the 94 percent option, 28 mills under the 95 percent option, 41 mills under the 96 percent option, 54 mills under the 97 percent option and 66 under the 98 percent option.

We did not take the analysis beyond 98 percent because that level was determined to be at the limit of control efficiency for one the major control techniques, steam stripping, and it was equivalent to the control level required for non-condensable gases ducted to controls from LVHC and HVLC sources in 40 CFR 63.443(d)(1). After setting up the percent increments, we established an equivalency between the different percent control options and the lb/ODTP and ppmw options:

Percent control, %	lb/ODTP option		ppmw option		Annual cost, $million	HAP emissions reduction, tpy
	Mills performing bleaching	Mills without bleaching	Mills performing bleaching	Mills without bleaching		
93	11.5	7.4	289	184	$0.99	2.0
94	12.8	8.3	248	158	4.1	4.1
95	14.0	9.1	206	131	9.0	6.1
96	15.3	9.9	165	105	16	8.2
97	16.6	10.7	124	79	25	10
98	17.9	11.6	83	53	34	12

Finally, we estimated the costs and HAP emissions reductions associated with each percent control option. Total annual costs for the options ranged from $1 million to $34 million, and HAP emissions reductions ranged from 2,000 to 12,000 tpy. Taking these costs and emissions reductions into consideration, we are proposing the 94 percent option for controlling kraft condensates emissions, which is estimated to cost $4 million per year, with an emissions reduction of 4,000 tpy and a cost effectiveness of $1,000 per ton of HAP.[48]

D. What other actions are we proposing?

1. Startup, Shutdown and Malfunction

The U.S. Court of Appeals for the District of Columbia Circuit vacated portions of two provisions in the EPA's CAA section 112 regulations governing the emissions of HAP during periods of SSM. *Sierra Club* v. *EPA,* 551 F.3d 1019 (DC Cir. 2008), *cert. denied,* 130 S. Ct. 1735 (U.S. 2010). Specifically, the Court vacated the SSM exemption contained in 40 CFR 63.6(f)(1) and 40 CFR 63.6(h)(1), that are part of a regulation, commonly referred to as the ''General Provisions Rule,'' that the EPA promulgated under CAA section 112(d). When incorporated into CAA section 112(d) regulations for specific source categories, these two provisions exempt sources from the requirement to comply with the otherwise applicable CAA section 112(d) emission standard during periods of SSM. In its decision, the *Sierra Club* court held that CAA section 112 and section 302(k) are properly read together to require continuous CAA section 112-compliant standards. 552 F.3d at 1027–28.

There are several provisions in the current regulations that include an exemption for SSM events, akin to the exemption in 40 CFR 63.6(f)(1) and 40 CFR 63.6(h)(1). The DC Circuit vacated the SSM exemption in 40 CFR 63.6(f)(1) and 40 CFR 63.6(h)(1), and we are proposing to remove similar language in this rule. In addition, we are proposing to remove the parenthetical language excluding periods of startup, shutdown or malfunction from excess emissions calculations contained within 40 CFR 63.443(e) and 40 CFR 63.459(b)(11)(ii) of this rule, because this language is inconsistent with *Sierra Club* v. *EPA.* The EPA is further proposing to eliminate the parenthetical language in 40 CFR 63.446(g) that includes startup, shutdown and malfunction periods in excess emissions calculations because retaining such language may incorrectly suggest that other excess emissions provisions such as 40 CFR 63.443(e) that lack such language allow exclusion of such periods in excess emissions calculations. In sum, retaining the parenthetical concerning startup, shutdown and malfunction periods in 40 CFR 63.443(g) is unnecessary and may create confusion.

We are also proposing several revisions to Table 1 (the General Provisions Applicability table). For example, we are proposing to eliminate the incorporation of the General Provisions' requirement that the source develop a SSM plan. We are further proposing to eliminate or revise certain recordkeeping and reporting that related to the SSM exemption. The EPA has attempted to ensure that we have not included in the proposed regulatory language any provisions that are inappropriate, unnecessary or

[48] Additional details on our kraft condensate technology review and cost analysis are provided in the memoranda, *Summary of Kraft Condensate Control Technology Review,* and *Costs and Environmental and Energy Impacts for Subpart S Risk and Technology Review,* in the docket for this proposed action.

redundant in the absence of the SSM exemption. We are specifically seeking comment on whether there are any such provisions that we have inadvertently incorporated or overlooked.

Finally, we are requesting comment on whether to remove, or modify, the excess emissions provisions for LVHC, HVLC and steam strippers in 40 CFR 63.443(e), 40 CFR 63.446(g), and 40 CFR 63.459(b)(11)(ii). The basis for these provisions is discussed in the preamble to the final rule at 63 FR 18529–18530, April 15, 1998. The basis for these excess emission allowances (discussed in the preamble to the final rule at 63 FR 18529–18530) was to approximate the level of backup control that exists at the best-performing mills and the associated periods of time when no control device is available. For LVHC systems, one percent of the operating hours on a semi-annual basis was determined to represent the best performers; for HVLC systems four percent was established to account for downtime due to flow balancing problems and unpredictable pressure changes inherent in the HVLC system; and for steam stripper systems ten percent was established to account for activities such as stripper tray damage or plugging, efficiency losses in the stripper due to contamination of condensate with fiber or black liquor, steam supply downtime, and combustion control downtime. We request comment on whether these provisions should be removed or modified in the final rule, as the provisions create time periods during which a source does not have to comply with a CAA section 112-compliant standard, which we believe is arguably at odds with Sierra Club.

We specifically solicit comment on a variety of issues and request that commenters provide data and information supporting their views. We first request comment and information on the circumstances under which such provisions have been relied upon in the past to remain in compliance with subpart S, and whether such circumstances meet the definitions of startup, shutdown or malfunction (as defined in 40 CFR 63.2), and if they do not, why not. We also seek information on the frequency with which these provisions are used. The annual emissions rates used in risk modeling for today's proposal incorporated emissions that occur during excess emissions periods and the EPA has already collected information on the use of backup controls through Part I of the ICR. We are thus interested in additional information that distinguishes between routine releases for which a source may be using the excess allowance provisions and malfunction events. We request information on: (1) The typical reasons for the releases, including a description of the nature and cause of the release, (2) the frequency of the releases, (3) the duration of such releases, (4) the estimated amount of emissions that occurs during such periods, (5) any work practices employed during excess emissions periods to reduce emissions, and (6) any procedures currently used to monitor such releases. Further, the EPA is interested in knowing whether the excess emissions periods are necessary for technological reasons (*e.g.,* equipment or operational), and the amount of time needed to switch between routine controls and any available backup controls (and whether venting is necessary during these times for technological reasons).

As an alternative to removing the excess allowance provisions, we request comment on whether such provisions should be revised by, for example, (1) narrowing the provisions (such as limiting the circumstances to which they apply), (2) setting an alternative numerical emission limit during these periods, or (3) setting a work practice standard during such periods consistent with the requirements of CAA section 112(h). Accordingly, we are requesting comments that would provide us information to evaluate these options, including sufficient supporting emissions data or other information. We also request comment on whether the current standard should be applied over a longer averaging period, and whether a longer averaging period would obviate the need for excess emissions periods. To the extent that any person suggests that a work practice is appropriate, they will need to provide support for the conclusion that work practices are permissible under section 112(h) because a numerical standard is ''not feasible'' within the meaning of section 112(h)(2). This should include cost information regarding monitoring, testing and controlling of emissions from the sources during these periods. Finally, to the extent that any person suggests that the excess emissions periods should be retained in some form, they should explain how the revisions that they are suggesting are consistent with the CAA.

In proposing the standards in this rule, the EPA has taken into account startup and shutdown periods and is not proposing a different standard for those periods. Nothing in the record suggests that the operations (and attendant emissions) are significantly different during startup or shutdown than during normal operation.

Periods of startup, normal operations and shutdown are all predictable and routine aspects of a source's operations. However, by contrast, malfunction is defined as a ''sudden, infrequent, and not reasonably preventable failure of air pollution control and monitoring equipment, process equipment or a process to operate in a normal or usual manner * * *'' (40 CFR 63.2). The EPA has determined that CAA section 112 does not require that emissions that occur during periods of malfunction be factored into development of CAA section 112 standards. Under section 112, emissions standards for new sources must be no less stringent than the level ''achieved'' by the best controlled similar source and for existing sources generally must be no less stringent than the average emission limitation ''achieved'' by the best performing 12 percent of sources in the category. There is nothing in section 112 that directs the agency to consider malfunctions in determining the level ''achieved'' by the best performing or best controlled sources when setting emission standards. Moreover, while the EPA accounts for variability in setting emissions standards consistent with the section 112 case law, nothing in that case law requires the agency to consider malfunctions as part of that analysis. Section 112 uses the concept of ''best controlled'' and ''best performing'' unit in defining the level of stringency that section 112 performance standards must meet. Applying the concept of ''best controlled'' or ''best performing'' to a unit that is malfunctioning presents significant difficulties, as malfunctions are sudden and unexpected events.

Further, accounting for malfunctions would be difficult, if not impossible, given the myriad different types of malfunctions that can occur across all sources in the category and given the difficulties associated with predicting or accounting for the frequency, degree and duration of various malfunctions that might occur. As such, the performance of units that are malfunctioning is not ''reasonably'' foreseeable. See, *e.g., Sierra Club* v. *EPA,* 167 F. 3d 658, 662 (DC Cir. 1999) (The EPA typically has wide latitude in determining the extent of data-gathering necessary to solve a problem. We generally defer to an agency's decision to proceed on the basis of imperfect scientific information, rather than to ''invest the resources to conduct the perfect study.''). See also, *Weyerhaeuser* v. *Costle,* 590 F.2d 1011, 1058 (DC Cir. 1978) (''In the nature of things, no general limit, individual permit, or even

any upset provision can anticipate all upset situations. After a certain point, the transgression of regulatory limits caused by 'uncontrollable acts of third parties,' such as strikes, sabotage, operator intoxication or insanity, and a variety of other eventualities, must be a matter for the administrative exercise of case-by-case enforcement discretion, not for specification in advance by regulation.''). In addition, the goal of a best controlled or best performing source is to operate in such a way as to avoid malfunctions of the source, and accounting for malfunctions could lead to standards that are significantly less stringent than levels that are achieved by a well-performing non-malfunctioning source. The EPA's approach to malfunctions is consistent with section 112 and is a reasonable interpretation of the statute.

In the event that a source fails to comply with the applicable CAA section 112(d) standards as a result of a malfunction event, the EPA would determine an appropriate response based on, among other things, the good faith efforts of the source to minimize emissions during malfunction periods, including preventative and corrective actions, as well as root cause analyses to ascertain and rectify excess emissions. The EPA would also consider whether the source's failure to comply with the CAA section 112(d) standard was, in fact, ''sudden, infrequent, not reasonably preventable'' and was not instead ''caused in part by poor maintenance or careless operation.'' 40 CFR 63.2 (definition of malfunction).

Finally, the EPA recognizes that even equipment that is properly designed and maintained can sometimes fail and that such failure can sometimes cause an exceedance of the relevant emission standard. (See, *e.g., State Implementation Plans: Policy Regarding Excessive Emissions During Malfunctions, Startup, and Shutdown* (Sept. 20, 1999); *Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions* (Feb. 15, 1983)). The EPA is therefore proposing to add to the rule an affirmative defense to civil penalties for exceedances of emission limits that are caused by malfunctions. See § 63.456 for this proposed addition (and see § 63.441 for a definition of ''affirmative defense'' that means, in the context of an enforcement proceeding, a response or defense put forward by a defendant, regarding which the defendant has the burden of proof and the merits of which are independently and objectively evaluated in a judicial or administrative proceeding.). We also are proposing other regulatory provisions to specify the elements that are necessary to establish this affirmative defense; the source must prove by a preponderance of the evidence that it has met all of the elements set forth in § 63.456. (See 40 CFR 22.24). The criteria ensure that the affirmative defense is available only where the event that causes an exceedance of the emission limit meets the narrow definition of malfunction in 40 CFR 63.2 (sudden, infrequent, not reasonable preventable and not caused by poor maintenance and or careless operation). For example, to successfully assert the affirmative defense, the source must prove by a preponderance of the evidence that excess emissions ''[w]ere caused by a sudden, infrequent, and unavoidable failure of air pollution control and monitoring equipment, process equipment, or a process to operate in a normal or usual manner * * *.'' The criteria also are designed to ensure that steps are taken to correct the malfunction, to minimize emissions in accordance with § 63.456 and to prevent future malfunctions. For example, the source must prove by a preponderance of the evidence that ''[r]epairs were made as expeditiously as possible when the applicable emission limitations were being exceeded * * *'' and that ''[a]ll possible steps were taken to minimize the impact of the excess emissions on ambient air quality, the environment and human health * * *.'' In any judicial or administrative proceeding, the Administrator may challenge the assertion of the affirmative defense and, if the respondent has not met its burden of proving all of the requirements in the affirmative defense, appropriate penalties may be assessed in accordance with section 113 of the CAA (see also 40 CFR 22.27).

Specifically, we are proposing the following changes to the rule related to SSM:

(1) Revise 40 CFR 63.443(e), 63.446(g), and 63.459(b)(11)(ii) to eliminate reference to periods of SSM;

(2) Revise 40 CFR 63.453(q) to incorporate the general duty from 40 CFR 63.6(e)(1)(i) to minimize emissions;

(3) Add 40 CFR 63.454(g), and 40 CFR 63.455(g) to require reporting and recordkeeping requirements associated with periods of malfunction;

(4) Add 40 CFR 63.456 (formerly reserved) to include an affirmative defense to civil penalties for exceedances of emissions limits caused by malfunctions, as well as criteria for establishing the affirmative defense;

(5) Add 40 CFR 63.457(o) to specify the conditions for performance tests; and

(6) Revise Table 1 to specify that 40 CFR 63.6 (e)(1)(i) and (ii), 63.6(e)(3), 63.6(f)(1); 40 CFR 63.7(e)(1), 40 CFR 63.8(c)(1)(i) and (iii), and the last sentence of 63.8(d)(3); 40 CFR 63.10(b)(2)(i),(ii), (iv), and (v); 40 CFR 63.10(c)(10), (11), and (15); and, 40 CFR 63.10(d)(5) of the General Provisions do not apply.

We have attempted to ensure that we have not included in the proposed regulatory language any provisions that are inappropriate, unnecessary or redundant in the absence of the SSM exemption. We are specifically seeking comment on whether there are any such provisions that we have inadvertently incorporated or overlooked.

2. Repeat Testing

As part of an ongoing effort to improve compliance with various federal air emission regulations, we reviewed the testing and monitoring requirement of subpart S and are proposing the following change.

We are proposing to require repeat air emissions performance testing once every 5 years for facilities complying with the standards for kraft, soda and semi-chemical pulping vent gases (§ 63.443(a)); sulfite processes (§ 63.444); and bleaching systems (§ 63.445). Repeat performance tests are already required by permitting authorities for some facilities.[49] Further, we believe that requiring periodic repeat performance tests will help to ensure that control systems are properly maintained over time, thereby reducing the potential for acute emissions episodes.[50]

With today's proposal, repeat air emissions testing would be required for mills complying with the kraft condensates standards in § 63.446 using a steam stripper (or other equipment serving the same function) since such equipment is, by definition, part of the LVHC system.

Quarterly sampling for four HAPs (acetaldehyde, methanol, MEK and propionaldehyde) is currently required for biological treatment systems to demonstrate compliance with the kraft condensates standards in § 63.446(e)(2). We believe this sampling sufficiently demonstrates compliance with the revised emissions standard we are proposing for kraft condensates. However, we are interested in receiving comment on the sampling and reporting methods used for these quarterly tests. We note that MEK was removed from the HAP list in 2005.[51] However, the subpart S equations were derived considering inclusion of MEK. We

[49] Located in 11 states.

[50] For information on the cost associated with the proposed repeat testing requirement, see the memorandum in the docket titled, *Costs and Environmental and Energy Impacts for Subpart S Risk and Technology Review.*

[51] See 70 FR 75047, December 19, 2005.

request comment on the appropriateness of re-deriving these equations to eliminate MEK for the final rule.

We are not proposing repeat air emissions testing for facilities complying with the CCA standards due to the complexity of this compliance approach (*e.g.,* comparison to baseline emissions calculations) and the fact that it often involves both air and/or liquid sampling depending on the CCA technology being used. Nevertheless, we are requesting comment on whether repeat air emissions testing is appropriate (or overly burdensome) for the CCA.

3. Electronic Reporting

The EPA must have performance test data to conduct effective reviews of CAA sections 112 and 129 standards, as well as for many other purposes including compliance determinations, emissions factor development and annual emissions rate determinations. In conducting these required reviews, the EPA has found it ineffective and time consuming, not only for us, but also for regulatory agencies and source owners and operators, to locate, collect and submit performance test data because of varied locations for data storage and varied data storage methods. In recent years, though, stack testing firms have typically collected performance test data in electronic format, making it possible to move to an electronic data submittal system that would increase the ease and efficiency of data submittal and improve data accessibility.

Through this proposal, the EPA is presenting a step to increase the ease and efficiency of data submittal and improve data accessibility. Specifically, the EPA is proposing that owners and operators of pulp and paper facilities submit electronic copies of required performance test reports to the EPA's WebFIRE database. The WebFIRE database was constructed to store performance test data for use in developing emissions factors. A description of the WebFIRE database is available at *http://cfpub.epa.gov/oarweb/index.cfm?action=fire.main*.

As proposed above, data entry would be through an electronic emissions test report structure called the ERT. The ERT would be able to transmit the electronic report through the EPA's CDX network for storage in the WebFIRE database making submittal of data very straightforward and easy. A description of the ERT can be found at *http://www.epa.gov/ttn/chief/ert/ert_tool.html*.

The proposal to submit performance test data electronically to the EPA would apply only to those performance tests conducted using test methods that will be supported by the ERT. The ERT contains a specific electronic data entry form for most of the commonly used EPA reference methods. A listing of the pollutants and test methods supported by the ERT is available at *http://www.epa.gov/ttn/chief/ert/ert_tool.html*. We believe that industry would benefit from this proposed approach to electronic data submittal. Having these data, the EPA would be able to develop improved emissions factors, make fewer information requests and promulgate better regulations.

One major advantage of the proposed submittal of performance test data through the ERT is a standardized method to compile and store much of the documentation required to be reported by this rule. Another advantage is that the ERT clearly states what testing information would be required. Another important proposed benefit of submitting these data to the EPA at the time the source test is conducted is that it should substantially reduce the effort involved in data collection activities in the future. When the EPA has performance test data in hand, there will likely be fewer or less substantial data collection requests in conjunction with prospective required residual risk assessments or technology reviews. This would result in a reduced burden on both affected facilities (in terms of reduced manpower to respond to data collection requests) and the EPA (in terms of preparing and distributing data collection requests and assessing the results).

State, local and tribal agencies could also benefit from more streamlined and accurate review of electronic data submitted to them. The ERT would allow for an electronic review process rather than a manual data assessment, making review and evaluation of the source provided data and calculations easier and more efficient. Finally, another benefit of the proposed data submittal to WebFIRE electronically is that these data would greatly improve the overall quality of existing and new emissions factors by supplementing the pool of emissions test data for establishing emissions factors and by ensuring that the factors are more representative of current industry operational procedures. A common complaint heard from industry and regulators is that emissions factors are outdated or not representative of a particular source category. With timely receipt and incorporation of data from most performance tests, the EPA would be able to ensure that emissions factors, when updated, represent the most current range of operational practices. In summary, in addition to supporting regulation development, control strategy development and other air pollution control activities, having an electronic database populated with performance test data would save industry, state, local, tribal agencies and the EPA significant time, money and effort while also improving the quality of emissions inventories and, as a result, air quality regulations.

Records must be maintained in a form suitable and readily available for expeditious review, according to § 63.10(b)(1). Electronic recordkeeping and reporting is available for many records, and is the form considered most suitable for expeditious review if available. Electronic recordkeeping and reporting is encouraged in this proposal, and some records and reports are required to be kept in electronic format. Records required to be maintained electronically include the output of continuous monitors and the output of the bag leak detection systems. Additionally, standard operating procedures for the bag leak detection system and fugitive emissions control are required to be submitted to the Administrator for approval in electronic format.

4. Other

The following lists additional minor changes to the subpart S NESHAP and minor changes to the part 63 General Provisions that we are proposing. This list includes proposed rule changes that address editorial and other corrections.

(1) Revise 40 CFR 63.457(b)(1) to specify part 60, appendix A–1 for Method 1 or 1A;

(2) Revise 40 CFR 63.457(b)(3) to specify part 60, appendix A–1 for Method 2, 2A, 2C, or 2D;

(3) Revise 40 CFR 63.457(b)(5)(i) to include four additional test methods—Method 320 of part 63, appendix A; Method 18 of part 60, appendix A–6; ASTM D6420–99; and ASTM D6348–03—for measuring methanol emissions from pulp and paper processes;

(4) Revise 40 CFR 63.457(b)(5)(ii) to specify part 60, appendix A–8 for Method 26A;

(5) Revise 40 CFR 63.457(d) to specify part 60, appendix A–7 for Method 21; and

(6) Revise 40 CFR 63.457(k)(1) to specify part 60, appendix A–2 for Method 3A or 3B, and include ASME PTC 19.10—Part 10 as an alternative to Method 3B;

(7) Revise 40 CFR 63.457(c)(3)(ii) to replace NCASI Method DI/MEOH–94.02 with the more recent version of this method, NCASI Method DI/MEOH–94.03;

(8) Add 40 CFR 63.14(f)(5) to incorporate by reference NCASI Method DI/MEOH–94.03; and

(9) Revise 40 CFR 63.14(i)(1) to incorporate by reference ANSI/ASME PTC 19.10–1981.

(10) Revise 40 CFR 63.14(b)(28) and (54) to incorporate by reference ASTM D6420–99 and ASTM D6348–03, respectively.

E. Compliance Dates

We are proposing that existing facilities must comply with all of the requirements in this action (other than affirmative defense provisions and electronic reporting, which are effective upon promulgation of the final rule) no later than 3 years after the effective date of this rule. All new or reconstructed facilities must comply with all requirements in this rule upon startup.

V. Summary of Cost, Environmental and Economic Impacts

A. What are the affected sources?

The affected source for kraft, soda, sulfite or semi-chemical pulping processes is the total of all HAP emission points in the pulping and bleaching systems. The affected source for mechanical, secondary or non-wood pulping processes is the total of all HAP emission points in the bleaching system.

B. What are the air quality impacts?

Under the proposed amendments, an estimated 15 mills would have to upgrade their steam strippers or biological treatment systems to comply with the more stringent kraft condensates standard. The current proposal is estimated to reduce HAP emissions by approximately 4,000 tpy.

The proposed amendments would require an estimated 114 mills to conduct repeat testing for pulping and bleaching operations and all 171 major sources in the category to operate without the SSM exemption. We were unable to quantify the specific emissions reductions associated with repeat emissions testing or eliminating the SSM exemption and excess emissions allowance. However, repeat testing would provide incentive for facilities to maintain their control systems and make periodic adjustments to ensure peak performance, thereby reducing emissions and the potential for periodic episodes of acute risk. Eliminating the SSM exemption would provide an incentive for facilities to minimize emissions during periods of SSM.

C. What are the cost impacts?

Under the proposed amendments, pulp and paper mills are expected to incur costs to upgrade their steam strippers or biological treatment systems to comply with the more stringent kraft condensates standard. These mills would also incur costs to conduct repeat testing and record malfunctions in support of the new affirmative defense in the rule. The total nationwide annual costs associated with these new requirements is $6.2 million.

D. What are the economic impacts?

The EPA performed an EIA of the proposed rule. The EIA, which documents the data sources and methods used and provides detailed results, can be found in the docket for this proposed action. This section provides an overview of key results.

The EPA performed a series of single-market partial-equilibrium analyses of national pulp and paper product markets to estimate the economic consequences of the proposal. The models predict how the regulatory program might affect prices and quantities for 10 paper and paperboard products that, aggregated, constitute the entire production of the papermaking industry. The EPA also conducted an economic welfare analysis that estimated the consumer and producer surplus changes associated with the regulatory program. The welfare analysis identifies how the regulatory costs are distributed across two broad classes of stakeholders: consumers and producers.

The market analysis found that the proposal is likely to induce minimal changes in the average national price of paper and paperboard products. Paper and paperboard product prices are predicted to increase less than 0.01 percent on average, while production levels decrease less than 0.01 percent on average, as a result of the proposal. The partial equilibrium models predict that consumers will see reductions in economic welfare of about $3.3 million as the result of higher prices and reduced consumption. Although producers' welfare losses are mitigated to some degree by slightly higher prices, market conditions limit their ability to pass on all of the compliance costs. As a result, producers are also predicted to experience a loss in economic welfare of about $2.9 million.

The EPA performed a screening analysis for impacts on small businesses by comparing estimated annualized engineering compliance costs at the company-level to company sales. The screening analysis found that the ratio of compliance cost to company revenue falls below 1 percent for the three small companies that are likely to be affected by the proposal. Based on this analysis, the EPA presumes there is no SISNOSE arising from the proposed NESHAP amendments.

Additionally, the EPA estimated the annual labor required to comply with the requirements of the proposal. To do this, the EPA first estimated the labor required for emission control equipment operation and maintenance, then converted this number to FTEs by dividing by 2,080 (40 hours per week multiplied by 52 weeks). The annual labor requirement to comply with the proposal is estimated at about five full-time-equivalent employees. The EPA notes that this type of FTE estimate cannot be used to make assumptions about the specific number of people involved or whether new jobs are created for new employees.

While a series of partial equilibrium models was used to analyze the economic impacts of this proposal, the EPA notes that it is currently developing the ISIS model for the United States pulp and paper industry. When completed, the ISIS model for the pulp and paper industry will be a dynamic engineering-economic model that facilitates analysis of emissions reduction strategies for multiple pollutants, while taking into account plant-level economic and technical factors, such as the type of mill, associated capacity, location, cost of production, applicable controls and costs. By considering various emissions reduction strategies, the model, when completed, will provide information on optimal industry operation and determine the most cost-effective controls to meet the demand for pulp and paper products and the emissions reduction requirements for a given time period of interest.

E. What are the benefits?

The proposed rule is expected to result in a reduction of approximately 4,000 tpy of HAP. We have not quantified the monetary benefits associated with these reductions.

VI. Request for Comments

We are soliciting comments on all aspects of this proposed action. In addition to general comments on this proposed action, we are also interested in any additional data that may help to reduce the uncertainties inherent in the risk assessments and other analyses. We are specifically interested in receiving corrections to the site-specific emissions profiles used for risk modeling. Such data should include supporting documentation in sufficient detail to allow characterization of the quality and representativeness of the data or information. Section VII of this preamble provides more information on submitting data.

VII. Submitting Data Corrections

The site-specific emissions profiles used in the source category risk analyses are available for download on the RTR web page at: *http://www.epa.gov/ttn/atw/rrisk/rtrpg.html.* The data files include detailed information for each

HAP emissions release point for each facility included in the source category.

If you believe that the data are not representative or are inaccurate, please identify the data in question, provide your reason for concern and provide any ''improved'' data that you have, if available. When you submit data, we request that you provide documentation of the basis for the revised values to support your suggested changes. To submit comments on the data downloaded from the RTR web page, complete the following steps:

1. Within this downloaded file, enter suggested revisions to the data fields appropriate for that information. The data fields that may be revised include the following:

Data element	Definition
Control Measure	Are control measures in place? (yes or no).
Control Measure Comment	Select control measure from list provided, and briefly describe the control measure.
Delete	Indicate here if the facility or record should be deleted.
Delete Comment	Describes the reason for deletion.
Emissions Calculation Method Code For Revised Emissions.	Code description of the method used to derive emissions. For example, CEMS, material balance, stack test, *etc.*
Emissions Process Group	Enter the general type of emissions process associated with the specified emissions point.
Fugitive Angle	Enter release angle (clockwise from true North); orientation of the y-dimension relative to true North, measured positive for clockwise starting at 0 degrees (maximum 89 degrees).
Fugitive Length	Enter dimension of the source in the east-west (x-) direction, commonly referred to as length (ft).
Fugitive Width	Enter dimension of the source in the north-south (y-) direction, commonly referred to as width (ft).
Malfunction Emissions	Enter total annual emissions due to malfunctions (tpy).
North American Datum	Enter datum for latitude/longitude coordinates (NAD27 or NAD83); if left blank, NAD83 is assumed.
Process Comment	Enter general comments about process sources of emissions.
REVISED Address	Enter revised physical street address for MACT facility here.
REVISED City	Enter revised city name here.
REVISED County Name	Enter revised county name here.
REVISED Emissions Release Point Type.	Enter revised Emissions Release Point Type here.
REVISED End Date	Enter revised End Date here.
REVISED Exit Gas Flow Rate.	Enter revised Exit Gas Flowrate here (ft^3/sec).
REVISED Exit Gas Temperature.	Enter revised Exit Gas Temperature here (°F).
REVISED Exit Gas Velocity	Enter revised Exit Gas Velocity here (ft/sec).
REVISED Facility Category Code.	Enter revised Facility Category Code here, which indicates whether facility is a major or area source.
REVISED Facility Name	Enter revised Facility Name here.
REVISED Facility Registry Identifier.	Enter revised Facility Registry Identifier here, which is an ID assigned by the EPA Facility Registry System.
REVISED HAP Emissions Performance Level Code.	Enter revised HAP Emissions Performance Level here.
REVISED Latitude	Enter revised Latitude here (decimal degrees).
REVISED Longitude	Enter revised Longitude here (decimal degrees).
REVISED MACT Code	Enter revised MACT Code here.
REVISED Pollutant Code	Enter revised Pollutant Code here.
REVISED Routine Emissions	Enter revised routine emissions value here (tpy).
REVISED SCC Code	Enter revised SCC Code here.
REVISED Stack Diameter	Enter revised Stack Diameter here (ft).
REVISED Stack Height	Enter revised Stack Height here (ft).
REVISED Start Date	Enter revised Start Date here.
REVISED State	Enter revised State here.
REVISED Tribal Code	Enter revised Tribal Code here.
REVISED Zip Code	Enter revised Zip Code here.
Shutdown Emissions	Enter total annual emissions due to shutdown events (tpy).
Stack Comment	Enter general comments about emissions release points.
Startup Emissions	Enter total annual emissions due to startup events (tpy).
Year Closed	Enter date facility stopped operations.

2. Fill in the commenter information fields for each suggested revision (*i.e.,* commenter name, commenter organization, commenter email address, commenter phone number and revision comments).

3. Gather documentation for any suggested emissions revisions (*e.g.,* performance test reports, material balance calculations).

4. Send the entire downloaded file with suggested revisions in Microsoft® Access format and all accompanying documentation to Docket ID Number EPA–HQ–OAR–2007–0544 (through one of the methods described in the ADDRESSES section of this preamble)..

5. If you are providing comments on a facility, you need only submit one file for that facility, which should contain all suggested changes for all sources at that facility. We request that all data revision comments be submitted in the form of updated Microsoft® Access files, which are provided on the RTR web page at: *http://www.epa.gov/ttn/atw/rrisk/rtrpg.html.* (**Note:** If you wish to compare your Pulp and paper ICR Part II submittal to the dataset available on the RTR web page, then you may find it useful to refer to the memorandum in the docket titled, ''*Inputs to the Pulp and Paper Industry October 2011 Residual Risk Modeling,*'' since this memorandum describes how the Part II

data were standardized for regulatory review.)

VIII. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is a ''significant regulatory action'' because it raises novel legal and policy issues. Accordingly, the EPA submitted this action to OMB for review under Executive Order 12866 and 13563 (76 FR 3821, January 21, 2011), and any changes made in response to OMB recommendations have been documented in the docket for this action.

B. Paperwork Reduction Act

The information collection requirements in this proposed rule have been submitted for approval to OMB under the PRA, 44 U.S.C. 3501 *et seq.* The ICR document prepared by the EPA has been assigned EPA ICR number 2452.01. The information collection requirements are not enforceable until OMB approves them. The information requirements are based on notification, recordkeeping and reporting requirements in the NESHAP General Provisions (40 CFR part 63, subpart A), which are mandatory for all operators subject to national emissions standards. These recordkeeping and reporting requirements are specifically authorized by CAA section 114 (42 U.S.C. 7414). All information submitted to the EPA pursuant to the recordkeeping and reporting requirements for which a claim of confidentiality is made is safeguarded according to agency policies set forth in 40 CFR part 2, subpart B.

We are proposing new paperwork requirements to the pulp and paper source category in the form of repeat testing for selected process equipment, as described in 40 CFR 63.457(a)(2) and recordkeeping of malfunctions, as described in 40 CFR 63.454(g) (conducted in support of the affirmative defense provisions, as described in 40 CFR 63.456). More specifically, we are proposing the addition of stack testing every 5 years for total HAP for chemical pulping operations and bleaching operations at pulp and paper mills.

For this proposed rule, the EPA is adding affirmative defense to the estimate of burden in the ICR. To provide the public with an estimate of the relative magnitude of the burden associated with an assertion of the affirmative defense position adopted by a source, the EPA has provided administrative adjustments to this ICR to show what the notification, recordkeeping and reporting requirements associated with the assertion of the affirmative defense might entail. The EPA's estimate for the required notification, reports and records for any individual incident, including the root cause analysis, totals $3,258 and is based on the time and effort required of a source to review relevant data, interview plant employees and document the events surrounding a malfunction that has caused an exceedance of an emissions limit. The estimate also includes time to produce and retain the record and reports for submission to the EPA. The EPA provides this illustrative estimate of this burden because these costs are only incurred if there has been a violation and a source chooses to take advantage of the affirmative defense.

Given the variety of circumstances under which malfunctions could occur, as well as differences among sources' operation and maintenance practices, we cannot reliably predict the severity and frequency of malfunction-related excess emissions events for a particular source. It is important to note that the EPA has no basis currently for estimating the number of malfunctions that would qualify for an affirmative defense. Current historical records would be an inappropriate basis, as source owners or operators previously operated their facilities in recognition that they were exempt from the requirement to comply with emissions standards during malfunctions. Of the number of excess emissions events reported by source operators, only a small number would be expected to result from a malfunction (based on the definition above), and only a subset of excess emissions caused by malfunctions would result in the source choosing to assert the affirmative defense. Thus we believe the number of instances in which source operators might be expected to avail themselves of the affirmative defense will be extremely small. For this reason, we estimate no more than 2 or 3 such occurrences for all sources subject to subpart S over the 3-year period covered by this ICR. We expect to gather information on such events in the future and will revise this estimate as better information becomes available.

The estimated recordkeeping and reporting burden associated with subpart S after the effective date of the proposed rule is estimated to be 52,300 labor hours at a cost of $4.94 million per year, and total non-labor capital and O&M costs of $841,000 per year. This estimate includes reporting costs, such as reading and understanding the rule requirements, conducting required activities (*e.g.,* stack testing, inspections), and preparing notifications and compliance reports and recordkeeping costs associated with malfunctions, monitoring and inspections. The total burden for the federal government is estimated to be 6,870 hours per year at a total labor cost of $310,000 per year. Burden is defined at 5 CFR 1320.3(b).

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for the EPA's regulations in 40 CFR are listed in 40 CFR part 9. When this ICR is approved by OMB, the agency will publish a technical amendment to 40 CFR part 9 in the **Federal Register** to display the OMB control numbers for the approved information collection requirements contained in the final rule.

To comment on the agency's need for this information, the accuracy of the provided burden estimates and any suggested methods for minimizing respondent burden, the EPA has established a public docket for this rule which includes this ICR, under Docket ID Number EPA–HQ–OAR–2007–0544. Submit any comments related to the ICR to the EPA and OMB. See **ADDRESSES** section at the beginning of this notice for where to submit comments to the EPA. Send comments to OMB at the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street NW., Washington, DC 20503, Attention: Desk Office for the EPA. Since OMB is required to make a decision concerning the ICR between 30 and 60 days after December 27, 2011, a comment to OMB is best assured of having its full effect if OMB receives it by January 26, 2012. The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal.

C. Regulatory Flexibility Act

The RFA generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act, or any other statute, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations and small governmental jurisdictions.

For purposes of assessing the impacts of this proposed rule on small entities, small entity is defined as: (1) A small business as defined by the SBA's regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field. For this source category, which has the general NAICS code 322 (*i.e.,* Paper Manufacturing), the SBA small business size standard is 500 to 750 employees (depending on the specific NAICS code) according to the SBA small business standards definitions. We have estimated the cost impacts of the proposed rule and have determined that the impacts do not constitute a significant economic impact on a substantial number of small entities.

After considering the economic impacts of this proposed rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. (See the EIA in the docket for this proposed rule.) Only three of the companies affected are considered small entities per the definition provided in this section. We estimate that this proposed action will not have a significant economic impact on those three companies. The impact of this proposed action will be an annualized compliance cost of less than 1 percent of each company's revenues.

Although this proposed rule will not have a significant economic impact on a substantial number of small entities, the EPA nonetheless has tried to reduce the impact of this rule on small entities. The proposed repeat testing requirement was established in a way that minimizes the costs for testing and reporting while still providing the agency the necessary information needed to ensure continuous compliance with the proposed standards. The proposed malfunction recordkeeping requirement was designed to provide all pulp and paper companies, including small entities, with a means of supporting an affirmative defense in the event of an exceedance occurring during a malfunction.

We continue to be interested in the potential impacts of the proposed rule on small entities and welcome comments on issues related to such impacts.

D. Unfunded Mandates Reform Act

This proposed rule does not contain a federal mandate that may result in expenditures of $100 million or more for state, local and tribal governments, in the aggregate or the private sector in any 1 year. This proposed rule is not expected to impact state, local or tribal governments. The nationwide annual cost of this proposed rule for affected sources is $6.2 million. Thus, this rule is not subject to the requirements of sections 202 and 205 of the UMRA.

This rule is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. This rule will not apply to such governments and will not impose any obligations upon them.

E. Executive Order 13132: Federalism

This proposed rule does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. None of the facilities subject to this action are owned or operated by state governments, and, nothing in this proposal will supersede state regulations. The burden to the respondents and the states is less than $6.2 million for the entire source category. Thus, Executive Order 13132 does not apply to this proposed rule.

In the spirit of Executive Order 13132, and consistent with the EPA policy to promote communications between the EPA and state and local governments, the EPA specifically solicits comment on this proposed rule from state and local officials.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This proposed rule does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). It will not have substantial direct effect on tribal governments, on the relationship between the federal government and Indian tribes, or on the distribution of power and responsibilities between the federal government and Indian tribes, as specified in Executive Order 13175. Thus, Executive Order 13175 does not apply to this action. However, the EPA did outreach and consultation on this rule. The EPA presented this information to the tribes prior to proposal of this rule via a call with the National Tribal Air Association. In addition, the EPA presented the information on the sources and the industry at the National Tribal Forum in Spokane Washington. The EPA also offered consultation by letters sent to all tribal leaders. We held that consultation with the Nez Perce, Forest County Potowatomi and Leech Lake Band of Ojibewa on October 6, 2011.

The EPA specifically solicits additional comment on this proposed action from tribal officials.

G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

This proposed rule is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997) because it is not economically significant as defined in Executive Order 12866, and because the agency does not believe the environmental health risks or safety risks addressed by this action present a disproportionate risk to children. This action's health and risk assessments are contained in sections III and IV of this preamble.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution or Use

This action is not a ''significant energy action'' as defined under Executive Order 13211 (66 FR 28355, May 22, 2001), because it is not likely to have a significant adverse effect on the supply, distribution or use of energy. This action will not create any new requirements for sources in the energy supply, distribution or use sectors.

I. National Technology Transfer and Advancement Act

Section 12(d) of the NTTAA, Public Law No. 104–113, (15 U.S.C. 272 note), directs the EPA to use VCS in its regulatory activities, unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* materials specifications, test methods, sampling procedures and business practices) that are developed or adopted by VCS bodies. The NTTAA directs the EPA to provide Congress, through OMB, explanations when the agency decides not to use available and applicable VCS.

This proposed rulemaking involves technical standards. The EPA proposes to use three VCS in this proposed rule. One VCS, ASME PTC 19.10–1981, ''Flue and Exhaust Gas Analyses,'' is cited in this proposed rule for its manual method of measuring the content of the exhaust gas as an acceptable alternative to EPA Method 3B of appendix A–2. This standard is available at *http://*

www.asme.org or by mail at the American Society of Mechanical Engineers (ASME), P.O. Box 2900, Fairfield, NJ 07007–2900; or at Global Engineering Documents, Sales Department, 15 Inverness Way East, Englewood, CO 80112.

The VCS, ASTM D6420–99 (2010), ''Test Method for Determination of Gaseous Organic Compounds by Direct Interface Gas Chromatography/Mass Spectrometry'' is cited as an acceptable alternative to EPA Method 18. Also, ASTM D6348–03 (2010), ''Test Method for Determination of Gaseous Compounds by Extractive Direct Interface Fourier Transform (FTIR) Spectroscopy,'' was determined to be an acceptable alternative to EPA Method 320. The EPA Methods 18 and 320 are proposed to be added as alternatives to EPA Method 308 for measurement of methanol emissions. These methods are available for purchase from ASTM, 100 Barr Harbor Drive, Post Office Box C700, West Conshohocken, PA 19428–2959; or ProQuest, 300 North Zeeb Road, Ann Arbor, MI 48106.

While the EPA has identified another 14 VCS as being potentially applicable to this proposed rule, we have decided not to use these VCS in this rulemaking. The use of these VCS would be impractical because they do not meet the objectives of the standards cited in this rule. See the docket for this proposed rule for the reasons for these determinations.

Under 40 CFR 63.7(e)(2)(ii) and (f) and 63.8(f) of the NESHAP General Provisions, a source may apply to the EPA for permission to use alternative test methods or alternative monitoring requirements in place of any required testing methods, performance specifications, or procedures in the final rule and any amendments.

The EPA welcomes comments on this aspect of the proposed rulemaking and, specifically, invites the public to identify potentially applicable VCS and to explain why such standards should be used in this regulation.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629, February 16, 1994) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low income populations in the United States.

EPA has determined that this proposed rule will not have disproportionately high and adverse human health or environmental effects on minority, low income, indigenous populations because it increases the level of environmental protection for all affected populations without having any disproportionately high and adverse human health or environmental effects on any population, including any minority, low income, or indigenous populations.

These proposed standards will improve public health and welfare, now and in the future, by reducing HAP emissions contributing to environmental and human health impacts. These reductions in HAP associated with the rule are expected to benefit all populations.

Additionally, the agency has reviewed this rule to determine if there is an overrepresentation of minority, low income, or indigenous populations near the sources such that they may face disproportionate exposure from pollutants that could be mitigated by this rulemaking. Although this analysis gives some indication of populations that may be exposed to levels of pollution that cause concern, it does not identify the demographic characteristics of the most highly affected individuals or communities.

The demographic data show that while most demographic categories are below, or within, 2 percentage points of national averages, the African-American population exceeds the national average by 3 percentage points (15 percent versus 12 percent), or +25 percent. The facility-level demographic analysis results are presented in the November 2011 memorandum titled *Review of Environmental Justice Impacts: Pulp and Paper,* a copy of which is available in the docket for this action (EPA–HQ–OAR–2007–0544).

The analysis of demographic data used proximity-to-a-source as a surrogate for exposure to identify those populations considered to be living near affected sources, such that they have notable exposures to current emissions from these sources. The demographic data for this analysis were extracted from the 2000 census data, which were provided to the EPA by the United States Census Bureau. Distributions by race are based on demographic information at the census block level, and all other demographic groups are based on the extrapolation of census block group level data to the census block level. The socio-demographic parameters used in the analysis included the following categories: Racial (White, African American, Native American, Other or Multiracial, and All Other Races); Ethnicity (Hispanic); and Other (Number of people below the poverty line, Number of people with ages between 0 and 18, Number of people with ages greater than or equal to 65, Number of people with no high school diploma).

In determining the aggregate demographic makeup of the communities near affected sources, the EPA focused on those census blocks within 3 miles of affected sources and determined the demographic composition (*e.g.,* race, income, *etc.*) of these census blocks and compared them to the corresponding compositions nationally. The radius of 3 miles (or approximately 5 km) is consistent with other demographic analyses focused on areas around potential sources.[52 53 54 55] In addition, air quality modeling experience has shown that the area within 3 miles of an individual source of emissions can generally be considered the area with the highest ambient air levels of the primary pollutants being emitted for most sources, both in absolute terms and relative to the contribution of other sources (assuming there are other sources in the area, as is typical in urban areas). While facility processes and fugitive emissions may have more localized impacts, the EPA acknowledges that because of various stack heights, there is the potential for dispersion beyond 3 miles. To the extent that any minority, low income, or indigenous subpopulation is disproportionately impacted by the current emissions as a result of the proximity of their homes to these sources, that subpopulation also stands to see increased environmental and health benefit from the emissions reductions called for by this rule.

List of Subjects in 40 CFR Part 63

Environmental protection, Air pollution control, Hazardous

[52] U.S. GAO (Government Accountability Office). *Demographics of People Living Near Waste Facilities.* Washington, DC: Government Printing Office; 1995.

[53] Mohai P, Saha R. ''Reassessing Racial and Socio-economic Disparities in Environmental Justice Research.'' *Demography.* 2006;43(2): 383–399.

[54] Mennis J. ''Using Geographic Information Systems to Create and Analyze Statistical Surfaces of Populations and Risk for Environmental Justice Analysis.'' *Social Science Quarterly,* 2002;83(1): 281–297.

[55] Bullard RD, Mohai P, Wright B, Saha R, *et al. Toxic Waste and Race at Twenty 1987–2007.* United Church of Christ. March, 2007.

substances, Reporting and recordkeeping requirements.

Dated: December 15, 2011.

Lisa P. Jackson,

Administrator.

For the reasons stated in the preamble, the Environmental Protection Agency proposes to amend Title 40, chapter I of the Code of Federal Regulations as follows:

PART 63—[AMENDED]

1. The authority citation for part 63 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart A—[Amended]

2. Section 63.14 is amended by adding paragraph (f)(5) and revising paragraphs (b)(28), (b)(54) and (i)(1) to read as follows:

§ 63.14 Incorporations by reference.

* * * * *

(b) * * *

(28) ASTM D6420–99 (Reapproved 2004), Standards Test Method for Determination of Gaseous Organic Compounds by Direct Interface Gas Chromatography-Mass Spectrometry, IBR approved for §§ 60.485(g)(5), 60.485a(g)(5), 63.457(b)(5)(i), 63.772(a)(1)(ii), 63.2354(b)(3)(i), 63.2354(b)(3)(ii), 63.2354(b)(3)(ii)(A), and 63.2351(b)(3)(ii)(B).

* * * * *

(54) ASTM D6348–03, Standard Test Method for Determination of Gaseous Compounds by Extractive Direct Interface Fourier Transform Infrared (FTIR) Spectroscopy, incorporation by reference (IBR) approved for § 63.457(b)(5)(i) of subpart S, § 63.1349(b)(4)(iii) of subpart LLL, and table 4 to subpart DDDD of this part as specified in the subpart.

* * * * *

(f) * * *

(5) NCASI Method DI/MEOH–94.03, Methanol in Process Liquids and Wastewaters by GC/FID, May 2000, NCASI, Research Triangle Park, NC, IBR approved for §§ 63.457(c)(3)(ii), 63.459(b)(5)(iv)(A), 63.459(b)(5)(iv)(A)(2), and 63.459(b)(8)(iii) of subpart S of this part.

* * * * *

(i) * * *

(1) ANSI/ASME PTC 19.10–1981, ''Flue and Exhaust Gas Analyses [Part 10, Instruments and Apparatus],'' IBR approved for §§ 63.309(k)(1)(iii), 63.457(k)(1), 63.865(b), 63.3166(a)(3), 63.3360(e)(1)(iii), 63.3545(a)(3), 63.3555(a)(3), 63.4166(a)(3), 63.4362(a)(3), 63.4766(a)(3), 63.4965(a)(3), 63.5160(d)(1)(iii), 63.9307(c)(2), 63.9323(a)(3), 63.11148(e)(3)(iii), 63.11155(e)(3), 63.11162(f)(3)(iii) and (f)(4), 63.11163(g)(1)(iii) and (g)(2), 63.11410(j)(1)(iii), 63.11551(a)(2)(i)(C), table 5 to subpart DDDDD of this part, table 1 to subpart ZZZZZ of this part, and table 4 to subpart JJJJJJ of this part.

* * * * *

Subpart S—[Amended]

3. Section 63.441 is amended by adding a definition for ''affirmative defense'' to read as follows:

§ 63.441 Definitions.

* * * * *

Affirmative defense means, in the context of an enforcement proceeding, a response or defense put forward by a defendant, regarding which the defendant has the burden of proof, and the merits of which are independently and objectively evaluated in a judicial or administrative proceeding.

* * * * *

4. Section 63.443 is amended by revising paragraph (e) introductory text to read as follows:

§ 63.443 Standards for the pulping system at kraft, soda, and semi-chemical processes.

* * * * *

(e) Periods of excess emissions reported under § 63.455 shall not be a violation of § 63.443(c) and (d) provided that the time of excess emissions divided by the total process operating time in a semi-annual reporting period does not exceed the following levels:

* * * * *

5. Section 63.446 is amended as follows:

a. By revising paragraph (e)(3);

b. By revising paragraph (e)(4);

c. By revising paragraph (e)(5); and

d. By revising paragraph (g).

§ 63.446 Standards for kraft pulping process condensates.

* * * * *

(e) * * *

(3) Treat the pulping process condensates to reduce or destroy the total HAPs by at least 92 percent or more by weight on or before [DATE 3 YEARS FROM DATE OF PUBLICATION OF FINAL RULE IN THE **FEDERAL REGISTER**]. After [DATE 3 YEARS FROM DATE OF PUBLICATION OF FINAL RULE IN THE **FEDERAL REGISTER**], treat pulping process condensates to reduce or destroy the total HAPs by at least 94 percent or more by weight; or

(4) At mills that do not perform bleaching, on or before [DATE 3 YEARS FROM DATE OF PUBLICATION OF FINAL RULE IN THE **FEDERAL REGISTER**] treat the pulping process condensates to remove 3.3 kilograms or more of total HAP per megagram (6.6 pounds per ton) of ODP, or achieve a total HAP concentration of 210 parts per million or less by weight at the outlet of the control device. After [DATE 3 YEARS FROM DATE OF PUBLICATION OF FINAL RULE IN THE **FEDERAL REGISTER**], treat the pulping process condensates to remove 4.2 kilograms or more of total HAP per megagram (8.3 pounds per ton) of ODP, or achieve a total HAP concentration of 158 parts per million or less by weight at the outlet of the control device; or

(5) At mills that perform bleaching, on or before [DATE 3 YEARS FROM DATE OF PUBLICATION OF FINAL RULE IN THE **FEDERAL REGISTER**] treat the pulping process condensates to remove 5.1 kilograms or more of total HAP per megagram (10.2 pounds per ton) of ODP, or achieve a total HAP concentration of 330 parts per million or less by weight at the outlet of the control device. After [DATE 3 YEARS FROM DATE OF PUBLICATION OF FINAL RULE IN THE **FEDERAL REGISTER**], treat the pulping process condensates to remove 6.4 kilograms or more of total HAP per megagram (12.8 pounds per ton) of ODP, or achieve a total HAP concentration of 248 parts per million or less by weight at the outlet of the control device.

* * * * *

(g) For each control device (*e.g.* steam stripper system or other equipment serving the same function) used to treat pulping process condensates to comply with the requirements specified in paragraphs (e)(3) through (e)(5) of this section, periods of excess emissions reported under § 63.455 shall not be a violation of paragraphs (d), (e)(3) through (e)(5), and (f) of this section provided that the time of excess emissions divided by the total process operating time in a semi-annual reporting period does not exceed 10 percent. The 10 percent excess emissions allowance does not apply to treatment of pulping process condensates according to paragraph (e)(2) of this section (*e.g.* the biological wastewater treatment system used to treat multiple (primarily non-condensate) wastewater streams to comply with the Clean Water Act).

* * * * *

6. Section 63.453 is amended by adding paragraph (q) to read as follows:

§ 63.453 Monitoring requirements.

* * * * *

(q) At all times, the owner or operator must operate and maintain any affected source, including associated air pollution control equipment and monitoring equipment, in a manner consistent with safety and good air pollution control practices for minimizing emissions. Determination of whether such operation and maintenance procedures are being used will be based on information available to the Administrator which may include, but is not limited to, monitoring results, review of operation and maintenance procedures, review of operation and maintenance records, and inspection of the source.

7. Section 63.454 is amended by revising paragraph (a) and adding paragraph (g) to read as follows:

§ 63.454 Recordkeeping requirements.

(a) The owner or operator of each affected source subject to the requirements of this subpart shall comply with the recordkeeping requirements of § 63.10, as shown in table 1 of this subpart, and the requirements specified in paragraphs (b) through (g) of this section for the monitoring parameters specified in § 63.453.

* * * * *

(g) *Recordkeeping of malfunctions.* The owner or operator must maintain the following records of malfunctions:

(1) Records of the occurrence and duration of each malfunction of operation (*i.e.,* process equipment) or the air pollution control and monitoring equipment.

(2) Records of actions taken during periods of malfunction to minimize emissions in accordance with § 63.453(q), including corrective actions to restore malfunctioning process and air pollution control and monitoring equipment to its normal or usual manner of operation.

8. Section 63.455 is amended by adding paragraphs (g) and (h) to read as follows:

§ 63.455 Reporting requirements.

* * * * *

(g) *Malfunction reporting requirements.* If a malfunction occurred during the reporting period, the report must include the number, duration, and a brief description for each type of malfunction which occurred during the reporting period and which caused or may have caused any applicable emission limitation to be exceeded. The report must also include a description of actions taken by an owner or operator during a malfunction of an affected source to minimize emissions in accordance with § 63.453(q), including actions taken to correct a malfunction.

(h) You must submit performance test reports as specified in paragraphs (h)(1) through (4).

(1) The owner or operator of an affected source shall report the results of the performance test before the close of business on the 60th day following the completion of the performance test, unless approved otherwise in writing by the Administrator. A performance test is ''completed'' when field sample collection is terminated. Unless otherwise approved by the Administrator in writing, results of a performance test shall include the analysis of samples, determination of emissions, and raw data. A complete test report must include the purpose of the test; a brief process description; a complete unit description, including a description of feed streams and control devices; sampling site description; pollutants measured; description of sampling and analysis procedures and any modifications to standard procedures; quality assurance procedures; record of operating conditions, including operating parameters for which limits are being set, during the test; record of preparation of standards; record of calibrations; raw data sheets for field sampling; raw data sheets for field and laboratory analyses; chain-of-custody documentation; explanation of laboratory data qualifiers; example calculations of all applicable stack gas parameters, emission rates, percent reduction rates, and analytical results, as applicable; and any other information required by the test method and the Administrator.

(2) As of January 1, 2012 and within 60 days after the date of completing each performance test, you must submit performance test data, except opacity data, electronically to EPA's Central Data Exchange (CDX) by using the Electronic Reporting Tool (ERT) (see *http://www.epa.gov/ttn/chief/ert/ert_tool.html*) and also report the results of the performance test to the appropriate permitting authority in the form and-or format specified by the permitting authority. Only data collected using test methods compatible with ERT are subject to this requirement to be submitted electronically to EPA's CDX.

(3) Within 60 days after the date of completing each CEMS performance evaluation test, as defined in § 63.2 and required by this subpart, you must submit the relative accuracy test audit data electronically into EPA's CDX by using the ERT as mentioned in paragraph (h)(2) of this section and also report the results of the performance test to the appropriate permitting authority in the form and-or format specified by the permitting authority. Only data collected using test methods compatible with ERT are subject to this requirement to be submitted electronically to EPA's CDX.

(4) All reports required by this subpart not subject to the requirements in paragraphs (h)(2) and (3) of this section must be sent to the Administrator at the appropriate address listed in § 63.13. The Administrator or the delegated authority may request a report in any form suitable for the specific case (*e.g.,* by electronic media such as Excel spreadsheet, on CD or hard copy). The Administrator retains the right to require submittal of reports subject to paragraphs (h)(2) and (3) of this section in paper format.

9. Section 63.456 is added to read as follows:

§ 63.456 Affirmative Defense for Exceedance of Emission Limit During Malfunction.

In response to an action to enforce the standards set forth in paragraphs §§ 63.443(c) and (d), 63.444(b) and (c), 63.445(b) and (c), 63.446(c), (d), and (e), 63.447(b) or § 63.450(d) the owner or operator may assert an affirmative defense to a claim for civil penalties for exceedances of such standards that are caused by malfunction, as defined at 40 CFR 63.2. Appropriate penalties may be assessed, however, if the owner or operator fails to meet the burden of proving all of the requirements in the affirmative defense. The affirmative defense shall not be available for claims for injunctive relief.

(a) To establish the affirmative defense in any action to enforce such a limit, the owner or operator must timely meet the notification requirements in paragraph (b) of this section, and must prove by a preponderance of evidence that:

(1) The excess emissions:

(i) Were caused by a sudden, infrequent, and unavoidable failure of air pollution control and monitoring equipment, process equipment, or a process to operate in a normal or usual manner, and

(ii) Could not have been prevented through careful planning, proper design or better operation and maintenance practices; and

(iii) Did not stem from any activity or event that could have been foreseen and avoided, or planned for; and

(iv) Were not part of a recurring pattern indicative of inadequate design, operation, or maintenance; and

(2) Repairs were made as expeditiously as possible when the applicable emission limitations were being exceeded. Off-shift and overtime labor were used, to the extent practicable to make these repairs; and

(3) The frequency, amount and duration of the excess emissions (including any bypass) were minimized to the maximum extent practicable during periods of such emissions; and

(4) If the excess emissions resulted from a bypass of control equipment or a process, then the bypass was unavoidable to prevent loss of life, personal injury, or severe property damage; and

(5) All possible steps were taken to minimize the impact of the excess emissions on ambient air quality, the environment and human health; and

(6) All emissions monitoring and control systems were kept in operation if at all possible, consistent with safety and good air pollution control practices; and

(7) All of the actions in response to the excess emissions were documented by properly signed, contemporaneous operating logs; and

(8) At all times, the affected source was operated in a manner consistent with good practices for minimizing emissions; and

(9) A written root cause analysis has been prepared, the purpose of which is to determine, correct, and eliminate the primary causes of the malfunction and the excess emissions resulting from the malfunction event at issue. The analysis shall also specify, using best monitoring methods and engineering judgment, the amount of excess emissions that were the result of the malfunction.

(b) *Notification.* The owner or operator of the affected source experiencing an exceedance of its emission limit(s) during a malfunction shall notify the Administrator by telephone or facsimile (FAX) transmission as soon as possible, but no later than two business days after the initial occurrence of the malfunction, if it wishes to avail itself of an affirmative defense to civil penalties for that malfunction. The owner or operator seeking to assert an affirmative defense shall also submit a written report to the Administrator within 45 days of the initial occurrence of the exceedance of the standard in paragraphs §§ 63.443(c) and (d), 63.444(b) and (c), 63.445(b) and (c), 63.446(c), (d), and (e), 63.447(b) or § 63.450(d) to demonstrate, with all necessary supporting documentation, that it has met the requirements set forth in paragraph (a) of this section. The owner or operator may seek an extension of this deadline for up to 30 additional days by submitting a written request to the Administrator before the expiration of the 45 day period. Until a request for an extension has been approved by the Administrator, the owner or operator is subject to the requirement to submit such report within 45 days of the initial occurrence of the exceedance.

10. Section 63.457 is amended as follows:

a. By revising paragraph (a);

b. By revising paragraphs (b)(1), (b)(3), (b)(4), (b)(5)(i), and (b)(5)(ii);

c. By revising paragraph (c)(3)(ii);

d. By revising paragraph (d)(1);

e. By revising paragraph (k)(1); and

f. By adding paragraph (o).

§ 63.457 Test methods and procedures.

(a) *Performance tests.* Initial and repeat performance tests are required for the emissions sources specified in paragraphs (a)(1) and (2) on this section, except for emission sources controlled by a combustion device that is designed and operated as specified in § 63.443(d)(3) or (d)(4).

(1) Conduct an initial performance test for all emission sources subject to the limitations in §§ 63.443, 63.444, 63.445, 63.446, and 63.447.

(2) Conduct repeat performance tests at five year intervals for all emission sources subject to the limitations in §§ 63.443, 63.444, and 63.445.

(b) * * *

(1) Method 1 or 1A of part 60, appendix A–1, as appropriate, shall be used for selection of the sampling site as follows:

* * * * *

(3) The vent gas volumetric flow rate shall be determined using Method 2, 2A, 2C, or 2D of part 60, appendix A–1, as appropriate.

(4) The moisture content of the vent gas shall be measured using Method 4 of part 60, appendix A–3.

(5) * * *

(i) Method 308 in Appendix A of this part; Method 320 in Appendix A of this part; Method 18 in appendix A–6 of part 60; ASTM D6420–99 (incorporated by reference in § 63.14(b)(28) of subpart A of this part); or ASTM D6348–03 (incorporated by reference in § 63.14(b)(54) of subpart A of this part) shall be used to determine the methanol concentration. If ASTM D6348–03 is used the conditions specified in paragraphs (b)(5)(i)(A) though (b)(5)(i)(B) of this section must be met.

(A) The test plan preparation and implementation in the Annexes to ASTM D6348–03, Sections A1 through A8 are required.

(B) In ASTM 6348–03 Annex A5 (Analyte Spiking Technique), the percent (%) R must be determined for each target analyte (Equation A5.5 of ASTM 6348–03). In order for the test data to be acceptable for a compound, %R must be between 70 and 130 percent. If the %R value does not meet this criterion for a target compound, the test data is not acceptable for that compound and the test must be repeated for that analyte following adjustment of the sampling or analytical procedure before the retest. The %R value for each compound must be reported in the test report, and all field measurements must be corrected with the calculated %R value for that compound using the following equation: Reported Result = Measured Concentration in the Stack × 100)/%R.

(ii) Except for the modifications specified in paragraphs (b)(5)(ii)(A) through (b)(5)(ii)(K) of this section, Method 26A of part 60, appendix A–8 shall be used to determine chlorine concentration in the vent stream.

* * * * *

(c) * * *

(3) * * *

(ii) For determining methanol concentrations, NCASI Method DI/MEOH–94.03, Methanol in Process Liquids and Wastewaters by GC/FID, May 2000, NCASI, Research Triangle Park, NC. This test method is incorporated by reference in § 63.14(f)(5) of subpart A of this part.

* * * * *

(d) * * *

(1) Method 21, of part 60, appendix A–7; and

* * * * *

(k) * * *

(1) The emission rate correction factor and excess air integrated sampling and analysis procedures of Methods 3A or 3B of part 60, appendix A–2 shall be used to determine the oxygen concentration. The samples shall be taken at the same time that the HAP samples are taken. As an alternative to Method 3B, ASME PTC 19.10–1981–Part 10 may be used (incorporated by reference, see § 63.14(i)(1)).

* * * * *

(o) Performance tests shall be conducted under such conditions as the Administrator specifies to the owner or operator based on representative performance of the affected source for the period being tested. Upon request, the owner or operator shall make available to the Administrator such records as may be necessary to determine the conditions of performance tests.

11. Section 63.459 is amended by revising paragraph (b)(11)(ii) to read as follows:

§ 63.459 Alternative standards.

* * * * *

(b) * * *

(11) * * *

(ii) Periods of excess emissions shall not constitute a violation provided the time of excess emissions divided by the total process operating time in a semi-annual reporting period does not exceed one percent. All periods of excess emission shall be reported, and shall include:

* * * * *

12. Table 1 to subpart S of part 63 is revised to read as follows:

TABLE 1 TO SUBPART S OF PART 63—GENERAL PROVISIONS APPLICABILITY TO SUBPART S [a]

Reference	Applies to subpart S	Comment
63.1(a)(1)–(3)	Yes.	
63.1(a)(4)	Yes	Subpart S (this table) specifies applicability of each paragraph in subpart A to subpart S.
63.1(a)(5)	No	Section reserved.
63.1(a)(6)–(8)	Yes.	
63.1(a)(9)	No	Section reserved.
63.1(a)(10)	No	Subpart S and other cross-referenced subparts specify calendar or operating day.
63.1(a)(11)–(14)	Yes.	
63.1(b)(1)	No	Subpart S specifies its own applicability.
63.1(b)(2)–(3)	Yes.	
63.1(c)(1)–(2)	Yes.	
63.1(c)(3)	No	Section reserved.
63.1(c)(4)–(5)	Yes.	
63.1(d)	No	Section reserved.
63.1(e)	Yes.	
63.2	Yes.	
63.3	Yes.	
63.4(a)(1)	Yes.	
63.4(a)(3).		
63.4(a)(4)	No	Section reserved.
63.4(a)(5)	Yes.	
63.4(b)	Yes.	
63.4(c)	Yes.	
63.5(a)	Yes.	
63.5(b)(1)	Yes.	
63.5(b)(2)	No	Section reserved.
63.5(b)(3)	Yes.	
63.5(b)(4)–(6)	Yes.	
63.5(c)	No	Section reserved.
63.5(d)	Yes.	
63.5(e)	Yes.	
63.5(f)	Yes.	
63.6(a)	Yes.	
63.6(b)	No	Subpart S specifies compliance dates for sources subject to subpart S.
63.6(c)	No	Subpart S specifies compliance dates for sources subject to subpart S.
63.6(d)	No	Section reserved.
63.6(e)(1)(i)	No	See § 63.453(q) for general duty requirement.
63.6(e)(1)(ii)	No.	
63.6(e)(1)(iii)	Yes.	
63.6(e)(2)	No	Section reserved.
63.6(e)(3)	No.	
63.6(f)(1)	No.	
63.6(f)(2)	Yes.	
63.6(f)(3)	Yes.	
63.6(g)	Yes.	
63.6(h)	No	Pertains to continuous opacity monitors that are not part of this standard.
63.6(i)	Yes.	
63.6(j)	Yes.	
63.7	Yes, except for 63.7(e)(1).	Section 63.7(e)(1) is replaced with § 63.457(o) which specifies performance testing conditions under Subpart S.
63.8(a)(1)	Yes.	
63.8(a)(2)	Yes.	
63.8(a)(3)	No	Section reserved.
63.8(a)(4)	Yes.	
63.8(b)(1)	Yes.	
63.8(b)(2)	No	Subpart S specifies locations to conduct monitoring.
63.8(b)(3)	Yes.	
63.8(c)(1)(i)	No	See § 63.453(q) for general duty requirement (which includes monitoring equipment).
63.8(c)(1)(ii)	Yes.	
63.8(c)(1)(iii)	No.	
63.8(c)(2)	Yes.	
63.8(c)(3)	Yes.	
63.8(c)(4)	No	Subpart S allows site specific determination of monitoring frequency in § 63.453(n)(4).
63.8(c)(5)	No	Pertains to continuous opacity monitors that are not part of this standard.
63.8(c)(6)	Yes.	
63.8(c)(7)	Yes.	

TABLE 1 TO SUBPART S OF PART 63—GENERAL PROVISIONS APPLICABILITY TO SUBPART S [a]—Continued

Reference	Applies to subpart S	Comment
63.8(c)(8)	Yes.	
63.8(d)	Yes, except for last sentence, which refers to an SSM plan.	SSM plans are not required.
63.8(e)	Yes.	
63.8(f)(1)–(5)	Yes.	
63.8(f)(6)	No	Subpart S does not specify relative accuracy test for CEMs.
63.8(g)	Yes.	
63.9(a)	Yes.	
63.9(b)	Yes	Initial notifications must be submitted within one year after the source becomes subject to the relevant standard.
63.9(c)	Yes.	
63.9(d)	No	Special compliance requirements are only applicable to kraft mills.
63.9(e)	Yes.	
63.9(f)	No	Pertains to continuous opacity monitors that are not part of this standard.
63.9(g)(1)	Yes.	
63.9(g)(2)	No	Pertains to continuous opacity monitors that are not part of this standard.
63.9(g)(3)	No	Subpart S does not specify relative accuracy tests, therefore no notification is required for an alternative.
63.9(h)	Yes.	
63.9(i)	Yes.	
63.9(j)	Yes.	
63.10(a)	Yes.	
63.10(b)(1)	Yes.	
63.10(b)(2)(i)	No.	
63.10(b)(2)(ii)	No	See § 63.454(g) for recordkeeping of (1) occurrence and duration and (2) actions taken during malfunction.
63.10(b)(2)(iii)	Yes.	
63.10(b)(2)(iv)	No.	
63.10(b)(2)(v)	No.	
63.10(b)(2)(vi)	Yes.	
63.10(b)(2)(vii)–(ix).	Yes.	
63.10(b)(3)	Yes.	
63.10(c)(1)–(7)	Yes.	
63.10(c)(8)	Yes.	
63.10(c)(9)	No	Section reserved.
63.10(c)(10)–(11)	No	See § 63.454(g) for malfunction recordkeeping requirements.
63.10(c)(12)–(14)	Yes.	
63.10(c)(15)	No.	
63.10(d)(1)	Yes.	
63.10(d)(2)	Yes.	
63.10(d)(3)	No	Pertains to continuous opacity monitors that are not part of this standard.
63.10(d)(4)	Yes.	
63.10(d)(5)	No	See § 63.455(g) for malfunction reporting requirements.
63.10(e)(1)	Yes.	
63.10(e)(2)(i)	Yes.	
63.10(e)(2)(ii)	No	Pertains to continuous opacity monitors that are not part of this standard.
63.10(e)(3)	Yes.	
63.10(e)(4)	No	Pertains to continuous opacity monitors that are not part of this standard.
63.10(f)	Yes.	
63.11–63.15	Yes.	

[a] Wherever subpart A specifies ''postmark'' dates, submittals may be sent by methods other than the U.S. Mail (*e.g.,* by fax or courier). Submittals shall be sent by the specified dates, but a postmark is not required.

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